



**THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS**

**EXPANDING ACCESS TO  
JUSTICE FOR THE POOR  
MALAWI'S SEARCH FOR  
SOLUTIONS**

A COMPARATIVE ANALYSIS  
WITH OTHER SELECT INFORMAL  
JUSTICE SYSTEMS

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RESEARCH PARTNERSHIP  
PROGRAMME  
DANISH INSTITUTE FOR HUMAN  
RIGHTS (DIHR)

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# THE RESEARCH PARTNERSHIP PROGRAMME

The Research Partnership Programme (RPP), funded by the Danish International Development Assistance (Danida) and organised by The Danish Institute for Human Rights (DIHR) offers a small number of researchers from developing and transitional countries the unique opportunity of becoming a guest researcher at the DIHR for a period of five months. The RPP is one component of the DIHR strategy to upgrade and expand the resource bases in developing and transitional countries within the field of human rights. The aim of the programme is to build human rights research capacity in these countries, and in general to contribute to stronger academic environments and increased exchange between institutions in the human rights field internationally.

For 2011-2013 the programme operates under the thematic focus of “Informal Justice Systems” (IJS), including the opportunities for access to justice where state systems lack outreach and forums in which a diversity of cultures and values can be respected as well as challenges and weaknesses in respect

of compliance with human rights standards concerning participation and accountability, fairness of procedures (including the protection of the vulnerable) and substantive outcomes.

During his stay at DIHR, Desmond Mudala Kaunda's research work was supervised by Senior Legal Adviser Lone Lindholt.

## AUTHOR

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Desmond Mudala Kaunda is a holder of a Master's Degree in International Human Rights Law obtained from the University of Essex (UK, 1996) and a LLB (Hons) Degree obtained from Chancellor College, University of Malawi in 1994. Having completed his practical attachment and internship programme at the London-based International Centre for the Legal Protection of Human Rights, Interights, in 1996, he worked for a brief period in private legal practice as an Associate with Racane Associates in Blantyre, Malawi, before joining the NGO sector in late 1997 as Legal Officer for the Malawi Human Rights Resource Centre (MHRRC) - a well-respected local organisational capacity building human rights NGO and key partner to the Danish Institute for Human Rights (DIHR).

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Further, Mr. Kaunda has served in various civil society and Government committees and boards. He is a former Commissioner of the Malawi Human Rights Commission (MHRC), and currently a Hubert Humphrey Fellow undertaking his one-year professional development program at the University of Minnesota Law School in the United States of America until June 2013. During his fellowship year, he will be investigating the interaction of USA Tribal Courts with State and Federal Courts. He has a keen interest in the issue of "expanding access to justice for the poor" through use of informal justice systems. While his life goal is "bringing order to chaos", his goal for the next five years is "bringing justice out of every situation of injustice".

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better researcher; secondly, the four months period gave me an opportunity to reflect on my life's purpose - resulting in me formulating a faith-based Personal Strategic Plan which will guide my activities for the next five years or more; and thirdly, I go back to Malawi not only with a diverse network of professional contacts but also a comprehensive data bank of electronic literature and documentation on the theme of access to justice generally and informal justice in particular.

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# CHAPTER 1

## INTRODUCTION

### 1.1 GENERAL INTRODUCTION

Having been modelled on the key international human rights instruments, Malawi's democratic Constitution of 1994 was poised to be a transformative Constitution with the potential for protecting and promoting rights of the poor, vulnerable, and marginalised Malawians if implemented in practice. While the judiciary has, over the years, generally emerged as a surprisingly strong institution in an otherwise weak political system, a body of pro-poor jurisprudence has failed to develop correspondingly, despite the transformative nature of the Constitution.<sup>1</sup> Indeed, there seems to be no disagreement among politicians, the judiciary, the human rights, and legal community as well as donors in Malawi, that the legal needs of the poor are not being met. This is largely due to the lack of operation of local courts, on the one hand, and the ineffective functioning of magistrate courts, on the other hand.<sup>2</sup> This research examines the efforts of the Malawi Law Commission, the Parliament, and the Judiciary to promote and enhance access to justice for the poor.<sup>3</sup> The research investigates three main contentions; firstly, that



the Malawi Law Commission's law reform and Parliament's legislative efforts at promoting and enhancing access to justice for the poor have been fairly comprehensive, progressive and pro-active: in this regard, the simultaneous passing of the new Legal Aid and Local Courts Acts in February, 2011 will be our primary point of examination. Secondly, that despite positive law reform and legislative efforts, constitutional discourse on the right of access to justice for the poor and the associated rights of legal representation and legal aid are virtually absent in practice in Malawi.<sup>4</sup> Thus, the judicial practice of promoting and enhancing access to justice for the poor has, to a large extent, not matched Malawi's constitutional, law reform, and legislative rhetoric. Thirdly, the paper advances the argument that local courts have the potential not only to provide solutions to both the under-representation of poor people in Malawi's formal justice system<sup>5</sup> and lack of respect for human rights and the Rule of Law under the informal justice system, but also to contribute to reforming the conventional justice system.<sup>6</sup> The paper advocates for a reconciliation of informal and formal justice systems not just on paper but in practice. Examination of practicalities of moving in the direction proposed by the two new pieces of legislation is the basis of this research. Our analysis illustrates the limits in institutional and social-legal reforms of the nature proposed by the Malawi Parliament. In the final analysis, specific recommendations are made with a view to advocating for the practical promotion,

empowerment, and enhancement of access to justice for the poor.

## 1.2 THE PERCEIVED PROBLEM

**” The lesson is clear. When democratic rules are ignored and there is no law capable of providing shelter, the people who suffer most are those who can least afford to lose. Creating an infrastructure of laws, rights, enforcement, and adjudication is not an academic project of interest to political scientists and social engineers. The establishment of such institutions can spell the difference between vulnerability and security, desperation and dignity for hundreds of millions of our fellow human beings.”<sup>7</sup>**

(Co-Chairs of the Commission on Legal Empowerment for the Poor)

The above quotation resonates well with the situation regarding access to justice for the poor across the globe generally and in Malawi in particular. This includes those living in absolute poverty (i.e. living on less than a dollar a day), as well as other vulnerable and marginalised groups such as women and children. It is said that over four billion people live outside the Rule of Law around the world.<sup>8</sup> A majority of poor people have little or no contact with the formal legal system and are not likely to increase their contact with the

system, even if all aspects of the access to justice and legal empowerment agenda are implemented. In lieu of access to the formal system, they seek justice from customary law and from informal systems. For example, in sub-Saharan Africa, customary land tenure law covers roughly 75 percent of land and in some countries, such as Mozambique and Ghana, over 90 percent of land transactions are governed by customary law.<sup>9</sup> In the case of Malawi, most Malawians cannot access the formal state mechanisms for resolving civil disputes. Consequently, they use non-state institutions and draw on the processes available in the 'informal' or 'primary' justice sector. A 'rapid assessment' by the British Department for International Development (DFID) MaSSAJ Primary Justice Pilot Project<sup>10</sup> confirmed that most people in Malawi depend on non-state institutions, of which the most frequently used were found to be traditional family counsellors (**ankhoswe**), traditional leaders, religious leaders and community, non-governmental, and faith-based organisations. The lack of access to justice is not new to Malawians; the government has been fighting this problem since the transition to a multi-party democracy in 1994 by, among others, adopting a comprehensive law reform programme, which is currently being implemented by the Malawi Law Commission<sup>11</sup>, and by establishing state accountability bodies such as the Malawi Human Rights Commission<sup>12</sup> and the Office of the Ombudsman<sup>13</sup> to receive and redress complaints from the public on human rights

violations and maladministration respectively. The inaccessibility and lack of functioning and effective legal structures in the rural areas of Malawi continues to be one of the main reasons why poor people are not receiving effective access to justice.<sup>14</sup> For those who live in villages, the closest Magistrate Court might be 25 to 40 kilometres away<sup>15</sup>. Most villagers cannot afford a personal vehicle, and public transportation in rural areas is non-existent. The only options available for villagers are walking, biking, or hitch-hiking to the court. Furthermore, it is necessary to get to the courthouse a couple of days prior to the trial's beginning. This requires Malawians to raise money for food, accommodation, and anything else they might need while traveling away from their homes. If the Magistrate Court does not have the jurisdiction to hear the case, the only other option is to take it to the High Court of Malawi in the closest city, which can be over 200 kilometres away. All of this puts a huge burden on villagers and makes it nearly impossible for them to access the justice guaranteed under the Constitution.

In this manner, while 'equal justice under law' is one of Malawi's most firmly embedded rights, it is also the most widely violated legal principles. It comes nowhere close to describing the justice system in practice which is largely due to the inadequate resources allocated to the judiciary in general, and legal aid and lower courts in particular. Governmental legal service budgets are capped at ludicrously low levels,

rendering effective legal assistance for most low-income litigants a statistical impossibility. This is not, of course, the only legal context in which rhetoric outruns reality, but it is one of the most disturbing, given the fundamental nature of the individual rights at issue.

For the above cited reasons, among many others, despite their apparent need for the legal system, many poor Malawians steer clear of it, and from state institutions in general. They believe, often correctly, that these institutions will not help solve their problems. Even if the system could conceivably provide adequate redress, it may take too long, cost too much, and require expertise that they lack and cannot afford.<sup>16</sup> This scenario reflects a deeper problem; a fundamental lack of trust in the formal legal system and state institutions by the majority of Malawians, compounded by a combination of ineffectiveness and inaccessibility of the state institutions.

Furthermore, the poor Malawians may be unable to access the justice system simply because they do not understand it, or lack knowledge about it. They may be illiterate, which severely hampers their ability to interact with the justice system. In Malawi, the law is drafted and administered in the official language, English, which many poor people are unable to speak and/or read thereby excluding the majority of the population that speak only local languages. Courts may also be under-funded, and judicial procedures

may be inaccessible for those who lack legal representation, which is generally too expensive for the poor.<sup>17</sup> Restrictions on who may practice law and provide legal services are other barriers that can block more accessible forms of legal services such as law student legal clinics and paralegals.

The foregoing analysis serves to illustrate the need for alternative means, approaches, and practical solutions to addressing the prevalent need for other conflict-handling mechanisms, and therefore, explains a much more pervasive phenomenon: the predominance of non-state justice systems as the primary mode of dispute resolution in the lived experiences of the overwhelming majority of the world's, as well as Malawi's poor.

The challenge facing the Malawi justice system, the government, and their international development partners, is formidable: the key question, therefore, has been how to turn the law into an effective tool for those living in absolute poverty (i.e. living with less than a dollar a day) as well as other vulnerable and marginalised groups such as women and children?

Existing political, administrative, and judicial institutions are not geared to protect the rights of the poor. Much of the development- and donor community is in crisis as it comes to acknowledge that old approaches are not good enough.<sup>18</sup> Now is the time to reckon with reality,

and strive for new solutions. As Albert Einstein observed, "We can't solve problems by using the same kind of thinking we used when we created them." 21st-century solutions are called for to complement or even replace strategies that were developed in the last century. As this paper demonstrates, we cannot expand access to justice to the poor who have no choice but to approach Informal Justice Systems (IJS) for their justice needs, if our attitudes towards the informal institutions are primarily negative and if our belief and support is solely rooted in the idea of the 'judiciary' as representing the entire justice system.

It was in light of the foregoing outlined problems that a Special Law Commission in 2004 was appointed to review the old Traditional Courts Act (1969) in light of the current Malawi legal system. The Special Law Commission concluded that local courts can be a benefit to society by helping provide access to justice in rural areas. As a result of this report, a proposal was formulated for a bill that would formally re-introduce these courts into society. According to the Local Courts' bill's memorandum, the Act "seeks to introduce a new genre of courts to be named 'Local Courts' with the primary function of dispensing familiar and affordable justice for the ordinary Malawian in line with the spirit of the Constitution, which aims at enhancing the right of access to justice for all citizens."<sup>19</sup> The Special Law Commission Report and Draft bill were debated and passed into law by the Malawi Parliament in February, 2011.<sup>20</sup>

In the same vein, a Special Law Commission Report on the Review of the Legal Aid Act, and the Proposed Draft Legal Aid Bill, was debated and passed by the Malawi Parliament at the same time as the Local Courts Bill in February, 2011.<sup>21</sup> The preamble to the Legal Aid Act introduces it as an

**” Act to make provision for the granting of legal aid in civil and criminal matters to persons whose means are insufficient to enable them engage private legal practitioners and to other categories of persons where the interests of justice so require; to provide for the establishment of a Legal Aid Fund; to allow for limited eligibility of other persons, besides legal practitioners, to provide legal aid for the purposes of this Act.”<sup>22</sup>**

As such, February 2011 brought about a development which could, ultimately, materialise into potential change for the poor living in the rural outskirts of Malawi. The two new complementary bills were passed simultaneously in Parliament in an attempt to address the problem of access to justice by the poor: the Local Courts Act and the Legal Aid Act. These two pieces of legislation, when taken together, may have a positive effect on the current legal system if implemented in practice. But, many Malawians are wondering whether these new pieces of legislation will actually enhance and expand their access to justice.

The current research study aims at unearthing answers and formulating recommendations in relation to this very question.

### **1.3 RESEARCH OBJECTIVES**

#### **1.3.1 RESEARCH GOAL**

This research aims at making recommendations for improving the functioning of local courts and legal aid in ways that empower users and better protects the rights of poor, vulnerable, and marginalised Malawians.

#### **1.3.2 RESEARCH OUTCOMES**

This research contributes to:

- Understanding the futility of attempts at expanding access to justice for the poor by working solely with the 'judiciary' as representing the entire justice system;
- Understanding the need to work collaboratively with both the formal and informal justice systems, and the need to deal with negative attitudes towards informal justice systems;
- Appreciating the challenges that stand in the way of effective implementation of the newly passed Legal Aid and Local Court Acts;
- Learning of lessons to be learnt from other similar local courts and legal aid initiatives in other contexts and jurisdictions within Africa.

At another level, the research contributes to the following development objectives:

- The enhancement of the operations of local courts and legal aid through the generation of new knowledge and data concerning their potentials and limitations;
- Improvement in the representation and participation of poor and marginalised community members, and integrating safeguards aimed at protecting their rights;
- Improvement in the ability of poor and marginalised community members to make use of local courts and legal aid to uphold their rights and obtain outcomes that are fair and equitable.

#### **1.3.3 RESEARCH OUTPUTS**

A comprehensive research report analysing qualitative data, knowledge, and insights relating to processes of local courts and legal aid systems and advancing recommendations for improving local courts and legal aid as well as legal empowerment of poor, vulnerable and marginalised people.

#### **1.3.4 CENTRAL RESEARCH QUESTIONS**

This research report analyses findings from the extensive literature review in terms of the following four principal research questions:

- **The difference between rhetoric and reality:** How do the proposed operations in the local courts and in legal aid provision compare to what is happening in practice? Will the

proposed operation of the local courts and legal aid be appropriate to the unmet needs of the poor and vulnerable groups?

- **Outcomes of delivery of Justice by Local Courts and provision of legal aid:** Will the outcome be different now that local courts will officially be allowed to hear poor and vulnerable peoples' cases? Will the provision of expanded legal aid under the new Legal Aid Act make any difference?
- **Impact of Systems Change:** Will the change in the system work as it is currently conceptualised, structured, and proposed? If not, how should it be changed to provide access to affordable, fair, and appropriate justice for poor and vulnerable people? How can the operation of local courts be improved in terms of appropriate jurisdiction, enhanced representation, participation, and rights protection of women, children, and other poor and vulnerable groups?
- **Lessons to be learnt from case studies of Informal Justice Systems from other jurisdictions:** What lessons can be learned from other similar local courts and legal aid initiatives in other contexts and jurisdictions within Africa?

#### 1.4 METHODOLOGY

The two predominant research techniques will be (1) meetings and interviews with key informants and justice sector stakeholders, and (2) a desk study of available literature and further follow-up contacts. Prior to travelling to Denmark and embarking on the study,

meetings, and interviews were conducted with key informants and officials from Malawi's justice sector - from both formal and informal systems at national and district levels. Key documents which form the basis of the desk study, were solicited and obtained from the justice sector institutions. These documents include: Malawi Law Commission Law Reform Reports and Draft Bills on Legal Aid and Local Courts; the Malawian Constitution; Laws of Malawi (Old Courts Act, Traditional Courts Act, Chiefs Act, Legal Practitioners and Legal Education Acts etc.); Parliamentary Hansards debating the draft Legal Aid and Local Courts Bills; The Legal Aid and Local Courts Acts passed and Gazetted by Parliament. The main reason for conducting the interviews and obtaining these documents prior to travelling to Denmark was the realisation that it was highly unlikely that the same sources could be obtained in Denmark.



## CHAPTER 2

# THE 'ACCESS TO JUSTICE' CONCEPT AT THE INTERNATIONAL LEVEL

**” ‘Justice’ is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims, and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century.”<sup>23</sup>**

(UN Secretary General, Kofi Annan)

Access to Justice is not a stand-alone right; rather, it is a concept. It is therefore necessary at the outset to investigate and interrogate the concept of access to justice. In this regard, ‘access to justice’, as a concept, is closely connected to another broader concept, ‘the Rule of Law’.

There is no universal definition for the term ‘rule of law’ or a common approach towards the Rule of Law. Various authorities have articulated the concept of the Rule of Law in various ways. Justice Anthony Kennedy, of the US, refers to the Rule of Law as

**” (...) a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”<sup>24</sup>**

From this statement, it is possible to state that there are some universally agreed key distinctions and principles relating to the Rule of Law.

A key distinction that is generally accepted is between 'rule by law' and 'rule of law': under 'rule by law', law is an instrument of government and government is considered above the law; while under 'rule of law', everyone in society is bound by the law, including the government itself. The 'rule of law' also connotes the horizontal relations amongst citizens.

Common principles of the Rule of Law, therefore, include:

- Predictability, certainty, publicity and clarity of laws;
- Open, clear and stable rules for making such laws;
- Prevention of arbitrary exercise of power;
- Promotion of formal equality before the law;
- Promotion of order.

As fundamental as the principle of equality before the law is, it is also

**” Incredibly difficult to fulfil. Even fully fledged democracies with well-functioning state institutions struggle to do so. In countries where democracy is weak, institutions are more likely to be captured by elites. All too often, the law is a tool of the state and ruling elites to use as they please – an option for the few, not an obligation that applies equally to all.”<sup>25</sup>**

Access to justice as a concept has been outlined in a number of international and regional instruments, which establish principles and minimum rules for the administration of justice and offer fairly detailed guidance to states on human rights and justice. These include Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, Guidelines on the Role of Prosecutors, Guidelines and Principles on the Right to Fair Trial and Legal Assistance in Africa (adopted by the African Commission on Human and Peoples' Rights in 2003), and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>26</sup>. In addition, the concept of access to justice can be drawn from a composite of related provisions in the international human rights instruments, including the United Nations Universal Declaration of Human Rights (UDHR) and specific covenants, conventions, rules, guidelines, and standards promulgated by the international community under the auspices of the United Nations. Relevant provisions of

the UDHR are articles 6, 8, and 10. Article 6 of UDHR simply provides that “everyone has the right to recognition everywhere as a person before the law”<sup>27</sup>. Article 8 builds on this and states that: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”. Further, article 10 states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>28</sup>

At the African regional level, access to justice is enshrined in the African Charter on Human and Peoples' Rights under Articles 5, 7, and 26 in the following terms: Article 5 states that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”. Article 7 states that “every individual shall have the right to have his cause heard. This comprises (a) the right to appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.” Further, Article 26 entrenches the rights to access justice by stating that “States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and promotion of appropriate national institutions entrusted with the promotion and protection of rights and

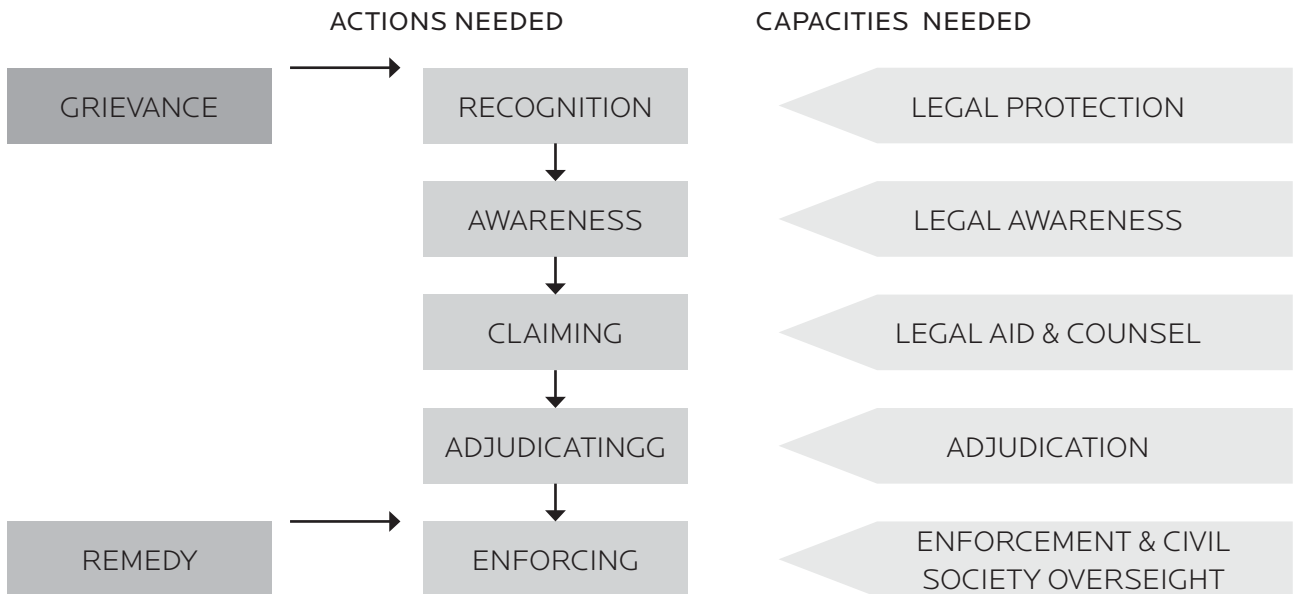
freedoms guaranteed by the present Charter.” The Malawi Constitution also domesticates and entrenches the concept of access to justice under Sections 41. Section 41(1) is couched in similar terms as Article 6 of UDHR. Section 41(1) states that “every person shall have a right to recognition as a person before the law”. Section 41(2) builds further on this by stating that: “every person shall have access to any court of law or any tribunal with jurisdiction for final settlement of legal issues.” Further, Section 41(3) provides that “every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.” As stated in the earlier chapter of this paper, in an effort to translate the concept of access to justice into practice – apart from establishing a system of courts under the judiciary – Malawi has also established state accountability bodies such as the Malawi Human Rights Commission and the Office of the Ombudsman, to receive and redress complaints from the public on human rights violations and maladministration respectively<sup>29</sup>.

Several principles seem likely to command broad agreement within the concept of access to justice. Access to justice rests on three key foundations<sup>30</sup>: substantive law, legal institutions, and legal services. First, the substantive law must advance appropriate norms that promote productivity, efficiency, and social justice. If they do not, then improving

access to the legal system cannot be counted as improving access to justice. Secondly, the institutions that develop, apply, and enforce the law - especially, but not exclusively the courts - must be competent, impartial, efficient, and effective. Access to an unjust legal system does not qualify as access to legal justice, no matter how excellent the laws appear on the statute books. Third, potential users of the legal system must be able to rely on an efficient and equitable system for producing and allocating legal services. The first two foundations

of access to legal justice emphasise the element of "access". It is important to note in relation to the third foundation that most of the people cannot use the legal system effectively without the assistance of specialist legal service providers. Without access to such providers, access to the legal justice system is difficult or impossible. However, the tripartite categorisation of the three foundations of access to justice should not obscure the fact that these three aspects of access to legal justice are interdependent.<sup>31</sup>

**FUNDAMENTAL ELEMENTS OF ACCESS TO JUSTICE**



UNDP defines 'access to justice' as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."<sup>32</sup>

While the main focus of access to justice and Rule of Law is the creation of an efficient, effective system for delivering legal services, the reality on the ground is that many poor people do not use the legal system because they believe, often correctly, that the legal system will not provide them with an effective remedy for their problems. Many poor people, who might otherwise avail themselves of the legal system to resolve disputes and advance their interests, do not do so because they lack the time, resources, and expertise necessary to navigate the legal system on their own, and because they are not able to source the assistance of legal service providers who could help them.<sup>33</sup>

It is for these reasons that Kofi Annan, the then Secretary-General of the United Nations warns;

**” The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means. And we have seen that elections held when**

**the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to Justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers, as well as many issues beyond the criminal justice system. But a “one-size-fits-all” does not work. Local actors must be involved from the start.”<sup>34</sup>**

All these challenges are largely because “access to justice is (...) much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.”<sup>35</sup> Indeed, UNDP underscores the importance of access to justice by going as far as to regard “access to justice” as a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.”<sup>36</sup> In this regard, access to justice is also closely linked to poverty reduction since

**” Being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.”<sup>37</sup>**

At another level, as linked to the concept of access to justice, poverty manifests itself in multiple others ways: especially in the sense that “laws that are vital to the poor are often unclear, contradictory, outdated, or discriminatory in their impact.”<sup>38</sup> In Malawi, for instance, an absence of, or poorly designed procedural laws, i.e. lack of functioning mechanisms to implement rights, are important reasons for ineffective substantive laws. This may partly explain why constitutional rights, as progressive as they may appear, remain so on paper only; taxes are not efficiently collected; and public investments in social services stay below ‘guaranteed’ levels.<sup>39</sup>

Another staggering fact about poverty is that

**” The vast majority of the world’s economy lives their daily lives in what is often referred to as the informal or extra-legal sector. At all levels (individual, family, community and national) the lack of access to effective legal protection and formal**

**policy and welfare systems, as well as a lack of recognition of economic assets/activities, worsens existing vulnerabilities and further constrains the economic and social development opportunities of the poor.”<sup>40</sup>**

It is for the above reasons that UNDP adopts a human rights-based approach<sup>41</sup> to its access to justice programming:

- Focus on the immediate, as well as underlying causes of the problem - the factors impeding access (lack of safeguards to access, or insufficient mechanisms that uphold justice for all under any circumstances);
- Identify the “claim holders” or beneficiaries - the most vulnerable (rural poor, women and children, people with diseases and disabilities, ethnic minorities, etc.);
- Identify the “duty bearers” - the ones accountable for addressing the issues/problems (institutions, groups, community leaders, etc.);
- Assess and analyse the capacity gaps of claim-holders to be able to claim their rights, and of duty-bearers to be able to meet their obligations, and use such analysis to focus capacity development strategies.

As the World Bank acknowledges, “the concept of access to justice [should] focus on two basic objectives of a legal system: (1) that it is accessible to people from all levels of

society; and (2) that it is able to provide fair decisions and rules for people from all levels of society, either individually or collectively. The fundamental idea to be mainstreamed in this concept is the achievement of social justice for all citizens."<sup>42</sup> Emphasis on achieving 'social justice for all citizens' stretches the concept of 'access to justice' even further in undertaking the dimension of 'access to justice for the poor' - in other ways, 'pro-poor access to justice'. This requires further elaboration.

Recent World Bank justice projects may serve to illustrate the concept of 'pro-poor' access to justice. An example is the World Bank's Justice for the Poor (J4P)<sup>43</sup> program which is a global research and development program aimed at informing, designing, and supporting pro-poor approaches to justice reform. It is an approach to justice reform which:

- Sees justice from the perspective of the poor or marginalised;
- Is grounded in social and cultural contexts;
- Recognises the importance of demand in building equitable justice systems;
- Understands justice as a cross-sectoral issue.

As such, 'pro-poor access to justice' is viewed as being about the distinctive manner in which access to justice as a concept is understood, articulated, and carried out in practice. In other words, 'pro-poor access to justice' is

**” a bottom-up approach in the sense that it is based in the realities of poverty and exclusion as experienced by the poor, and requires their active participation and buy-in. At the same time, pro-poor access to justice requires political leadership and commitment from the top and alliances with key stakeholders. It is a political approach based on broad coalitions for change, rather than a technical or bureaucratic approach that engages only with international civil servants, government leaders, and elites. Above all, while pro-poor access to justice is buttressed by international human rights principles, its priorities are set by the poor and grounded in local needs and conditions.”<sup>44</sup>**

In this paper, the concern is more with 'pro-poor' access to justice. While the bulk of the other literature reviewed has addressed the concept of access to justice in general terms, this paper understands the concept as being directly linked to human rights. As such, it is acknowledged that human rights take a deliberate bias in favour of the vulnerable and marginalised groups - hence the concern with 'pro-poor' access to justice. Further, as a recent study commissioned by UNDP, UNICEF, and UNIFEM and undertaken by DIHR acknowledges;

**” Human rights standards offer the possibility of fairness in three dimensions of justice:**

- **Structure, encompassing participation and accountability aspects: Particular attention must be paid to the rights of groups not strongly represented in IJS. This includes women, minorities, and children.**
- **Procedure, giving guidance for adjudication processes that ensure that the parties to a dispute are treated equally with each other, having their case decided by a person who has no interest in the case and who is obliged to decide it only on facts and objective rules rather than personal preferences, or that a person making an assertion or accusation has to prove it with verifiable evidence.**
- **Substantive rules that protect the vulnerable, such as when children should not be married off for the economic benefit of parents or guardians, or widows have the right to inherit.”<sup>45</sup>**

In this regard, despite the unequivocal provision in the Universal Declaration of Human Rights, tens of millions of people still experience a lack of access to justice. The lack of access to justice experienced by the majority of the poor leaves them even more vulnerable to exploitation. As the UN Commission on Legal Empowerment of the Poor acknowledges that

**” State institutions tend to serve the established networks of the political and economic elites rather than the poor. Comparative global statistics on access to justice are hard to come by; even accurate measurement is tricky. A country that is thronging with lawyers, for instance, may not necessarily have a better and fairer legal system. But figures can still indicate the scale of the problem. In India, for example, where there are reportedly only 11 judges for every million people, more than 20 million legal cases are pending, and some civil cases take over 20 years to reach court. Around a million cases are pending in Kenya, over 300,000 before the High Court in Nairobi alone. The average judge in the Philippines has a backlog of 1,479 cases.”<sup>46</sup>**

The Malawi situation is not any better; “between 80 and 90% of all disputes are processed through customary justice forums”<sup>47</sup>.

While equal access to justice may currently be an implausible ideal, adequate access to fair justice should remain a societal concern and aspiration. To begin with, the law should be regarded as a public good. As such, promoting and protecting legal rights of the poor, vulnerable and marginalised people will often have value beyond what those rights are worth to any single client. What constitutes the appropriate balance in terms of ‘adequate



access to justice' should therefore be a matter of debate within the legal and justice services community. The point is simply that the current state of access to justice has inappropriately skewed the balance. There has been little or no effort to effectively address common access to justice problems, nor efforts at helping to organise community initiatives that will help the poor to access justice. And such challenges are likely to persist unless policy makers, and justice and legal professionals are persuaded of the importance of adequate access to justice in practice as well as in principle. To that end, one would have thought that courts, bar associations, law schools, legal aid providers, and communities would be engaged in dialogue towards reaching agreement about this concern and aspiration. On the contrary, the reality as we shall see in later chapters, is that 'access to justice' remains a "legal context in which rhetoric outruns reality"<sup>48</sup>. This is a most disturbing irony given the fundamental nature of the individual rights at issue. It is even more disturbing that the inequities in accessing justice attract so little attention and concern. Neither the public nor the legal profession has been moved to respond in any significant fashion. Entire categories of the "poor" have been denied legal assistance, and political leadership and the judicial profession have largely acquiesced in these limitations. Access to justice for the poor is the subject for countless research agendas, law commissions, committees, conferences, and colloquia, but it is only now beginning to be voiced as a core

concern in the international policy decisions which have yet to impact access to justice programming, constitutional jurisprudence, or law school curricula in countries like Malawi. Later chapters of this article argue for a more attainable aspiration. They focus on a candid confrontation of our failures: our unwillingness to take the justice needs of the poor seriously at conceptual, doctrinal, political, or professional levels. We pose a challenge to do better. The objective is to explore the outlines of a more manageable commitment, adequate access to justice for the poor, and some strategies for pushing us in that direction.

## CHAPTER 3

# THE MALAWI PRE-2011 ACCESS TO JUSTICE LEGAL FRAMEWORK

### 3.1 THE PRE-COLONIAL PERIOD

The first of the several related Maravi clans to settle in what is known as Malawi today, arrived in the area in the 13<sup>th</sup> Century AD from the northern Shaba province, and settled near Lake Malawi. From this area they branched out into the Shire Valley, settling in the western and southern shores of Lake Malawi and in nearby Zambia and Mozambique, in search of good land. In the course of these migrations, one clan, the Phiri clan, emerged as the leader of the other clans, namely, the Banda, Mwali, and Nkhoma clans. In time, the group had identified a leader out of the many leaders who led the march into Malawi, as a paramount chief, and he was bestowed with the title of Karonga. The Maravi clans came to be known as the Chewa, who later branched further into the Mang'anja and Nyanja tribes. They are predominantly matrilineal, and primarily occupy the central region of Malawi. Alongside the settlement of this group, was the settlement of a series of other clans referred to as the Tumbuka, followed by the Ngonde, in the 15<sup>th</sup> Century, and later on the Phoka, Nkhamanga, and Henga in the 17<sup>th</sup> and early 18<sup>th</sup> Century, and finally

the Ngoni in the 17<sup>th</sup> century in the Northern Region of Malawi. These groups of people are predominantly patrilineal, and mostly occupy the northern region of Malawi. Simultaneously, the Yao and Lomwe, other matrilineal groups of people, moved in from Mozambique and settled in some parts of the southern Region of Malawi, where they have stayed up to the present day<sup>49</sup>. All these various clans brought with them their own mechanisms for settling disputes - largely distinguishable - and influenced by whether they were predominantly matrilineal or patrilineal. This then was the genesis of the pluralistic composition of justice systems in Malawi.

### 3.2 BRITISH COLONIAL PERIOD

The British colonial rule led to a hybrid system of law. British common law applied to Europeans and was enforced in formal courts, while Africans fell under the jurisdiction of customary law and adjudication mechanisms. However, "native courts," being subject to a different set of laws, still fell under the control of the Colonial Government; they attained quasi-formal status in the threshold between

judicial and administrative functions of the colonial government. This is best reflected in two observations, firstly, that European District Commissioners, responsible for administrative functions at the district and local levels, held broad powers of review over lay judges in customary courts. And, secondly, Africans could sometimes appeal judgments in criminal cases to British lower courts. In practice, customary institutions came to occupy a third tier of the colonial judicial system, beneath magistrate and high courts. Customary practices were transformed under colonial rule as

**” ‘Indigenous’ norms and procedures were allowed to coexist, provided they were not repugnant to the European notion of natural justice and morality. They were administered directly, either by colonial authorities (advised by local personnel), or by a traditional authority officially invested with judicial powers. In this way, a parallel system of laws and courts emerged, transforming dynamic traditions into rigid customary laws, sometimes even codified and ruled by an uncontested authority.’<sup>50</sup>**

This process paved the way for indirect rule, as it isolated individual chiefs who could serve as points of control to the administration<sup>51</sup>. Thus, the British policy of selecting chiefs who represented their interests to newly established local/native courts fundamentally changed the original balance of power among communities,

and was far less effective than the indigenous system. However, as supervision was fairly loose in many parts of the country, practices in these parts were undoubtedly less affected.<sup>52</sup>

### 3.3 POST-COLONIAL PERIOD UNDER DR. KAMUZU BANDA

Malawi’s post-colonial period still relied heavily upon the basic legal architecture that was constructed to support colonial rule. Dr. Kamuzu Banda’s regime did not only retain basic matters of criminal and civil procedure un-amended, but also other statutes governing the most fundamental aspects of Malawi’s economy and society, including the Penal Code. Many of these statutes centralised power in the executive, and heavily curtailed accountability and basic citizens’ rights. It was a further feature of the colonial and post-colonial legal systems that they involved regulation through top-down rules, and the application of criminal sanctions, rather than systems of consultation with the regulated. The legislation also created strong police powers and limitations on civil rights such as preventive detention and limitations on freedom of assembly.

The Traditional Courts were granted sweeping powers equal to the High Court to try Criminal Cases including murder, treason, and sedition in 1969. Before this, during both Colonial and Post-colonial periods,

**” Magistrates’ courts had no power to administer customary law. That power was vested in both formal and informal traditional courts, and the power to hear appeals against their decisions was vested in the High Court. Through the exercise of this power, the High Court participated in judicialisation of customary law. However, in 1969, the power was transferred to district, regional and the national traditional courts and common law courts no longer had any role in the judicialisation of customary law or establishment of precedents. However, after the de facto abolition of the formal traditional court system in 1994 magistrates’ courts and the High Court had been once again been empowered to apply customary law alongside statutes, common law and principles of equity.”<sup>53</sup>**

However, as in many other developing countries, prior to 2011 as is the case today, Malawian citizens often faced substantial barriers in accessing the formal court structures. These barriers include, *inter alia*, substantial delays and comparatively high usage costs, limitations on available remedies, perceptions of bias, language barriers, inadequate information, and lack of access to legal aid, corruption, as well as differing views and concepts of justice. As a result, where possible, local communities often pursued cases through alternative or non-

state justice systems<sup>54</sup> rather than through the formal courts. Traditional Courts functioned as officially recognised customary courts in Malawi under the Traditional Courts Acts, which dated from the colonial period and were expanded in authority under the regime of Hastings Kamuzu Banda. The Traditional Courts Act remained technically in force until 2011<sup>55</sup> even though the courts it regulated were abolished with the transition to a multi-party system in 1994, due to their excesses.

The Traditional Courts were permitted to use the customary law of an ethnic group in a particular locality in civil cases and criminal cases, as long as this did not conflict with statutory law and was not repugnant.<sup>56</sup> It has been argued that

**” The relationship between (what has been deemed) customary law and state law leads to even more confusion. Most colonial regimes introduced colonial repugnancy clauses thereby recognizing customary law only to the extent that it conformed to European legal norms. Similarly, most African constitutions now recognize customary courts only in so far as they do not violate any of the fundamental rights enshrined in state constitutions. While this may sound reasonable to those sympathetic to human rights norms, communities are left with the difficult task of defining which practices**

**violate these norms (presuming that there is any attempt to monitor such compliance). Such limitations may also be seen as an attempt to undermine customary systems by setting the standard too high, particularly considering it could hardly be claimed that many state systems currently comply with international human rights standards that are often also enshrined in state law.”<sup>57</sup>**

With such a plural system of justice, the interface of these different avenues could be, and still are, very challenging for the poor, marginalised, and vulnerable Malawian who may have had a grievance, as he or she was forced to choose between multiple, and often conflicting, Justice and Rule of Law systems. Since informal justice methods were based largely on local value systems, they could provide conflict resolution in a way that is perceived as more legitimate in the eyes of the involved parties. Nevertheless, these systems could also be discriminatory and captured by vested interests – as exemplified by the way in which the Traditional Courts were captured and abused by politicians under Dr. Banda’s regime as a means of retaining power.<sup>58</sup> They may also be ill-equipped to address issues involving actors outside of the communities, such as between communities with competing customary law systems.

With the change of governance to a multi-party system in 1994, a new focus on governance and justice work emerged in Malawi. Since then, good governance and human rights practices have been high on the agenda of the Malawi government and the general public, as supported by international development partners. The right to a fair public hearing of any dispute was constitutionally enshrined under ‘Access to justice and legal remedies’ within Section 41<sup>59</sup> of the 1994 Republic of Malawi Constitution. For example, Section 41 provides for certain rights to facilitate access to justice and legal remedies such as the right of every person to recognition as a person before the law, the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues and the right to an effective remedy by a court of law or tribunal, for acts violating the rights and freedoms guaranteed by the Constitution. Further, section 44 has isolated and entrenched the right to ‘equality and recognition before the law’ as non-derogable among the rights under section 41.

In order to further emphasise the importance of access to justice and legal remedies, the Malawi Law Commission considered this right extremely important and recommended that it be included among the non-derogable rights under Section 44 of the Malawi Constitution. The Commission argued that this right is closely associated with the right to ‘equality and recognition before the law’ (both non-

derogable rights) to the extent that the two cannot be separated. Consequently, the Commission recommended amendment of section 44(1) (g) to incorporate “the right of access to any courts of law or any other tribunal with jurisdiction for final settlement of legal issues”<sup>60</sup> as a non-derogable right. Malawi Parliament is yet to debate such recommendations by the Malawi Law Commission.

## CHAPTER 4

# THE MALAWI POST-2011 ACCESS TO JUSTICE LEGAL FRAMEWORK

### 4.1 THE MALAWI POLITICAL AND LEGAL CONTEXT

Malawi is a country in transition. The country's institutions of democratic governance, justice, and Rule of Law have been established against a historical background of a "closed society (... ) where silence ruled".<sup>61</sup> Until recently, "Malawians did not live in an open society. Seventy years of colonial rule (1891-1961) were immediately followed by thirty years of one-party dictatorship (1964-1994)"<sup>62</sup>. The last 15 years have been characterised by a transition to multi-party democracy and the institutionalisation of rights and freedoms. These changes necessitated the establishment of new institutions to respond to the new challenges. More importantly, the political changes entailed the emergence of a new political, legal, and socio-economic culture in which people have become freer than was hitherto the case. Malawians have acquired social, political, and economic rights that have to be fulfilled. Civil liberties and various forms of human rights and freedoms are constitutional rights. This also necessitates the reform or establishment of new institutions of

justice to provide effective and fair access to justice - especially for the poor, vulnerable, and marginalised Malawians.

The Malawi Constitution also recognises the existence of traditional leadership. The Constitution provided for the possibility of traditional leaders holding judicial functions through local courts subordinate to the High Court. Section 110(3) of the Constitution provides:

**” Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.”**

This is a function, which traditional leaders have held by custom throughout history. The Chiefs Act also recognises the role of traditional leadership. However, the latter piece of legislation dilutes the powers of traditional leadership by subjugating it to the office of

the President. Traditional leaders therefore become an extension of the Executive arm of the government.

#### 4.2 THE NEED FOR LEGAL REFORM

Despite Malawi's strong support for constitutionalism and an independent judiciary, there has always been the need for laws that are suited to the needs of the majority poor both in form and content. There are several reasons why Malawi's legal system was not better adapted to the justice needs of the poor: firstly, the substantive laws applied by the courts were, and still are, largely out-of-date and some still carry the stamp of Dr. Kamuzu Banda's authoritarian rule. Secondly, Malawi has been far behind its law reform programme, and in the few cases where law reforms have been proposed, mainly by the Malawi Law Commission, there has been either a lack of political will or parliamentary time to legislate the reforms. Apart from the fact that the Malawi Parliament gives too much priority to debating political issues, Dr. Edge Kanyongo advances two other reasons for the parliament's failure to legislate on the Law Commission's recommendations:

**” The first is that the Law Commission is not the only source of proposals for law reform and its proposals have to compete for space on the government's legislative calendar. It is also possible that the Law Commission's priorities may be closer to those of the foreign**

**donors who provide most of the funding for its programmes than to those of the executive, which may favour only legislation focused on the delivery of immediate social and economic benefits.”<sup>63</sup>**

#### 4.3 LINKAGES BETWEEN FORMAL AND INFORMAL JUDICIAL SYSTEMS

In 2010, Malawi Parliament saw the need to establish clear institutional linkages between the informal judicial system and the judiciary when inspired by a 2007 Report by the Malawi Law Commission<sup>64</sup>. They preferred an official way of creating or appropriating informal dispute resolution forums that draw from local norms/customs and practices, while having their operation focused on general civil jurisdiction and criminal jurisdiction limited to minor cases<sup>65</sup>. Such a linkage would also allow routine reviews to prevent gross abuses of natural justice and human rights, in much the same way that high courts routinely review lower Magistrate court decisions.

However, the Malawi Law Commission and Parliament had to bear in mind that, in the past, relations between formal and informal courts have not always been smooth. In most instances they have been openly hostile. Some of the common points of tension that arose during Dr. Kamuzu Banda's parallel system of courts' failure to define the relationship between formal and informal judicial institutions were:



- IJS over-stepping their jurisdiction. In some cases, intervening in cases that were already before magistrates' courts;
- Lack of clear understanding by IJS of their functions due to lack of training since many of the Chiefs presiding over traditional courts did not receive training similar to that of their counter parts under magistrate courts;
- Poor record keeping by IJS, which made it difficult for formal courts to consult the decisions arrived at;
- Lack of monitoring or supervision, largely because such responsibility for monitoring had not been assigned under any statute;
- Former traditional courts being granted criminal jurisdiction equal to the High Court - entailing that a 'chief presiding over a Traditional Court was parallel to the Chief Justice'.

#### 4.4 STATE INTERVENTIONS INTRODUCING REFORMS EXPANDING ACCESS TO JUSTICE FOR THE POOR

Guided by the 1994 Malawi Constitution (s110), in February, 2011, the Malawi Parliament enacted and passed legislation granting general civil and limited criminal jurisdiction to Local Courts. Local Courts now have concurrent jurisdiction with the lower Magistrates' Courts in civil matters and petty criminal offences. At the same time, the Malawi Parliament also passed a new Legal Aid Act expanding the scope of legal aid for poor and indigent Malawians. In turn, each of the two new Acts and the debate surrounding their passing into law will be analysed below.

#### 4.5 THE LEGAL AID ACT

The Legal Aid Bill was first introduced and debated in the Malawi Parliament during the Third Meeting of the 42<sup>nd</sup> Session on December 9<sup>th</sup>, 2010.<sup>66</sup> The Minister of Justice and Constitutional Affairs, Hon. Chaponda stated that the Legal Aid Bill was prepared by the Malawi Law Commission in 2005, following nation-wide consultations which started in 2003. This was in conformity with Section 42 of the Malawi Constitution, which obliges the state to provide legal aid to indigent clients in both criminal and civil matters. Indeed, the preamble to the Legal Aid Bill introduces it as an

**” Act to make provision for the granting of legal aid in civil and criminal matters to persons whose means are insufficient to enable them engage private legal practitioners and to other categories of persons where the interests of justice so require; to provide for the establishment of a Legal Aid Fund; to allow for limited eligibility of other persons, besides legal practitioners, to provide legal aid for the purposes of this Act (...).”<sup>67</sup>**

The Minister of Justice and Constitutional Affairs further introduced the purpose of the Bill as “to repeal the Legal Aid Act [Chapter 4:01] in order to expand Legal Aid Services so as to make justice accessible to all”.<sup>68</sup> In expounding on how the Bill was going to “expand Legal Aid services”, the Minister of Justice alluded to the following as some of the ways:

- Expansion of the ambit of legal aid to include pre-trial assistance, legal advice, and legal education;
- Recognition of the role of other players in the provision of legal aid services such as lawyers, law students, paralegals, and NGOs;
- Addressing the problem of organisational structure of the existing Legal Aid Department by introducing a new Legal Aid Board independent of the Ministry of Justice and Constitutional Affairs;
- Narrowing down the authorities eligible for granting Legal Aid;
- Reviewing the criteria for granting legal aid;
- Introduction of a Legal Aid Fund.

In order to further appreciate the changes introduced by the new Legal Aid Bill, a schematic comparison of the old and new Legal Aid Acts is provided below:

The Legal Aid Bill (now Legal Aid Act) is a liberal piece of legislation, which provides an expanded access to justice for the poor and indigent Malawi's. Some of the notable innovative features of the new law, which set it apart from the old law as highlighted in the above table include the following:

Expounding on the right of access to justice through legal representation as enshrined under section 42 of the Malawi Constitution (1994):

- Broadening of the ambit of legal aid: traditionally, legal aid under the old law was equated to legal representation in court. The new law goes beyond this narrow definition of legal aid and expands it to include legal advice, legal education, pre-trial assistance, and **pro-bono** assistance.

Areas Reviewed	OLD LEGAL AID ACT	NEW LEGAL AID ACT
<b>Ambit of Legal Aid</b>	<ul style="list-style-type: none"> <li>• Silent on manner and form in which legal aid becomes available.</li> <li>• No provision for legal advice.</li> <li>• No provision for legal education.</li> <li>• Remits the grant of legal aid to Magistrate Courts, High Court and Supreme Court.</li> </ul>	<p>Expanded to include:</p> <ul style="list-style-type: none"> <li>• Provision of information.</li> <li>• Provision of education.</li> <li>• Pre-trial assistance and advice.</li> <li>• Legal assistance through pro bono services.</li> <li>• Alternative Dispute Resolution (ADR) processes recognised as options.</li> </ul>

<b>Recognition of the role of other players</b>	<ul style="list-style-type: none"> <li>• Role of other players not legally recognised and defined as having a bearing in expanding provision of legal aid services.</li> </ul>	<p>Role of other players legally recognised and defined, such as:</p> <ul style="list-style-type: none"> <li>• Malawi Law Society.</li> <li>• Senior law students.</li> <li>• Paralegals.</li> <li>• Civil society organisations.</li> </ul>
<b>Problem of organisational structure</b>	<ul style="list-style-type: none"> <li>• Legal Aid Department as a department of the Ministry of Justice (not independent).</li> <li>• Legal Aid Department operating only in three regions of Blantyre, Lilongwe and Mzuzu.</li> </ul>	<ul style="list-style-type: none"> <li>• Legal Aid Department transforms into an 'independent' Legal Aid Bureau headed by a Director (appointed by the Public Appointments Committee).</li> <li>• Geographical extension of legal aid services: Legal Aid Bureau to operate beyond regional centres and to open District Legal Aid Offices.</li> </ul>
<b>Authorities eligible to grant Legal Aid</b>	<ul style="list-style-type: none"> <li>• Minister of Justice authorised to grant legal aid.</li> <li>• Judicial officers</li> <li>• Principal Legal Aid Advocates.</li> </ul>	<ul style="list-style-type: none"> <li>• The number of officials eligible for granting legal aid narrowed down, and the Minister removed from the list.</li> </ul>
<b>Criteria for granting legal aid</b>	<p>Areas not qualifying for legal Aid:</p> <ul style="list-style-type: none"> <li>• Non-court proceedings and tribunals.</li> <li>• No guidelines for eligibility of persons seeking legal aid.</li> </ul>	<ul style="list-style-type: none"> <li>• Revised to be more in tune with the times.</li> </ul>
<b>Legal Aid Fund</b>	<ul style="list-style-type: none"> <li>• Sole reliance of Government funding.</li> <li>• No Legal Aid Fund.</li> </ul>	<p>Legal Aid Fund introduced. Sources to consist of:</p> <ul style="list-style-type: none"> <li>• Allocations from Treasury.</li> <li>• Contingency fees.</li> <li>• Costs awarded by courts.</li> <li>• Deductions from costs awarded by courts.</li> <li>• Contributions made by legally aided persons.</li> </ul>

- Extending coverage of legal aid to civil<sup>69</sup> and criminal<sup>70</sup> matters which directly concern and affect poor people's rights.

Section 23 grants powers to courts, in appropriate cases, to proactively direct that a person who is appearing before them (in civil as well as criminal cases) be assisted through legal aid. This is a positive development since in most cases in the past, once the Legal Aid Department had refused to offer legal aid, the person affected did not have the right of recourse against the decision.

The above power of the courts complements Section 24 under the new law, which gives a person who is denied legal aid, the right to appeal against the decision.

The legal aid system that proposes to include a wider spectrum of stakeholders should have a broader appeal. And the idea that financial support for such a system should come from a variety of sources such as donor funding, rather than general tax funds, is also likely to command greater support, as is promoting the sustainability of the Legal Aid Fund. However, due to currently strained relations between the Malawi Government and some traditional donors to the justice sector, there have not been any substantial inflows to support implementation of the new Legal Aid law<sup>71</sup>.

In many ways, it would appear that the new Legal Aid Act tries very hard to ensure that the

right to legal representation is entrenched in the law. Whether this translates into practical reality depends largely on whether Malawians, who have been described elsewhere as people who accept to “suffer in silence”, will now open up and take advantage of their new-found rights. Bearing this challenge in mind, the role of legal aid and court officials in promoting access to such rights closer to communities cannot be overemphasised.

At the present moment, in order to gain a further appreciation of the dilemmas facing Malawi in adopting the new Legal Aid law, it may be necessary to present an analysis of the manner in which the Legal Aid Bill was debated in Parliament. In the next few paragraphs, a flavour of the views of Members of Parliament during debate in the house is presented.

The introduction of the bill was generally welcomed by both sides of the National Assembly (government and opposition) as a positive development. The main opposition party, the Malawi Congress Party (MC), speaking through its Spokes Person on Legal Matters Hon. Menyani, represented the view that once the bill becomes law, it would assist the poor, vulnerable, and marginalised Malawians including:

**” A certain category of accused persons which solely rely on legal aid such as homicide suspects overstay on remand for a period exceeding 8 to**

**10 years contributing to congestion in prisons.”<sup>72</sup> The MCP also welcomed the provision for ‘pro bono’ services in the bill on the basis that “generally speaking, in [Malawi] legal costs could be classified as being exorbitant, it is beyond the reach of many average Malawians.”**

This view point was further elaborated by Hon. Dr. Mwalwanda, who added the dimension that:

The cost of legal practitioners in Malawi is extremely exorbitant..[that] even us [MPs cannot afford them].”<sup>73</sup> Moreover, Hon. Menyani was quick to warn that “quite a number of legal practitioners are perceived by most Malawians as being reluctant to be involved in pro bono work”. While supporting the idea for pro bono services as “lessening the burden placed on lawyers working in Legal Aid Department.”

Hon. Menyani went further in offering worrying statistics about the state of legal aid services in Malawi:

**” At the moment, unless things have taken a dramatic change, the research carried out by the Malawi Congress Party revealed that there were only about 16 lawyers in the Legal Aid Department to assist perhaps over 6 million to 10 million Malawians, our fellow countrymen who cannot afford to pay for private practice lawyers.”<sup>74</sup>**

Thus, Hon. Menyani proposed that, in order to attract more lawyers to work in the Legal Aid Department (Bureau), and in order to retain them, they should be provided with the necessary ‘incentives’ and be ‘properly motivated’. This proposal was premised on the fact that “just bringing the [Legal Aid] Bureau in itself does not solve matters- we have seen for example how the Anti-Corruption Bureau has failed to retain lawyers”.<sup>75</sup>

In the same vein, Hon. Menyani challenged his fellow MPs, arguing that unless the government/Parliament were to “fix some sort of percentage of the State’s criminal justice budget” the problems that the Legal Aid Bill was to address, would not go away. He said:

**” I am saying this because for a very long time in [Malawi] the budget that we use for legal aid, the ceiling (...) is K30million. I have seen that the budget has been close to K28million, K30million for seven [consecutive] years, things going on like that and what the K27million translates into(...) is that government of Malawi allocates K2 per capita or each and every Malawian has to use about K1.70 for legal aid of which is not practical (...) cant’s we seriously look at issues of legal aid as being a constitutional issue, being a human rights issue, so that we have a threshold that can really translate into practicable means of legal aid.”<sup>76</sup>**

The second largest opposition Party in Parliament, the United Democratic Front (UDF), also applauded the introduction of the Legal Aid Bill. The UDF Spokesperson on Legal Matters, Hon. Muluzi, welcomed the narrowing down of the number of officials authorised to grant legal aid and the removal of the Minister from the list. He argued that:

**“ This (...) is undesirable, the powers of the Minister were so wide that the Minister may even order the Principal Legal Aid advocate not to undertake representation for any person in any proceedings. This was extremely undesirable. The new law on the other hand proposes to expand the legal aid services so as to make justice accessible to all.”<sup>77</sup>**

While welcoming the geographical extension of legal aid services by providing for District Legal Aid Offices, Hon. Muluzi cautioned that “what will be important, however, is to ensure that when this bill becomes law, the Ministry will ensure there is mass public awareness on the changes which have been proposed, and the services will be available”<sup>78</sup>. This point was echoed by Hon. Kunkuyu who went further in saying that “ignorance will still cost us a lot. If people are ignorant, even if we pass the bill, it may be of no use to the people that really deserve the services under this bill”<sup>79</sup>.

While supporting the Bill, Hon. Reverend Ngwira warned against “abuse” of the Legal Aid Fund proposed under the bill. Citing the example of a series of abuses of deceased estate funds at the Administrator General, Hon. Reverend Ngwira warned that: “we absolutely need to protect our people against exploitation by the legal aid department.”<sup>80</sup>

Hon. Nawena wondered why the Legal Aid Bill was proposing ‘contributions’ towards legal aid from the very same poor who, within the Malawi Banking sector, were failing to access soft loans because Banks were similarly demanding ‘collateral’. He lamented what might pose a further challenge to the implementation of the bill once passed into law:

**“ We are discussing here very serious matters because for years and years the poor have suffered because of the absence of legal aid (...) what I am seeing here is a little contradiction because when we talked about banks not helping the poor, the reason was and still stands that banks demand collateral. Give us collateral we will give you a loan (...). It is not right that this bill should include such demands. If you have no property you cannot access legal aid (...) .the poor in the village must make available the very collaterals they have not been able to provide for loans.”<sup>81</sup>**

On the other hand, Hon. Chilumpha focused on the requirement for practical implementation of the bill once it became law. He appealed to the Minister of Justice and Constitutional Affairs to ensure

**“ That in the implementation of this bill, two things should be done: The funding has got to be adequate otherwise the Act will be just a deal letter on the shelf; Secondly, I hope that we will cut the bureaucracy involved in the decision whether legal aid should be granted... Because justice delayed is justice denied.”<sup>82</sup>**

in his practical demonstration, Hon. Matola (Leader of UDF in the House) almost caused uproar in the National Assembly, when he proposed that certain non-performing Ministers present in the house should resign since, if they were incapable of running the government, they could be entrusted with implementing the Legal Aid law itself. Hon. Matola said:

**“ What I am saying is also affecting the poor of this country (...) I beg to move that the following Ministers should resign from today (...) Minister of Justice and Constitutional Affairs, Minister of Information and Civic Education, Minister of Finance, Economic Planning and Development (...) all these Ministers are not capable. You are running this government as a hawker. You are**

**running this government as a canteen. You are running this government as your own personal property. You are supposed to resign. The Minister of Justice should resign.”<sup>83</sup>**

The debate on the Legal Aid Bill was not problematic. It was passed into law with a consensus of both sides of the house on February 2nd, 2011, and published in the government Gazette on 8<sup>th</sup> April, 2011. The debate on the Legal Aid Bill however, is revealing in a number of respects;

Firstly, the debate demonstrates the dilemma of legal aid services in Malawi as access to justice itself remains in a state of flux. It also reflects the degree of neglect by the government when it comes to the infrastructure for legal aid, since the concentration of resources, and decision-making is still a preserve of the Ministry of Justice and Constitutional Affairs at Capital Hill, Lilongwe. The disproportionate imbalance in the resourcing and staffing of positions at legal aid offices is sufficient evidence of lack of government attempts at ameliorating the problem. Under such circumstances, one can fairly assume a total absence of moral and material incentives for the support staff at the legal aid offices.

The crisis of legal aid is a reflection of the crisis of the judiciary and access to justice in general, and paints a picture of the degree of decay and

neglect of public institutions, which are one distinct hallmark of any democratic society.

The decline and neglect of legal aid services is consistent with the misplaced priorities of the government and its efforts to effectively decentralise the operations of public institutions. The debate demonstrates that a highly centralised state system such as Malawi's, cannot effectively design institutions that reflect the justice needs of the poor and grassroots.

Finally, the debate on the Legal Aid Bill demonstrates that one sure test of the effectiveness of a democratic society like Malawi is the manner in which the grassroots have access to public institutions such as legal aid services.

#### **4.6 ANALYSIS OF POTENTIAL LINK BETWEEN LEGAL AID AND LOCAL COURTS**

Although legal representation is generally not available during proceedings in informal or lower courts, now that the scope of legal aid has been expanded to include pre-trial services, legal advice, and legal education, these are areas necessary even for clients appearing before Local Courts. It would be interesting to see if such a link was made during the debate and passing of the Local Courts Act analysed in the next few paragraphs.

#### **4.7 THE LOCAL COURTS ACT**

The Local Courts Act, which was debated only five days after the passing of the Legal Aid Bill, presents a completely different story. As analysed below, it is difficult to appreciate that it was the same members of Parliament, at the same sitting of Parliament, who five days earlier had passed into law, the Legal Aid Bill,<sup>84</sup> and who were now debating the Local Courts Bill. The emotions, which the Local Courts Bill invoked, will be analysed later.

The Local Courts Bill was also introduced and debated in the Malawi Parliament during the Third Meeting of the 42<sup>nd</sup> Session on February 7th, 2011.<sup>85</sup> The Minister of Justice and Constitutional Affairs, Hon. Chaponda, stated that the Local Courts Bill was prepared by the Malawi Law Commission in September, 2007, following nation-wide consultations. This was in conformity with Section 110(3) of the Malawi Constitution, which provides for the introduction of Traditional Courts or Local Courts. The Minister stated that the purpose of the Bill was to "introduce a genre of courts to be named Local Courts with the primary function of dispensing familiar and affordable justice for the ordinary Malawian"<sup>86</sup>. This was in line with the spirit of the Constitution, which is aimed at enhancing the rights of access to justice for all citizens. In expounding on why it was necessary to introduce Local Courts, the Minister of Justice alluded to the following:

- The Law Commission was of the view that former Traditional Courts which were



“integrated into the High Court” in 1994 could never be replaced by Magistrate Courts “due to their differences in practice and procedure”<sup>87</sup>;

- The Law Commission also observed that “ordinary Malawians residing in rural areas might be denied [access to justice] if matters including customary civil matters continued to be handled by Magistrate Courts, which were ill equipped to handle such matters”;
- Local Courts would provide “timely access to justice to the rural masses” and contribute to “unclogging” the backlog of cases in various registries of the Magistrate and High Court system;
- Local Courts would complement the Decentralization Policy and Local Government Act passed in 1998. The Policy and Act aim at ensuring that services are brought closer to communities. They would also help government enforce by-laws by dealing with cases under the by-laws. Local Council currently have problems managing cases arising under the by-laws;<sup>88</sup>
- Local Court would adopt simple procedures to allow for easy access;
- Local Court proceedings would be conducted in the local language and apply the customary law of the local area;

Meanwhile, it will also be necessary to present a schematic analysis of the differences between the Old Traditional Courts Act and the New Local Courts Act:

<b>Areas Reviewed</b>	<b>OLD TRADITIONAL COURTS ACT</b>	<b>NEW LOCAL COURT ACT</b>
<b>Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Unlimited in both civil and criminal. Could try e.g. murder, sedition, and treason.</li> </ul>	<ul style="list-style-type: none"> <li>• In civil and minor criminal matters, criminal jurisdiction is limited in terms of type of law (customary), size and complexity of the matter, as well as geographical territory and (local) and monetary considerations.</li> <li>• Will not try inheritance issues, custody of children, cases of witchcraft, land disputes, and distribution of matrimonial property.</li> </ul>
<b>Practice and Procedure</b>	<ul style="list-style-type: none"> <li>• S40 empowered the Minister of Justice to make rules for practice and procedure.</li> <li>• Minister promulgated the Traditional Court (Procedure) Rules.</li> </ul>	<ul style="list-style-type: none"> <li>• To be prepared by the Chief Justice and provided for in subsidiary legislation.</li> <li>• Mode of commencing proceeding vested in the Director of Public Prosecutions.</li> </ul>
<b>Legal Representation</b>	<ul style="list-style-type: none"> <li>• S40 prohibited legal representation in Traditional Courts unless the Minister of Justice allowed it in writing.</li> </ul>	<ul style="list-style-type: none"> <li>• Legal representation prohibited in civil matters.</li> <li>• Legal representation allowed in criminal matters on the basis that it is a 'non-derogable' right under the Constitution.</li> </ul>
<b>Laws to be Administered</b>	<ul style="list-style-type: none"> <li>• S12 empowered Traditional Courts to administer customary law and provisions of any Act authorised by the Minister of Justice.</li> </ul>	<ul style="list-style-type: none"> <li>• In civil matters, customary law of the geographical area where the court is located.</li> <li>• In criminal matter, only the laws included in a Schedule to the Local Courts Act.</li> <li>• To have regard for the Constitution and human rights.</li> </ul>
<b>Review and Supervision</b>	<ul style="list-style-type: none"> <li>• Review and supervision by an Executive officer known as Traditional Courts Commissioner under the Minister of Justice.</li> </ul>	<ul style="list-style-type: none"> <li>• Review and supervision by the Chief Justice.</li> </ul>

<b>Appeals</b>	<ul style="list-style-type: none"> <li>• From the grass roots and all the way to the National Traditional Appeals Court.</li> </ul>	<ul style="list-style-type: none"> <li>• To the High Court and Supreme Court.</li> </ul>
<b>Enforcement of Judgments</b>	<ul style="list-style-type: none"> <li>• No stand-alone provision in the Act. Provisions were embedded in section dealing with awards in civil matters.</li> <li>• Minister promulgated Traditional Courts (Enforcement of Judgments) Rules.</li> </ul>	<ul style="list-style-type: none"> <li>• Stand-alone provision highlighting the need for effective remedies.</li> <li>• Enforcement rule to be made by the Chief Justice.</li> </ul>
<b>Institutional Setup</b>	<ul style="list-style-type: none"> <li>• Completely separate and parallel to the High court system and Supreme Court.<sup>89</sup></li> <li>• Courts administered by the Executive through the Minister of Justice.</li> <li>• Executive through the Minister of Justice chose personnel who sat on Traditional Courts.</li> <li>• Chief presided over Traditional Courts.</li> </ul>	<ul style="list-style-type: none"> <li>• Parallel to Magistrate courts but appeal directed to the High Court and Supreme Court.</li> <li>• Courts administered by the Chief Justice.</li> <li>• The Chief Justice to recruit and choose judicial staff to sit on the Local Courts.</li> <li>• Lay Persons to preside over Local Courts.</li> </ul>

## 4.8 ANALYSIS OF THE LOCAL COURT BILL

### The Type of Legal Pluralism Chosen

Broadly speaking, there are three types of legal pluralism. The first is where legal orders exist in parallel to the state system and are not formally recognised or state-sanctioned. Such non-state legal orders exist in every country, including Malawi. The second kind of legal pluralism is where the state legal order is plural such as when family and some property matters are governed by different laws for different religious or ethnic communities. The third kind of legal pluralism is where quasi-state legal orders are established or the State incorporates non-state legal orders, for example, through decentralisation<sup>90</sup>. The third type is the route taken by Malawi's new Local Courts Act. The Act has been adopted by the State to provide a means of resolving legal disputes and grievances without recourse to the formal court system. In a poor country like Malawi, the use of these mechanisms is justified on the basis of providing a vital service where state capacity is weak or overburdened. But it should be emphasised, that even in countries with relatively well resourced justice systems, such systems are used to divert some cases out of the formal court system in order to reduce backlogs and costs to the State<sup>91</sup>.

Other policy options, which Malawi may have used include:<sup>92</sup>

**Codification and ascertainment of customary laws:** Codification involves recording customary

laws in writing, either in an informal record for use by local communities, or in a statutory form for use by state courts. Ascertainment assists communities in determining their own laws but, unlike codification, the focus is on describing (not prescribing) the principles applied. Codification and ascertainment is used primarily to bring legal certainty to discrete areas of law, such as land ownership, where clarity may be needed for development to take place.

**Incorporation of customary fora into the state hierarchy of courts:** Hybrid courts apply customary law at first instance. On appeal, the higher courts use assessors to determine the content of, and how to apply, the customary law. Integration is usually appropriate when the customary legal system is already cooperating significantly with the state. This is the option used by Malawi with the new Local Courts Act.

**Adaptation of the laws and procedures in the state legal system to accommodate customary precepts:** This option attempts to harness the best features of both systems. It is best suited to a common law system, which is inherently able to adapt to new circumstances, and certainly only when the state and the judiciary are open to cooperating actively with customary societies.

**State monitoring of the decisions made by customary systems using independent accountability mechanisms,** such as Human

Rights Commissions. This policy option may be appropriate in cases where the state legal system is incapable of dispensing justice. However, it does not resolve jurisdictional issues, and may need to be combined with additional regulatory reforms.

**State regulations of customary legal systems:**

These subject customary legal systems to state oversight on a wide range of matters, including observance of human rights standards. Regulation needs to be used with restraint, and only where intervention is strictly necessary to ensure that customary legal systems can operate.

In essence, Malawi’s new Local Courts Act adopted a combination of most of the policy options above since most of its provisions are attempts at adapting laws and procedures in the state legal system to accommodate customary precepts. At the same time, the Chief Justice has been designated the role of regulating, supervising and monitoring the functioning of the Local Courts.

However, the Local Courts Act faces the tricky dilemma of recognising the traditional justice system and walking the tightrope of aligning it with the constitution.<sup>93</sup> The biggest problem is that the traditional leaders come from a system of hereditary succession, and are aligned to the Executive arm of government.<sup>94</sup> In theory, this challenge has been dealt with by making provision for lay persons (not chiefs) to preside over these Local Courts. Having, done so, the

Local Court creates yet another dilemma; the question as to whether robbing traditional authority of judicial function does not “kill the very essence of tradition leadership.”<sup>95</sup> The Special Law Commission considered this issue from two perspectives;

Firstly, the Commission was of the view that from a Rule of Law perspective,

**” If any courts are established and are presided over by chiefs, it may result in the erosion of the independence of the Judiciary from the Executive arm of Government. This will go against the spirit of the Constitution.”**

Secondly, the Commission recognised the practical dilemma and scenario in which Malawi’s pluralistic legal system is set. The Commission states:

**” The involvement of chiefs in the formal justice sector would have an adverse effect on their role in the informal dispute settlement mechanism referred to as ‘the non-state customary system of justice’ which has always co-existed with and complemented the formal justice system since colonization. The Commission recognized that re-establishing these courts excluding the Chiefs from the system will not rob chiefs of their traditional judicial functions as is feared from some quarters.”<sup>96</sup>**

The Local Courts Bill did not go down well with opposition members of Parliament. In order to understand further the emotion, which the introduction of the Local Bill invoked in Parliament, it will be necessary to analyse the debate, which emerged. The main Opposition Party, the Malawi Congress Party (MC, speaking through its Spokes Person on Legal Matters, Hon. Menyani, started by describing the memorandum to the Bill as “sincere and straight forward ... at face value” as it was seeking “to bring a modern version of the notorious Traditional Courts that were synonymous with the one party era.”<sup>97</sup> In the same vein, Hon. Uladi Mussa believed that the Local Courts Bill had a “hidden agenda.”<sup>98</sup> Hon. Mussa then accused the Hon. Minister of Justice and Constitution Affairs of proposing such “bad” legislation as a consequence of the Hon. Minister living outside Malawi during the Dr. Kamuzu Banda regime.<sup>99</sup>

However, Hon. Menyani was quick to state that there were “fears” that the “proposition of such a Bill like this one would want to bring in the re-emergence of an autocratic state [and be used] to suppress and oppress the people of Malawi.”<sup>100</sup> Hon. Menyani also feared that such a Bill may set “the nation back several decades”<sup>101</sup>. In this regard, he observed that it was not “mandatory that Parliament has to introduce Local Courts” under Section 110(3) of the Constitution. He therefore went further to suggest that it was better for Parliament “to abolish the provision [section 110(3)] all together” since the proposed Local Courts gave

him “goose bumps” in view of the bad history of the old Traditional Courts. Hon. Dr. Cassim Chilumpha went straight to the point by saying that:

**“ Those who oppose these courts, they are opposing them because of the history - that these courts have been abused. The reason why that is the case is because they have always been created by an Act of Parliament, just like we are doing now (...) as a country, we have seen what has happened in the past. Our fore-bears who sat in this House championed the law that changed the Local Courts to Traditional Courts; championed the law that allowed these courts to try murder cases; championed the law that allowed these courts to punish people who had committed treason. The sad thing is when you look back historically, they were the first ones to face the wrath of these courts.”<sup>102</sup>**

On the other hand, Hon. Menyani wondered whether the introduction of Local Courts was “yet another vote of no confidence in [the] judicial system”. This question was posed after having observed that, in addition to jurisdiction in civil matters at customary law, the Local Courts were also being given jurisdiction in criminal matters at statutory law.<sup>103</sup> The expressed fear was that it would be “very dangerous and suicidal” for Local Courts to be granted such jurisdiction since they may

be subject to manipulation and abuse as was the case with the former Traditional Courts. However, Hon. Dausi challenged his fellow Members of Parliament in stating that Local Courts may not necessarily be the problem - rather the general governance challenges. He observed that:

**” When Late Kamuzu Banda was arrested and searched for 13 hours, there were no Local Courts. When Kamuzu’s property was expropriated, there were no Local Courts. When the Honorable J.Z.U Tembo was searched for 25 hours, there were no Local Courts. When the Malawi Congress Party was snatched its headquarters property, there were no Local Courts (...) when Minister of Justice and Constitutional Affairs ordered the freezing of Late Kamuzu Banda’s Bank Accounts, there were no Local Courts.”**<sup>104</sup>

The main issue therefore was expressed by Hon. Uladi Mussa who observed that

**” It would have been very, very imperative for the government to repeal some of the [old] laws, they are too archaic for this nation to adhere to. We need to repeal some of these laws as far as our democracy is concerned; they are not in conformity with our democracy in this country.”**<sup>105</sup>

Hon. Menyani also complained about the “long process of appeal” proposed under the Local Courts Act. He worried about the long process involved in appealing from the Local Court, to the District Appeal Structure before proceeding to appeal to the High Court and then the Supreme Court of Appeal. He observed that

What this means effectively is that justice is going to be delayed because we do not know how the district appellate court is going to operate because it can either be very ineffective or politically influenced so as to delay the whole appellate process.”<sup>106</sup>

Having expressed the concerns of MCP on the Local Courts Bill, Hon. Menyani nevertheless recognised the importance of the Bill, stating that

**” We cannot just block this bill in its totality. We will offer a compromise to the Honourable Minister of Justice and Constitutional Affairs.” In the final analysis, as a compromise, the MCP proposed that “the most important thing is to leave all criminal jurisdiction in the hands of Magistrate Courts.”**<sup>107</sup>

This compromise position was shared by other Members of Parliament on the opposition side of the House. In this regard, Hon. Khwauli

Msiska said “what is of contention here is whether what is contained in the substantive pages of this Bill manages to address the intention correctly.” Hon. Msiska went further:

**” When you look at the First Schedule which lists the kinds of [criminal] offences that such courts would have jurisdiction over, you start wondering, why it is necessary for [the presiding officer] to have adequate knowledge of customary law because 99 per cent of the kind of offences listed in the First Schedule have very little to do with customary law.”<sup>108</sup>**

The United Democratic Front (UDF) Spokesperson on Legal Matters, Hon. Muluzi, also acknowledged the importance of the Bill, stating that: “[if] properly managed and implemented, the introduction of Local Courts could perhaps play a pivotal role in the settlement of disputes for the majority of our people within our local communities.”<sup>109</sup> However, Hon. Muluzi was quick to point out that “people need to have faith in the institutions we are attempting to create for fair arbitration.” Further, Hon. Muluzi raised several concerns, one being the lack of a clear definition of customary law in the Bill and no systematic development of the subject matter; the other, the expectation of

**” Conflict between the demands of customary law on the one hand, and the imperatives of human rights on the other. Customary law appears to be insensitive to gender equity or equality. Our constitution together with international law instruments emphasizes the rights and the equality of persons irrespective of gender. How the Local Courts will handle this condition or contradiction appears to be unclear.”<sup>110</sup>**

In the final analysis, Hon. Muluzi proposed a balancing act: firstly, that “it will be prudent to address some of the financial expectations or constraints that [the] current court systems are experiencing at the moment,”<sup>111</sup> and secondly, that “we must take care not to introduce Local Courts at the expense of Magistrate Courts and we must take care not to introduce a new cost centre which we may not be able to afford.”<sup>112</sup>

Unlike the Legal Aid Act, the Local Court Bill had a rough and bumpy ride in Parliament. Debate was so intense and would have raged on if it were not curtailed by vote through a “division”.<sup>113</sup> As such, its passing into law was not with the consensus of both sides of the house. The opposition side of the house was strongly opposed to passing the bill in its totality without adopting the proposed changes to the bill. The major contention regarded whether the Local Courts should be granted criminal jurisdiction in the form that the Bill



proposed. Consequently, Opposition members of the house called for a “division” in passing the bill, which was later rejected by the Speaker. The Bill was passed into law on 9<sup>th</sup> February, 2011, and published in the government Gazette on 8<sup>th</sup> April, 2011.

The whole commotion and tension in Parliament can be traced back to the dilemma, which the Malawi Law Commission faced in considering whether to recommend criminal jurisdiction for Local Courts. The Report of the Law Commission states:

**” Public opinion as discerned from the initial consultative workshop was in favour of removing criminal jurisdiction from Local Courts. This was principally due to the high standards that the Constitution has set in terms of the conduct of the criminal process starting from investigations to trial. Stakeholders did not have confidence in Local Courts to live up to the standards set by the Constitution (...)**

**With this background in mind, the Commission considered whether, given the constitutional language, it would be possible not to grant criminal jurisdiction to Local Courts. After lengthy debate, the Commission concluded that the wording of Section 110(3) is permissive and gives Parliament discretion on the setting up**

**and jurisdiction of traditional or local courts. The Commission was also made aware that the original draft of the Constitution did not include criminal jurisdiction for traditional or local courts but rather that this was inserted at a later stage in the drafting process. The original intention was that such courts should exercise jurisdiction in civil matters at customary law only.”<sup>114</sup>**

How such clear views and opinions from the majority of stakeholders and the general public ended up in the Law Commission recommending criminal jurisdiction for Local Courts is difficult to understand. What is clear is that in view of the context within which the Local Courts Act was passed into law, it is highly unlikely that it will lead to a smooth practical implementation as analysed in later chapters of this report.

Nonetheless, the analysis of the passage of the two new laws (Legal Aid and Local Court Acts) in the National Assembly gives us a lot of insights into the current state and nature of politics, democratic governance, the Rule of Law, and human rights in Malawi:

- On the one hand, opposition MPs demonstrate how astute they are over such matters of national importance. They have shown that they are neither ‘push-overs’ nor ‘rubber stamps’ as hitherto portrayed. They demonstrate that they can stand for the

human rights cause and interests of the poor and masses (and of course, their own political interests);

- On the other hand, the debate demonstrates how much Malawi is still very much in its infancy as a country in “transition”. Perhaps what is even more striking is the fact that the tensions also demonstrate how deeply divided Malawians are on issues and matters relating to Malawi’s past dictatorial regime. The trend appears to be, that such issues can flare at any time in Parliament. As such, without effectively dealing with the past history of gross human rights abuses under Dr. Kamuzu Banda, Malawi can be described as a ‘ticking time bomb’. Malawi has opted for a “transition without transformation”<sup>115</sup>;
- This further demonstrates the high level of trust and confidence which opposition MPs have with Magistrate Courts and the High Court system. This is hardly surprising given that the High Court has generally been progressive in adjudicating civil and political matters in this otherwise weak political system.<sup>116</sup> Most of the MPs have benefitted from such positive jurisprudence of the High Court - especially through judicial review processes and the granting of injunctions.

Ordinarily, customary legal systems deal principally with three areas of law<sup>117</sup>: the law of obligations; family law; and property law and succession. These are areas in which communal conflicts frequently arise and for which an effective dispute resolution

mechanism is often needed. As has been stated already, the most significant characteristic of customary dispute resolution is that it seeks to deliver restorative justice, rather than punitive sanctions, in order to achieve social reconciliation. This then, is where Malawi’s new Local Court Act invited unnecessary tensions in its debate in Parliament. It may be argued that, for example, giving Local Courts the mandate to deal with such criminal offences as “publication of false news likely to cause fear and alarm in the public” and “offences in relation to publications, importation of which is prohibited”<sup>118</sup> is not in line with the traditional areas of law for such courts. In any event, these are the type of criminal offences, which provide an entry point for politicians to abuse Local Courts to silence opposition and criticism. Granting Local Courts powers to pass a maximum aggregated prison sentence of up to 2 years further aggravates this situation<sup>119</sup>. At the end of the day, the manner in which the Local Courts Act was ‘rushed’ and ‘pushed’ through parliament by the Minister of Justice and Constitutional Affairs demonstrates a ‘missed opportunity’ for the government to rally all key stakeholders behind implementation of the new law. Implementation prospects for the Local Courts Act are now slim since the government is being perceived, perhaps rightly, as re-introducing the local courts in order to use them as a tool to silence opposition and criticism, as was previously the case under Dr. Kamuzu Banda with traditional courts.

Pushing for the new Local Courts Bill required sober analysis of what was feasible, but also required a readiness to take chances when the timing looked right. The government failed to realise that “pragmatic policymakers look for policy windows that open, and use them to create a space for moving forward to solve the particular access to justice problems facing the poor.”<sup>120</sup>

Consequently, the debate in Parliament on the new Local Courts bill failed to do the most important thing - that of linking the Local Courts bill with the Legal Aid Act passed just five days earlier. Such links can have the following dimensions:<sup>121</sup>

- Can benefit both laws, benefit one law but weaken the other, or benefit one law while the other sees little benefit. In the particular case of Malawi, such links were perceived as benefitting the formal justice system more than the informal justice system;
- Links can be initiated by both sides, but the state usually makes the first move. In the case of Malawi, links were initiated by the state through the Malawi Law Commission’s review of the old Traditional Courts Act;
- Justice actors may also seek partners who can supplement their resources (their economic, cultural, or social capital). Indeed, the Malawi Government intended to reduce the backlogs in the formal justice system through Local Courts which were perceived to offer more accessible and affordable justice familiar to the poor people’s concept of justice;

- Links with non-state actors are rarely seen by governments as a perfect solution. However, having some control over non-state actors may be worth the government losing centralised, uniform justice provision. This was indeed the case of Malawi’s initiative with the Local Courts Act;
- Links can raise standards on both sides: the state increases its understanding of local needs and knowledge, and non-state actors conform more to constitutional and international human rights standards. This was among the aims and objectives for proposing the Local Courts Acts;
- The adaptability of local non-state structures allows them to combine with external approaches to form more than just a link, and to create an original hybrid formation.

According to the Minister of Justice and Constitutional Affairs, and the Report of the Special Law Commission, Malawi Parliament’s attempts at actively developing links between state and non-state systems was meant to offer the opportunity of judiciary oversight, according to constitutional standards and within an affordable national budget. Indeed, the Malawi Judiciary was also to benefit from customary systems, which already enjoy local legitimacy, ownership, sustainability, and effective procedures.<sup>122</sup> As such, initiating and strengthening such links, which promise mutual enhancement could be beneficial.

Ideally, Malawi’s legal reform which contemplated links and engagement of both

the state and customary justice systems, should have carefully navigated a delicate balance between several competing interests and many complex issues such as; the governance and political context, power structures, cultural practices, ethnic or tribal identities, attitudes toward customary justice systems, and sensitivities heightened after 70 years of colonial rule and 30 years of dictatorship under Dr. Kamuzu Banda. The poor choice of policy options, that might have been used to achieve such a balance is what challenged the passing of the Local Courts Bill - and is sure to pose as an even greater challenge to the implementation of the Local Courts Act.

## CHAPTER 5

# THE SHIFT TOWARDS ENGAGEMENT WITH INFORMAL JUSTICE SYSTEMS – STAKEHOLDER PERSPECTIVES

**”** [T]hose who have criticized [informal traditional justice forums] as being too traditional to promote development are often too simplistic in their arguments. They are bound up in the traditional-modern dichotomy in which ‘traditional’ is equated with ‘backward’ and ‘modern’ with ‘advanced’. Development can thus only occur within a ‘modern’ framework. The main problem with this equation is that it is based on a very static view of tradition. It ignores the fact that traditions are often ‘invented’ and hence, very ‘modern’ in content.”<sup>123</sup>

In terms of the use of, and view upon, traditional systems, it has been argued that

**”** Development organizations have not only tended to ignore traditional systems, they have had a propensity to view them in fairly negative terms. Traditional systems are often seen as archaic, ‘backward’, or rigid practices that are not amenable to modernization, efficient market relations, or broader

development goals. In terms of reform, they are often seen as overly localized and complex, with the diversity of systems making more generalized initiatives too difficult. They are often seen as undemocratic - lacking democratic accountability mechanisms to induce reform - and lacking in legal legitimacy, authority and enforceability.”<sup>124</sup>

Meanwhile, other commentators observe that

**”** There is a temptation, particularly in common law societies, to equate the judiciary with the entire legal system, and to look to judges to serve as the primary guardians of probity and fairness. Yet the judiciary is but a part of the entire legal system, and both the scope of its powers and its political role vary considerably from jurisdiction to jurisdiction (...) For these reasons, there can be no one-size-fits-all analysis of the role of judges in ameliorating poverty.”<sup>125</sup>

In this regard,

**” There is a general tendency for access to justice reform (both multilateral and bilateral) to focus on programmes supporting formal mechanisms of justice, especially processes of adjudication through the judiciary. This is understandable from a governance perspective. However, from access to justice perspectives, it is essential that common parameters of assessment be applied to both formal and informal justice mechanisms.”<sup>126</sup>**

Indeed, where Customary Law has been recognised and its adjudication transferred to the formal courts, this “has in certain respects caused Customary Law to lose its original force although provision was made for Customary Law ‘expert witnesses’ to assist courts. In fact (...) it can be said that the customary system has been reduced into a secondary source of law for the formal courts.” Against the backdrop of this development, the formal system in general, certainly views Customary Law as subordinate, if not so much in the same fashion as their colonial predecessors did.<sup>127</sup>

Alarmed by such developments, others also argue that “given the prevalence and importance of customary legal systems in most developing countries in the world, the relative lack of attention to the workings - and effects - of these systems by development practitioners is striking, even if not surprising.”<sup>128</sup>

Tackling negative perceptions towards IJS is particularly challenging because it demands behavioural change to reverse deeply ingrained habits, attitudes, and ways of doing business. Shifting attitudes toward excluded groups is crucial but takes time.<sup>129</sup> However, it is encouraging that there is gradual change in thinking. In this regard, DFID recognises that there may be ‘myths’ and ‘folklore’ about IJS. DFID states that

**” Opinions and beliefs about NSJS systems that are widely held may not have a solid basis. Some assumptions may hold true in certain contexts, but not in others. A research strategy should recognize and respond to this. Dispelling a prevalent but erroneous myth about NSJS systems may be a strategic output in itself.”<sup>130</sup>**

As such, the negative trend does appear to be slowly shifting, mainly because, as we shall see later in this report, reforms to the judiciary and the formal justice system are either not working or are too slow. Consequently, DFID has a specific policy on working with non-state justice systems. The World Bank Justice for the Poor programme also works with informal justice systems through their Justice for the Poor programme. In this Chapter, we analyse the shifting attitudes and perceptions of the development practitioners, justice stakeholders, and Malawian authorities towards engagement with IJS.<sup>131</sup> We also assess the implications that such changing views have on

the future of IJS and access to justice for the poor.

## 5.1 THE UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP)

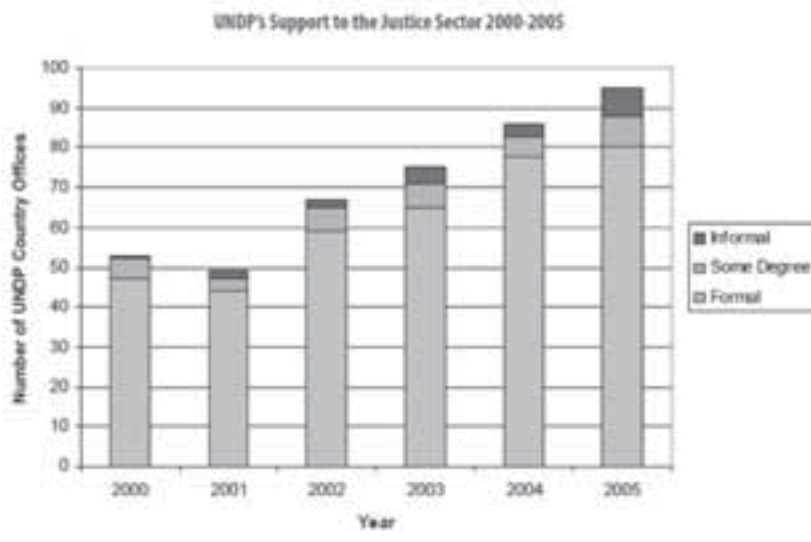
In 2006, UNDP acknowledged that

**” Justice sector reform is a rapidly expanding area. However informal justice systems still remain largely neglected by UNDP and most multi-lateral and bi-lateral development assistance. This is somewhat surprising as the poor and disadvantaged are infrequent users of the informal justice system and UNDP’s specific niche lies in ensuring access to justice for those who are poor and disadvantaged ... Given the prevalence of these systems and the fact that so many people access them for their justice needs, the support to informal justice systems is very limited. Most development assistance is channelled to what is referred to as the ‘rule of law’ approach. This type of approach has generally not focused on issues of accessibility, has tended to focus on institutions rather than people, has been top-down, has generally not been successful in improving access to justice for poor and disadvantaged populations, and has not been cognizant of where people actually go to seek justice.”** Further, UNDP

**observed that “Informal justice systems are the cornerstone of accessing justice for the majority of the population in many countries, and recourse to the formal system is only contemplated, if at all, as a last resort.”<sup>132</sup>**

By 2005, UNDP’s support to the justice sector had almost doubled within six years

**” From 53 countries reporting programming on human rights or the justice sector in 2000 to 95 in 2005. Support to informal justice systems [had] increased slightly, but remain[ed] minimal in comparison to formal justice systems; in 2005, 80 countries reported support to the formal justice system, seven reported support to informal justice systems and eight reported support to some type of alternative dispute resolution or mediation mechanisms.”**



Source: UNDP, Doing Justice, pp. 11. Note: The 'some degree' category refers to reported support to mediation or ADR mechanisms, but the reports do not explicitly state that they work with informal or informal justice systems.



UNDP was then quick to recognise that;

**”** There is no denying that support to enhance the rule of law and improve the functioning of the formal justice institutions is crucial. However given the slow pace of reform, it is increasingly recognized that technical top-down fixes alone will not suffice to improve access to justice. Despite the challenges [facing IJS], engaging with informal justice systems is necessary for enhancing access to justice for the poor and disadvantaged. Ignoring such systems will not change problematic practices present in the

**operations of informal justice systems. It is of course very important to take all concerns seriously. Any initiatives undertaken should work towards gradually enhancing the quality of dispute resolution and addressing the weaknesses faced by informal justice systems. Such initiatives should be part of a broader, holistic access to justice strategy, which focuses on achieving the broader goal of enhancing access to justice by working with both formal institutions and informal justice systems.”<sup>133</sup>**



Hence, UNDP's approach to justice sector reform focuses on strengthening the independence and integrity of both formal and informal justice systems, making both more responsive and more effective in meeting the needs of justice for all - especially the poor and marginalized."<sup>134</sup>

Marking a change in its approach, UNDP states that;

**” We cannot ignore informal justice systems if we are true to our human rights-based approach. Ignoring informal justice systems will not change the problematic practices, which may be present in their operations. Existence of these systems cannot be overlooked. We need to develop strategies to take advantage of the benefits of informal systems while encouraging appropriate reforms.”<sup>135</sup>**

UNDP then committed itself

**” To using a human rights-based approach in its programming, guided by international human rights standards and principles. If we apply the human rights based approach to the development of an access to justice strategy in a given country, we will likely find that poor people and disadvantaged communities show ambivalence towards the formal**

**institutions and put their trust into the informal institutions. In many cases, informal systems not only reflect prevailing community norms and values, but the state systems lack legitimacy; they are seen as mechanisms of control and coercion used by oppressive regimes. To become efficient in overcoming barriers for people to access justice, strategies and reforms need to be designed in and for the specific local contexts and the process must be driven by national actors – both claim holders and duty bearers. Therefore, UNDP in particular, and the broader development community in general, needs, as a first step, to assess the existing capacity gaps for the claim holders (in this case ordinary citizens) to be able to claim their rights, and duty bearers (state and non-state officials bearing responsibility for delivering justice services) to be able to meet their obligations - this includes working with informal justice actors.”<sup>136</sup>**

## 5.2 DANIDA

In recent years, Danida has stated its objects as clearly as “enabling access to justice for the poor and marginalized through an increased focus on informal justice systems.”<sup>137</sup> In this regard, Danish support for informal justice systems is “provided as an integrated part of support to justice sector reform.”

However, Danida has also been quick to provide technical guidance and inspiration for programming choices to its Danish development cooperation staff in various countries around the globe through its Danida “How to Notes”.<sup>138</sup> In essence;

**” Denmark will only support informal systems of justice that respect human rights, or that are willing and able to change norms and practices that infringe on human rights. Support should:**

- **Promote equal access to justice for all by improving the quality of dispute resolution within the available systems and their compliance with international human rights norms and standards;**
- **Be provided as an integrated part of support to broader, nationally owned justice sector reform that encompasses both state and non-state institutions and actors;**
- **Build on the strengths of the systems and seek to reform their weaknesses by, for example, building positive linkages between formal and informal justice systems;**
- **Empower the users of both formal and informal systems to know and claim their rights and to demand accountability from the different justice systems.”<sup>139</sup>**

### **5.3 UK’S DEPARTMENT FOR INTERNATIONAL DEVELOPMENT (DFID)**

DFID’s policy on safety, security, and access to justice (SSAJ) recognises the importance of

**” Traditional and informal systems as complements to formal state systems. It notes that non-state justice and security systems may need reform in order to become fairer and more effective.”<sup>140</sup> DFID’s Briefing Notes then proceeds to provide practical guidance to DFID in-country staff on how to work with non-state systems using evidence from past interventions and research. In guiding its staff, DFID stresses that “in general, actions should aim to identify and build on the strengths of the systems, and address those aspects that have a negative effect on poor people’s safety and access to justice. Particular attention should be given to whether NSJS systems respect individual rights.”<sup>141</sup>**

DFID further notes that “engagement with NSJS systems is not a neutral, technical activity, but one that raises broader governance issues.. [As] there is often no separation between NSJS systems and local governance structures. Intervention may thus have an impact on existing power relations at both local and national levels.”<sup>142</sup> However, DFID is guided by its overall goal to which all its SSAJ programs contribute, that of “reducing poverty

in its widest sense.” Consistent with a growing international consensus, “DFID views poverty as embracing such problems as powerlessness and vulnerability, and not just material deprivation. Given that in many developing countries NSJS handle more disputes than do the courts and other state institutions, they hold considerable significance for SSAJ and poverty alleviation.”<sup>143</sup>

#### **5.4 THE WORLD BANK**

Prior to 2005, the scenario had been similar at the World Bank. While the World Bank had been increasing its efforts in promoting justice sector reform in the countries where it was working, yet none of these projects had been dealing explicitly with informal justice systems, despite their predominance in many of the countries involved. Of the 78 assessments of legal and justice systems undertaken by the Bank since 1994, many mentioned informal justice systems in the countries looked at, but none explored the systems in detail or examined links between local level systems and state regimes.<sup>144</sup>

The World Bank has undergone a fundamental shift in thinking with a view to promoting pro-poor access to justice. The World Bank currently supports a Justice for the Poor (J4P) research program which is a multi-country study that seeks to develop an empirically-based understanding of how the poor or excluded navigate through local justice systems, in order to inform and evaluate innovative efforts at local-level justice reform. The program

recognises that “rules and systems that most affect the poor frequently fall outside of formal justice structures, and that efforts that focus solely on formal institutions, while valuable, can exclude large segments of the population.”<sup>145</sup> The J4P approach focuses on the demand side of justice reform, seeking to understand the perspective of the poor and marginalised. It considers the role that local value systems play in determining how people perceive and interact with justice, the formal and informal institutions, the locally developed, and externally-influenced. It also analyses the ways in which local power and authority structures are perceived, and gain legitimacy. Consequently, the J4P has helped the World Bank to appreciate that “building an understanding that local traditions and realities, as well as resources that affect decisions about whether and where to pursue justice, can enable more effective targeting and programming for poor and marginalized populations.”<sup>146</sup>

#### **5.5 MALAWIAN AUTHORITIES AND STAKEHOLDERS**

Further, resistance to IJS may come from government officials, court officers, and others who interpret and administer laws, statutes, and regulations. Officials who gain from these policies and legal instruments may sabotage reform.<sup>147</sup> Their attitudes and perceptions are therefore of utmost importance. In this regard, the attitudes of lawyers, judges, magistrates, and government or ministry officials towards

IJS systems - especially at higher levels - may be openly hostile or at best indifferent. Despite governments' inability to offer effective and accessible justice services for the majority of citizens' justice authorities, donors, and international organisations have been wary of supporting local non-state justice providers. This reluctance seems to be based on an ideological commitment to 'state-building'. DFID proffers the following as other possible diverse reasons for the 'hostile attitudes' or 'indifference'<sup>148</sup>:

- Many lawyers and judges are concerned about human rights abuses in IJS systems and believe they should be abolished;
- Judges may be reluctant to acknowledge the weaknesses of the formal system;
- Lawyers may see the growth of informal dispute resolution mechanisms as a threat to their incomes;
- Those who work within the formal system may criticise IJS systems precisely for not being like formal courts with formalised rules of procedures;
- Government officials may criticize donor support to traditional systems as obstructing modernisation;
- Potential political controversies over restoring or strengthening "traditional" forms of authority;
- Competition over the national budget and foreign aid can lead judiciaries and Ministries to view proposed support to IJS systems as a threat to their own funding.

## 5.6 SUMMING UP

It is evident that many criticisms of IJS by legal professionals fault these justice systems for not being like the courts. For instance, pointing out a lack of evidentiary rules, a lack of reference to relevant laws and a lack of understanding of the principle of separation between judicial and executive powers. Some commentators have characterised this as a 'traditional lawyer's response' steeped in refusal to accept that lay people can exercise judicial power.<sup>149</sup> On the other hand, it is important to note that such attitudes may be waning. For example, the recent Local Courts of Malawi, to be presided over by lay persons, with civil and limited criminal jurisdiction, were proposed by a Special Law Commission composed entirely of 12 senior judicial officers (5 Judges and 7 lawyers).<sup>150</sup> Nonetheless, attitudes of rural magistrates and groups engaged in community outreach activities, such as NGO and paralegal trainings, are more positive. Lower courts inevitably have more contact with the reality of the active role played by community-based systems. As such, it would be more meaningful to focus any efforts at the lower levels of the judiciary.<sup>151</sup>

So far, the shift in thinking towards greater engagement with IJS has been premised on a broad range of research and pilot projects. These have informed current policy as reflected in the various 'Practice Notes', 'How-to Notes', and 'Briefing Notes' as guides for programme staff. There is a general consensus among

such policy guides that “actions should aim to identify and build on the strengths of the [IJS], and address those aspects that have a negative effect on poor people’s safety and access to justice. [And that] particular attention should be given to whether [IJS] systems respect individual rights.” If this is the generally agreed approach, it is surprising that efforts to work generally with IJS beyond research, pilot projects, and policy guidance towards practical programme implementation, are rare among the available extensive and overwhelming literature on IJS. Since the ‘test of the pudding is in the eating’, it remains to be seen as to how much of the high level policy guidance will translate not only into programme design at various country levels, but more importantly, into implementation. As the World Bank acknowledges, for any meaningful impact in an IJS sector, programmes need to be designed with long-term commitments spanning 15 years or more.<sup>152</sup> Therefore, one can only assume that the next wave of research projects will focus on assessments of performance, and impacts of such innovative programmes’ engagement with IJS.

## CHAPTER 6

# THE CURRENT MALAWI STATE OF ACCESS TO JUSTICE BY THE POOR AND PROSPECTS FOR IMPLEMENTATION OF THE NEW LEGAL AID AND THE LOCAL COURTS ACTS

This chapter aims to provide an overview of local experiences of the poor in accessing justice. This, together with the conclusions and reflections drawn from previous sections, should lead us into generating policy recommendations that respond to the Malawian reality in the realm of access to justice and the Rule of Law. This Chapter argues for a more attainable aspiration. It begins with a candid confrontation of our failures: our unwillingness to take access to justice seriously at a conceptual, doctrinal, political, or professional levels. And it concludes with a challenge to do better. The objective is to explore the outlines of a more manageable commitment, namely adequate access to justice, and some strategies for pushing Malawi in that direction.

The World Bank acknowledges that;

**” whether expanding general access benefits the poor depends on initial levels of coverage. In many African countries, overall access rates improved over the last decade, but the bottom 40 percent of the population registered**

**no gains at all. This is not surprising. Given the low initial coverage in many of these countries, the expansion favoured wealthier households. This does not mean, however, that expanding access when overall levels of service provision are low is bad for equity. On the contrary - better to expand access in this case than to focus on upgrading quality, which would benefit only the few who already have access.”<sup>153</sup>**

Malawian law is drafted with the intent to conform to various international human rights conventions and documents. Many of these laws are conducive in promoting equal access to justice. However, there are still major setbacks in achieving such equality in practice. Government in relation to the justice sector, particularly the Magistrate Courts, plays only a peripheral role in solving disputes. It is apparent that government involvement may in itself not be a guarantee of equal access to justice. Communities prefer to solve conflicts on the basis of their understanding of justice, which reflects their ideas and values and social

realities rather than relying on state institutions. Various factors make the poor unequal users of justice. This Chapter will highlight the gaps between policy and practice in terms of access to justice and justice administration. Below follows some of the key dilemmas.

### **6.1 CONCERNS ON LACK OF ADHERENCE TO HUMAN RIGHTS NORMS**

In promoting equal access to justice, informal justice systems may not necessarily present a better alternative. They are often based on different concepts of justice, which may not comply with the concept of individual rights on which international human rights standards are based. Informal systems are also subject to asymmetric power hierarchies, which can prevent the poor from accessing justice. This has a detrimental effect in poor people's efforts to realise their rights. In the case of women, they have to take up their grievances with the informal systems, most of which can be dominated by male authorities.

Therefore, donors and the Government should support reforms aimed at strengthening IJS' linkages with the judiciary so as to open up avenues for the application of human rights principles to the operation of non-formal justice systems. As such, people's access to higher courts that are vested with power to uphold constitutional rights should not be unnecessarily hampered - rather, the process should be strengthened.

### **6.2 INADEQUATE CAPACITIES AND INSTITUTIONAL BARRIERS**

As shown above, the institutional hurdles that poor people face, arise from justice systems that lack capacity and do not respond to poor people's particular justice needs, including real accessibility in particular. Despite decades of donor-supported projects to build courtrooms and train the police and judiciary in Malawi, the reach of the formal system is very limited. Social and institutional barriers deny the poor - especially women and children - access to legal redress. Gender discriminatory attitudes among service providers are compounded by the lack of capacity of many justice systems. The high cost of litigation, language barriers and the geographical distance of many courts, are just a few examples of the capacity deficits that prevent the poor from coming forward and pursuing their claims through formal legal channels. These problems result in very high levels of under-reporting and attrition, which means that only a fraction of cases that are initiated in the formal system ever results in a court decision or in a just outcome for the poor. However, governments and civil society can respond by reforming justice services and by creating new models that are specifically tailored to poor people's justice needs. Changes in the organisational mandates, procedures, and cultures of justice sector service providers are needed in order to make them more responsive and accountable to poor people.<sup>154</sup>

### 6.3 LACK OF WILL AND DISCIPLINE FOR PRACTICAL IMPLEMENTATION

The inclusion of the poor through international conventions and domestic legal reform in justice processes is illusory. The official justice system contains progressive laws for the implementation of concepts of individual rights. However, the poor's experiences with the law, shows a typical dilemma: even progressive laws are meaningless if they are disconnected from social realities.<sup>155</sup> This disconnect is especially strong where local understanding of justice is based on a communal and restorative approach. For example, laws promoting gender equity are good, but they cannot be simply applied and enforced if not supported by society. With regard to other grievances or conflicts, informal justice systems come with a number of advantages for communities since they are closely intertwined with local value systems and social realities. In theft or assault cases, for example, they can deliver solutions in a time- and cost-efficient way that also complies with local understandings of how the conflict should be solved. However, with regard to women's grievances, only some features of the informal systems are supportive in fostering gender equality, others contradict the concepts of individual rights. While international and domestic instruments are important in poor peoples' empowerment, access to justice practitioners and policy makers need to place equal emphasis on fostering the practical implementation of laws, and to emphasise opportunities for increased equality in informal systems.

While the Malawi Government should be applauded for pursuing the adoption of laws promoting access to justice, practitioners and policy makers need to accompany such law reform with activities that promote the application of the laws and their appreciation by society. This holds particularly true for most Malawian communities, which are based on strong indigenous social systems that may be at odds with the norms of the official law and human rights. It is important to infuse knowledge of formal laws into informal processes. Informal processes are legitimate in the eyes of the community, they are affordable and they are nearby and easy to access. While making use of these advantages, awareness of official laws and principles can be infused into these informal processes. Increasing the knowledge of official rights in local communities can have ample effect on informal processes. Ways also need to be identified, to address male bias in both systems, and to ensure equal treatment for women in all justice systems.

As the Commission on Legal Empowerment for the poor also observes,

**” Reforming the law on paper is not enough to change how the poor experience it day to day. Even the best laws are mere paper tigers if poor people cannot use the justice system to give them teeth. Even the best regulations do not help the poor**



**if the institutions enforcing them are ineffective, corrupt, or captured by elites. It is therefore vitally important to reform public institutions and remove the legal and administrative barriers that prevent the poor from securing their rights and interests.”<sup>156</sup>**

Realisation of the full potential of the access to justice reform ultimately requires establishing more open, inclusive, and accountable institutions across the political, economic, and judicial systems. Nonetheless, “everything does not need to happen at once. Access to justice by the poor can start with changes in some policy areas. As the poor get empowered legally and gain knowledge, assets, and power, they will be in a stronger position to call for additional institutional and legal reforms.”<sup>157</sup> The policy conclusion from this, however, should not be that:

**” Nothing can be done until exhaustive efforts have been made to ‘understand’ local legal systems so that they can be made more ‘compatible’ with formal/state systems; doing so would be hugely time consuming, and unlikely to fundamentally alter the balance of power or overcome the pervasive information asymmetries that exists between local communities and legal professionals.”<sup>158</sup>**

The above situation if further aggravated by the realisation that, as Professor Wiseman Chirwa observes:

**” [What] the country lacks is not law (although there are significant shortcomings that need focus), but disciplined implementation and leadership to command compliance with existing rules. The loose attitude toward rules evidenced in the fiscal sphere has spread to the political realm. In crucial ways, the rule of law and the constitution have been eroded as political forces put short-term expediency ahead of principle.”<sup>159</sup>**

Further, UNDP states:

**” Where adequate constitutional or legal protection exists and risks of setbacks are not high, law enforcement—not law-making—deserves priority. Expanding legislation when enacted laws are not implemented will be inefficient and an ineffective use of resources. It can erode public confidence in the legal system”<sup>160</sup>.**

Nonetheless, it is important to recognise that while it will often make sense to anchor the access to justice for the poor agenda in existing development processes, such as the Malawi Growth and Development Strategy, access to justice for the poor should not hide behind any

processes that are stalled or dysfunctional. Broad political coalitions for pro-poor change, that involve leaders from across societies, are needed to galvanise and sustain reforms, and to prevent such reforms from being diverted, diluted, or delayed.<sup>161</sup>

#### **6.4 NEGATIVE ATTITUDES AMONG THE LEGAL PROFESSION AND JUSTICE STAKEHOLDERS**

The official laws can be difficult to apply when they are not socially acknowledged, contextualised, or received, and therefore have minimal impact on poor peoples' lives.

An example that emphasises the negative attitudes, is the new Legal Aid Act's proposed provision for Legal Aid through **pro bono** services, legal advice, and legal education by law students, paralegals, and civil society organisations. While access to justice for the poor is a favourite theme in bar rhetoric it is a low priority in reform agendas. The gap between rhetoric and reality is particularly apparent in the views of legal professionals as follows:

**Pro bono** programs involving the legal profession's most affluent members reflect a particularly dispiriting distance between the bar's idealised image and actual practices. While law is among the nation's highest paying occupations, many of its top earners are making only nominal contributions to **pro bono** work.<sup>162</sup>

Efforts to increase the profession's public service commitments have met with both moral and practical objections. As a matter of principle, some lawyers insist that compulsory 'charity' is a contradiction in terms. From their perspective, requiring service would undermine its moral significance and infringe lawyers' own rights. They argue that if equal justice under law is a societal value, then society as a whole should bear its cost. For example, the poor have fundamental needs for food and medical care, but we do not require grocers or physicians to donate their help in meeting those needs. Why should lawyers' responsibilities be greater? There are several problems with this claim, beginning with its assumption that **pro bono** service is "charity" - such assistance is not simply a philanthropic exercise; it is also a professional responsibility. Lawyers have special powers and special privileges, and this entails special obligations, be they based on ethical or moral grounds.

While pragmatic objections to **pro bono** obligations are more plausible, ultimately they are no more convincing. It is true, as critics note, that having reluctant lawyers engage in poverty law, is an expensive way of providing what may sometimes be inadequate services. However, the question should always be: "compared to what?" For the poor, some assistance will be better than none - which is their current alternative in the Malawi setting.

Another area in which the bar's record concerning access to justice for the poor has been particularly troubling involves unrepresented parties. The profession has both resisted efforts to provide non-lawyer assistance for such parties, and thus has tolerated exploitation of their vulnerability by opponents. The Malawi bar's opposition to unauthorised practice of law by lay competitors or paralegals, has implications for access to justice. Bar leaders have long insisted that such prohibitions are motivated solely by concerns to protect the public rather than the profession. But no experts share this view as most research finds that lay and paralegal specialists can effectively provide routine services where legal needs are greatest. For many of these needs, it has been said that retaining a lawyer is like "hir[ing] a surgeon to pierce an ear."<sup>163</sup> Other countries generally permit non-lawyers to give legal advice and to provide assistance on routine matters, and no evidence suggests that these lay or paralegal specialists are inadequate. A case in point involves Great Britain's Citizen's Advice Bureaus,<sup>164</sup> which rely on non-lawyer volunteers to provide effective low-cost assistance in some ten million matters yearly.

In some cases, formal courts have in the past promoted negative interpretations of customary law. In so doing, the formal system has also effectively made customary law a secondary source of law through the legal positivism of magistrates and judges, who often excluded customary law in favour of written

law.<sup>165</sup> There are a number of explanations for this attitude, including the profound influence of the 1994 Constitution, which, albeit still in only nascent form, is causing judges and magistrates to become more attuned to the demands of constitutional fidelity. Because of these attitudes, the party seeking to secure its application must put customary law to the strictest proof. A competent court must then decide on the existence of a customary law, after the party seeking to secure its application has adduced evidence of its existence. Formal courts have used this inherent power to pronounce or reject customary law according to their whims.<sup>166</sup> Given the extensive criminal jurisdiction conferred on Local Courts, it could also be feared that presiding officers might be drawn to practice more of such negative attitudes in their effort to apply the written law.

As the above examples suggest, the bar's commitment to equal justice for the poor remains largely rhetorical. Most attorneys support the concept, but only as long as it does not put their own interests at risk. However, what legal professionals overlook, is the fact that these projects would offer welcome opportunities to develop new skills, obtain more trial experience, and enhance their contacts and reputations in the community. Such opportunities would prove more rewarding, personally and professionally, than much of what now occupies their time. Moreover, there is broader value in exposing all members of the bar to how the justice system

functions, or fails to function, at all levels for the poor. Such exposure may eventually build support for reform and increase the accountability of lower level Local Courts who may be tempted to cut procedural corners. A similar point could be made about requiring pro bono service by law students. Law schools do not impose such requirements and most students graduate without pro bono legal experience. Linking such law schools and student law societies to pro bono services under the Legal Aid Act would help bridge such gaps in legal practice.

However, we must be conscious of the fact that in some cases, legal reform may also create policy 'losers'. "Professionals may also have a stake in maintaining the disempowering status quo, such as lawyers who would lose out if laws were translated into everyday language or if inexpensive means of conflict resolution spread."<sup>167</sup> Policymakers should endeavour to ensure that different interests can be negotiated to meet the needs of every side. Otherwise, plenty of potential for confrontation remains as long as important stakeholders believe others' gains come at their expense.

Where possible, officials who resist such change should be given positive incentives to support legal reform policies instead of resisting them, for example, by offering judicial officers promotions, interesting new responsibilities, training opportunities, or other perquisites if they help with implementation.

Hence, mobilising allies and supportive stakeholders, and finding ways to manage the critical ones, is fundamental to the success of any legal reform effort. However, success is most reliably won when one delivers measurable and meaningful benefits to the beneficiaries.<sup>168</sup>

### 6.5 INADEQUATE BUDGETARY PROVISIONS

Governmental legal services budgets are capped at ludicrously low levels, making effective legal assistance for most low-income litigants a statistical impossibility. As Dr. Edge Kanyongolo observes:

**” In general, government funding for the justice sector is unsatisfactory. Most operations of institutions in the sector are directly funded by donors, including DFID, the European Union, the United States Agency for International Development, the Norwegian Agency for International Development, the Danish Institute for Human Rights and others, rather than from the general government budget. In relation to central government funding to the sector, approved budgets are often much lower than estimated expenditures; funds may not be released from the Treasury according to approved budgets; and funds may be released irregularly and in greatly varying amounts. The inadequate**

**funding for the sector is compounded by inequitable distribution of resources within particular institutions. For example, in determining its internal distribution of budgetary resources, the administration of the judiciary tends to unduly favour the High Court and Supreme Court of Appeal at the expense of subordinate courts.”<sup>169</sup>**

Consequently, millions of Malawians lack any access to the justice system, let alone equal access. In particular, the cost of legal professional services remain unaffordable to the average Malawian, contributing to the continued popularity of informal justice systems as a practical forum for dispute resolution, especially in rural areas.

Most government and donor-sponsored efforts to expand legal services to the poor, emphasise access to the formal legal system. Hence, a significant fraction of legal aid resources are targeted at subsidising lawyers or reducing costs associated with using the formal court system. But as we have shown, many poor people tend to rely on informal or customary justice systems.

Every effort should be made to avoid implementation failure of the new Legal Aid Act and Local Courts Act due to inadequate resourcing by government and failure to pay remuneration to the members sitting on the Legal Aid Board and Local Courts, as is

required under the laws. As rightly argued by MP Hon. Menyani, the government’s hiring of 16 lawyers to provide legal aid service to a population of 13 million Malawians, does not demonstrate any serious attempt at expanding access to justice to the poor. In the same vein, allocating approximately Mk2 for every Malawi to access legal aid is not practical, bearing the importance of access to justice for the poor.<sup>170</sup>

## **6.6 LIMITED CHOICES AVAILABLE FOR THE POOR**

Poor people’s preference for non-state justice systems may reflect the lack of choices available to them, especially women and children, because of the social and institutional obstacles they face when approaching the formal state system. Understanding Malawi as a legally plural society would be an important starting point for looking at poor people’s access to justice beyond the limited reach of the formal state system. Indeed, at its 35<sup>th</sup> session in June, 2006, the United Nations Committee on the Elimination of Discrimination against Women recommended that “[Malawi] ensures the constitutionality of the customary courts, and that their rulings are not discriminatory against women” and expressed concern about “the prevalence of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep-rooted cultural norms, customs and traditions” that discriminate against women and constitute serious obstacles to women’s enjoyment of their human rights.<sup>171</sup> It is encouraging that the

Malawi government, donors, and international organisations are becoming more engaged with legal pluralism, in particular by looking to justice institutions outside the formal system to provide faster, more efficient, and more legitimate solutions for poor people in situations where formal justice systems are weak. This recognition of the reality of legal pluralism is welcome and long overdue.

### **6.7 DIFFERENCES IN CONCEPTS, PROCESSES AND PROCEDURES**

Differences between local concepts of justice, and the concepts underlying the official law is another important factor that prevents local communities from deciding to address their grievances in formal courts. Local systems focus on the maintenance of social harmony while the formal system focuses on the individual perpetrator. Local conflict resolution is predominantly based on the understanding of communal rather than individual responsibility for misconduct. It is further acknowledged, that: “traditional leaders are likely to be closest to the people and to understand custom and the factual basis of disputes. They may present the greatest chance of having settlements carried out in practice. In some contexts, they may enjoy a high level of trust.”<sup>172</sup> It is therefore not surprising that local communities and local level authorities prefer that many grievances or conflicts be tried under the informal systems.

Progressive laws are therefore meaningless if they are disconnected from social reality. In such cases, their application can even serve as a deterrent for the community to further engage with the formal system. Approaches to addressing these shortcomings will need to focus on the whole community, and will need to increase access to the formal system, while at the same time also engaging with informal systems in order to make them less biased and ensuring their conformity with constitutional and international human rights principles. Only a gradual, simultaneous approach to both formal and informal systems, and a steady support for social change, can help overcome such hurdles by seeking to harness the respective strengths of customary and state legal systems.

### **6.8 CHALLENGES IN REFORMING PLURAL LEGAL SYSTEMS**

Plural legal systems, both state-recognised and non-state systems, can be difficult to reform for three interrelated reasons:

First, where these systems are recognised, as is the case with Malawi’s new Local Courts Act, it can place the state’s seal of approval on them, making them even harder to reform.

Second, plural legal systems are intertwined with the politics of identity, which can make reform efforts highly contentious. As acknowledged by UNDP:

**” Informal justice systems often reflect local social norms and are closely linked to the local community. Community members often have a sense of ownership towards their respective system. Informal justice actors have local legitimacy and authority that is not always afforded to formal operators. Informal justice systems tend to work well where the community is relatively homogenous, linguistically, culturally and is bound by ties of mutual dependency. In this setting one often defines one’s identity as being inextricably part of networks: familial networks, cultural networks, religious networks and a strong sense of bounded communities.”<sup>173</sup>**

Third, because plural legal systems are complex, in practical terms they are harder to reform. When the Malawi Government recognises non-state and customary laws, which may be discriminatory but are also evolving, it should take particular care that it does not effectively ‘freeze’ what were fluid systems that could have been amenable to progressive reform. Further, Local Courts have provisions for consulting experts/assessors to ascertain the ‘correct’ interpretation of certain customary laws. The most obvious experts, such as religious scholars, community leaders, elders, or academics, usually belong to dominant social groups who may not necessarily reflect the views of the silent

majority poor, and rarely reflect women’s and children’s interests<sup>174</sup>.

Ultimately, there would have been much greater prospects not only for the smooth passing of the Local Court Bill in Parliament, but also for its eventual implementation if:

- The links were designed to promote and advance the skills set of officials in both the formal and informal justice systems;
- Officials from both formal and informal justice systems increasingly respected and trusted one another and gained local support;
- Links can be established through an appeal process by which decisions rendered by non-state justice can be appealed to the state justice system. This would reduce inconsistencies and poor performance.

Some commentators have also advanced the argument that

**” Imposing formal mechanisms on communities without regard for the local level processes and informal legal systems may not only be ineffectual, but can actually create major problems. First, the failure to recognise different systems of understanding may in itself be discriminatory or exclusionary, and hence inequitable. Second, there are often very good reasons why many people chose to use informal or customary systems which should**

**be considered and understood. Third, there is ample evidence that ignoring or trying to stamp out customary practices is not working, and in some cases is having serious negative implications. Fourth, ignoring traditional systems and believing that top-down reform strategies will eventually change practice at the local level may mean that on-going discriminatory practices and the oppression of marginalised groups in the local context goes unchallenged. Finally, focusing purely on state regimes and access to formal systems in some ways assumes that such systems can be made accessible to all, while clearly even in the most developed countries this is not the case.”<sup>175</sup>**

It is also important to realise that “empowerment strategies depend on the beneficiary stakeholders choosing to go along. If the poor resist a change, the best-intended policy will do little good.”<sup>176</sup> The principal allies of the poor are:

- Pro-poor community associations and civil society activists. They can be mobilised for reform and become strong allies. Some may be local social action or advocacy groups, such as the Malawi Centre for Advice and Education on Rights (Malawi CARER), whose mission is to defend poor people in court and expand their rights.

- Professional associations sympathetic to the plight of the excluded. The Malawi Law Society and the Paralegal Resource Centre (PARECE - a law student body based at the Law Faculty in Zomba), for example, support legal assistance for the indigents in Malawi.

## **6.9 OPPORTUNITIES FOR FURTHER INTERVENTIONS**

The Government of Malawi has been implementing a Rule of Law and Justice, Law Reform Programme for approximately 10 years. This programme integrates a large number of governance and justice reform activities, funded by several donors, under one umbrella. One of the programmes' objectives is improving access to justice. The programme actively pursues input from civil society and is particularly interested in supplementing its current knowledge base with qualitative research. Complementary to this effort, the Office of the President has initiated significant work on justice under the DFID funded Malawi Safety, Security and Access to Justice (MaSSAJ) Programme. A National Steering Committee was established and charged with the coordination and harmonisation of safety, security and justice interventions, and has assisted in proposing a policy framework for MaSSAJ, which includes the integration of local value systems and a linkage between formal and informal justice systems. Local and international NGOs have also been active in human rights and justice reform efforts in Malawi. Until 2011, when the Bingu government



started consolidating his grip on power, Malawi had a strong and thriving civil society which often produced independent and informative work, and was able to hold the government accountable. The richness of the country's skilled and experienced NGOs provides an excellent opportunity for the Judiciary and Legal Aid Board to form partnerships that can further enrich implementation of the legal and policy reform efforts.

Legal reformers should therefore consider targeting legal aid resources and legal service providers who can help poor people deal with both the customary and the formal state system. The Paralegal Resource Institute (PASI) programme and the Catholic Commission for Justice and Peace (CCJP) Community Mediation programme are good examples in this regard. Paralegals under these programmes possess basic training in formal law, but they are also drawn from the local community and are familiar with local traditions and customary law. They can therefore assist clients in both the informal and formal justice systems. They can also monitor abuses, and are better positioned to advise clients on when they should take a dispute to the formal state system.

## **6.10 SUMMING UP**

The current political prospects for expanding access to justice for the poor in Malawi are, to say the least, less than encouraging. At a time of growing scepticism towards the Bingu

government's governance and human rights performance as well as declining funds for budgetary support, implementation of both the Legal Aid and Local Court Acts will face an uphill battle. To begin with, the government needs to rally opposition political parties, as well as Malawi civil society, firmly behind its reform agenda. One way of doing this, is by demonstrating a political will to introduce only those reforms which serve the national interest, as opposed to the government's narrow political agenda of entrenching its hold on power. Meanwhile, the government's expressed intention to review and amend unpopular laws as well as old and archaic laws is a move in the right direction.<sup>177</sup> Further, the government needs to rally the international development partners behind its reform agenda. As a starting point, improving its diplomatic relations with Malawi's long time traditional donors such as DFID cannot be overemphasised since, until recently, DIFD was Malawi's biggest donor for several years.

## CHAPTER 7

# COMPARATIVE CASE STUDIES: LESSONS TO BE LEARNED FROM OTHER SELECT INFORMAL JUSTICE SYSTEMS

It is important to draw lessons from previous development experiences in other jurisdictions. However, at the outset, the most important lesson is that the “best practice” is always based on the national context and the needs of the specific disadvantaged groups. Since situations vary from country to country, there are no templates that identify generic entry points for access to justice programming. In order to choose an entry point, we must analyse the situation in relevant sectors and identify catalytic actors and institutions. Needs assessments are a good entry point.<sup>178</sup> Because certain processes do not necessarily work across societies in exactly the same ways, policymakers must be watchful and experimental.<sup>179</sup> The challenge is to learn from other experiences (in particular, those from other developing countries that have overcome similar challenges), while providing customised solutions for particular situations. In this chapter, we undertake a review of existing initiatives in other countries.

There are both similarities and differences in the way countries around the world, and over

time, have approached the challenge of access to justice by the poor. These experiences are only partly comparatively analysed or understood, both in terms of their key attributes and their outcomes. Our literature review reveals that there has been no systematic effort to compare, share or synthesise lessons learned across regional or global experience in this area. We therefore examine a representative selection of such experiences in order to identify promising reform paths and approaches. Ultimately, we seek to use these experiences to influence real outcomes on the ground in Malawi.

The focus will be south-south lessons from our neighbours in the Southern African Region. South-south learning is said to offer “promise for effective capacity development and best-fit approaches because it can draw on knowledge from countries that have more recently experienced transitions or share regional political, economic, or socio-cultural characteristics.”<sup>180</sup> In this regard, we have selected Zambia due to its close proximity as well as similarities in legal systems and political

history - both Malawi and Zambia having been former British Colonies. The Republic of South Africa has been chosen, mainly due to the country's innovative approaches to legal reforms - approaches that have placed South Africa on the map as a pacesetter in the region. Uganda has been chosen bearing in mind that so far, Malawi has been accustomed to drawing lessons from Uganda, due to the country's innovative approaches to justice programming. The 'chain-linked' programme is a case in point. Before delving into specific lessons from these countries, we begin by highlighting general lessons to be learnt across the board.

### 7.1 GENERAL LESSONS

There is revealing comparative experience from countries that have carried out and implemented pro-poor legal and access to justice reforms. Below, evidence from across Africa is analysed, with a view to what works and what does not, as well as why and how. On this basis, promising approaches involving governments, civil-society organisations, and innovative social movements are set out. These can be modified and applied to the Malawi setting. At the outset, the key lessons include:

The most common mistakes are to underestimate the impediments to implementation and to not foresee unintended negative consequences for the poor.

Success, on the other hand, invariably involves understanding the impediments

and addressing them, listening to the poor, and learning by doing. In this regard, UNDP's experience to date offers a number of principles for action on access to justice. Among them is the lesson that:

**“ Policies and programmes need to ensure an explicit focus on the poor and disadvantaged. The concerns of the disadvantaged need to be included in programme conception and design from the outset so that they do not fall through the cracks of justice reform. People's perceptions of justice, the obstacles they face and the ways they address them need to be understood. If justice programming does not produce results for the most disadvantaged, we run the risk of widening existing gaps in access to justice.”<sup>181</sup>**

Whatever type of reform is chosen, it should place be placed in the context of society's unique past and its readiness to accept change.

To kick-start a change as controversial and deep-seated as the pro-poor access to justice - an approach that threatens many vested interests - the positive role of national political leadership and the judiciary cannot be overstated. Pursuing a particular policy, such as expanding access to justice for the poor, requires a handful of leaders and judicial officers who agree on what the problem is and how to solve it. Some of these individuals may

emerge as 'policy champions' who drive reform forward by marshalling a broader coalition for change within government, and by overcoming objections and obstacles.<sup>182</sup>

Some states have tried to integrate traditional systems into wider legal and regulatory frameworks, often with little success. For example, South Africa's 1996 democratic constitution explicitly recognises customary law. Many other countries in sub-Saharan Africa have also made attempts to recognise customary tenure and customary marriage arrangements within their state laws. It is important to note, however, that in countries where customary systems are formally recognised, in practice these systems generally continue to operate independently of the state system, sometimes in a relationship marked by uneasy tensions with prevailing formal justice system.<sup>183</sup>

Other studies suggest that those traditional systems, which have been integrated into the state legal system, have been relatively successful due to their procedural resemblance to traditional mechanisms. The relative informality of such tribunals was seen as a positive attribute. On the other hand, overly technical procedures and the incomprehensibility of formal court decisions are some of the reasons for distrusting such courts.<sup>184</sup> While one of the most effective tools has been the widespread cooperation and coordination across a substantial number of

villages, the coordination and enforcement efforts have also gone as far as being enforced by ostracising villagers (and in some cases entire villages), that refuse to fully participate.<sup>185</sup>

A comparative research by the International Council on Human Rights Policy, highlights the failings of donor approaches to date.<sup>186</sup> The report of the council has set out a strategic approach, which includes (among others) the need to:

- Start from the beneficiary perspective;
- Adopt a rights based approach;
- Give priority to the needs of poor, vulnerable, and marginalised groups by enhancing their access to justice.

## **7.2 OTHER AFRICAN JURISDICTIONS- ZAMBIA, REPUBLIC OF SOUTH AFRICA, UGANDA**

### **7.2.1 ZAMBIA**

The judicial system in Zambia is comprised of the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts, and the Local Courts. Local Courts play an important part in the settlement of disputes among the majority of the population.

The original jurisdiction of the Local Courts was customary law. However, the courts have developed no clear definition of customary law, nor has there been any systematic

development of this subject. There has been a conflict between the demands of customary law on the one hand, and the imperatives of human rights on the other. Customary law tends to be insensitive to gender equity while modern constitutional, and international law instruments emphasise the rights and equality of all persons, irrespective of gender.

Local Courts are renowned for their quick dispensation of justice. This has a positive as well as a negative connotation. It is well known that justice delayed is justice denied. On the other hand, it has been argued that the "'fast food justice' currently dispensed in the local courts leave many consumers troubled."<sup>187</sup> In the urban areas, particularly in Lusaka and Kabwe, customary law is increasingly becoming a myth. The picture that emerges is that the Local Courts have become institutions for resolving community disputes. The guiding principle in these cases is simple logic and common sense.

The Local Courts provide a valuable guide on the independence of the judiciary. The clear lesson is that judicial officers should not only be independent from the manipulation of the executive branch, but should be sufficiently secure in material needs and resources so as not to fall victim to corruption. Local Courts face a particular dilemma as customary law remains in a state of flux as a result of a degree of neglect by the government of the infrastructure of the Local Courts. Resources

and decision-making are preserves of the central administration in Lusaka, leading to an absence of moral and material incentives for the judicial and support staff at the Local Court level.

The challenges facing the Local Courts reflect the challenges of the judiciary as a whole. The decline and marginalisation is consistent with misplaced priorities in the government administration, as well as with the failure of the government to de-concentrate and decentralise the operations of public institutions. Clearly, the Zambia scenario presents the lesson that a highly centralised state system cannot effectively design institutions, which reflect the needs of the grassroots.

### 7.2.2 SOUTH AFRICA

The coexistence of various official state laws in South Africa began as early as the 1830s when chiefs in Cape Colony were granted authority to enforce indigenous law (subject to review by a colonial official).<sup>188</sup> At the end of the apartheid era there were approximately 800 officially recognised traditional communities and traditional leaders, 12,000 headmen, and 12 kings. Since 1994, South Africa has worked towards bringing traditional systems into the state framework. Traditional institutions and laws are all officially recognised in the 1996 constitution. After a long political process, the national Traditional Leadership and Governance Framework Act was promulgated in 2004, setting out the roles and responsibilities of

different levels of traditional leaders and institutions, and their relationships to the different levels of government.

While the constitutional and administrative recognition of customary law was celebrated by many, there clearly are difficulties. Therefore, South Africa offers useful examples of recent cases where the state has recognised the legitimacy of customary law up to a point, but has required that customary systems change to respect human rights. Customary practices have generally been criticised as incompatible with rights in the constitution and in the new South African Bill of Rights, especially with the equal rights and status of women. For example, in 2005, of 800 traditional leaders recognised by the state in South Africa, only one was female. In an attempt to deal with this, the state issued a regulation in early 2005 that female participation must be at 30 percent by the end of the year, but there is no consensus on how this might be achieved. Recognising the difficult task of effectively integrating the different systems, the South African model adopted a “progressive alignment”<sup>189</sup> with the constitution approach.

South African NGOs also successfully lobbied for the passage of a ‘Recognition of Customary Marriages Act’ that formally recognised marriages concluded in accordance of customary law, but only if customary law provided for equality of husband and wife in terms of status, decision making authority,

property ownership, and child custody. While South African laws have not been implemented perfectly, and customary gender discrimination is still a pervasive problem, these experiments still suggest that it is possible to enact reform built around a political compromise: formal recognition of customary law in exchange for the rejection of certain customary norms that are against human rights principles of non-discrimination and gender equality.

Another lesson from the South African experience, is that these sorts of reform strategies cannot be imposed immediately from the top down. Where cultural practices and discriminatory attitudes are deeply entrenched, successful legislative reform requires sustained consultation, lobbying, and political organising efforts. Further, in some cases, the pursuit of gender equity goals might need to be informed by pragmatic considerations, and it might be better to pursue a “gradual reform strategy” that starts by targeting only the most extreme forms of gender discrimination, and then progressively expanding the scope of this anti-discrimination principle. In this regard, while the implementation strategy will vary from country to country, the lesson here is that targeted interventions to eliminate discriminatory practices - particularly gender-based discrimination - should be a prerequisite for widespread recognition or acceptance of customary or informal justice systems.<sup>190</sup>

### 7.2.3 UGANDA

In the next few paragraphs, we present a Case Study of Uganda's Local Council Courts (LCCs). The aim is to draw lessons from the experiences of Uganda in implementing such informal justice systems.

Local Council Courts (LCCs) were reintroduced in 1986 when the National Resistance Movement (NRM), engaged in armed struggle against the government, set up the Resistance Committee Councils and Courts at the village level. LCCs start at village level where the elected village Executive Committee (LC I) constitutes itself into a court to hear disputes that arise between individuals in the community. Following this is the LC II court at parish level, and then the LC III court at the sub-county level. LCC members (Councillors) who serve on the lowest tier (LC I) are directly elected, while those serving at higher levels are elected by an electoral college.<sup>191</sup> There are altogether 953 LC III Courts, 5,225 LC II Courts and 44,402 LC I Courts in Uganda. The courts are therefore physically accessible, even in the rural areas, which are still inaccessible to the formal justice institutions.<sup>192</sup>

These courts were later renamed Local Council Courts (LCCs).<sup>193</sup> LCCs, which were initially set up where formal courts were absent, are now officially incorporated into the lower court system with the right to appeal to Magistrate Courts. LCCs also carry out local government functions. The Ministry of Justice and the

Ministry of Local Government jointly supervise the LCCs.<sup>194</sup>

In matters of customary law, people can now choose to take their civil matters to the customary tribunal, or to the formal court system, as both LCCs and the magistrates courts have unlimited first instance jurisdiction in matters of customary law. However, this choice does not exist in all cases since magisterial areas are not always accessible. The LCCs' jurisdiction is limited to civil cases and minor criminal cases.<sup>195</sup> LCCs may make orders of reconciliation, declarations, compensation,<sup>196</sup> apology, caution, attachment, and sale as well as issue fines for infringement of by-laws.<sup>197</sup> In matters relating to children, LCCs make orders for guidance and remand in custody. LCCs have special jurisdiction in criminal matters over children for the offences of affray, common assault, causing actual bodily harm, theft, trespass, and malicious damage to property.<sup>198</sup>

The situation in Uganda is that, in effect, "formal and customary systems are often so intertwined that it is often difficult- nearly impossible- to meaningfully distinguish between the two."<sup>199</sup> In practice though, poor people are more likely to use customary tribunals, as they are unable to afford to take their matters to the formal judiciary. Lawyers are not allowed to appear in LCCs and this also reduces the cost of these tribunals.

One of the most important distinguishing factors of LCCs is that from their origin, they were mandated to have women serving on the tribunals. Gender balance is still required for LCCs, with the law stipulating a 30% representation of women for LCC I. LCCs are constituted when 5 of the 8 members of the committee are present to hear a dispute. Where the quorum is not filled, the committee may co-opt one of the members of the local government committee of the same area to sit as a member of the court. The courts therefore may sit regularly and are, in most cases, not bogged down by the failure to constitute quorum, as is the case with other Tribunals. The procedures in LCCs are simplified and the hearing is informal, conducted in the indigenous languages of the people. The records are kept in the same language. However, their failure to keep records is one of the well-known shortfalls of these Courts.<sup>200</sup>

In addition, suits in LCCs may be instituted verbally by stating the nature of the claim to the Chairperson of the Council who then puts it into writing.

The LCC courts initially enjoyed a measure of legitimacy largely due to their reputation for delivering speedy and affordable justice. They are generally commended for being accessible, quick in delivering justice, using simple procedures and familiar language, allowing for broader community participation, and being oriented towards reconciliation

and promotion of harmonious community relations. However, LCC's popularity is slowly waning as they are increasingly characterised by partisanship and partiality. The lesson here is that while representation may be a necessary requirement, it may not be a sufficient factor in establishing legitimacy.<sup>201</sup> This also opens up the broader question: when a government takes it upon itself to 'invent', adapt or reform justice systems in parallel to the formal judiciary, how can problems associated with lack of legitimacy be avoided or minimised? While LCCs have legitimacy in law through the LCC Act 2006, the question is whether they are legitimate among the people.

LCCs are also caught between applying customary law, which they were set up to do, and following the written law - most importantly the Constitution - which applies to everyone, even to people subject to Customary Law.<sup>202</sup>

The area, in which this conflict is greatest, is in relation to provisions regarding the status of women, since some customary laws go against human rights norms. Despite clear concepts enshrined in the 1995 Constitution, the breach in practice is in some cases striking, as is the absence of a grounded understanding of the precise manner in which these concepts should be translated on the ground.<sup>203</sup> This challenge offers us two dimensions in understanding the problem in terms of gaps between law and practice. While customary law is partly the problem, since the law offers good protection,



the bigger problem is the gap between law and practice.

Further, some LCC courts are perceived by the public as corrupt and subject to abuse by powerful officials. This is not surprising since LCCs are considered to be a part of the local government system. Some Councillors are even perceived as accountable to their informal networks such as 'drinking companions'.<sup>204</sup> Some of these concerns are being addressed by incorporating the reform of the LCC courts into the overall national strategic plan for judicial reform.

### 7.3 SUMMING UP

From the various African case studies, there are both similarities and differences in the way countries have approached and worked with informal justice systems. However, these experiences are only partly understood, both in terms of their key attributes and their outcomes. Furthermore, there has been no systematic effort to compare or synthesise lessons learned across regional experiences in this area. As such, one of the research agendas for the future should be to examine a representative selection of such experiences in order to identify promising reform paths, practices and tools. Ultimately, countries like Malawi should seek to use these experiences to influence real outcomes on the ground. Nonetheless, the major lesson to be learnt from our analysis is that, in order to succeed, Malawi must introduce fundamental changes in

relation to how its institutions approach access to justice issues, as well as how it captures the public interest and stimulates demand for such changes at all levels.<sup>205</sup>

## CHAPTER 8

# GENERAL CONCLUSIONS AND RECOMMENDATIONS

### 8.1 GENERAL CONCLUSIONS

The preceding chapters of this paper should serve to illustrate that Malawi can, and must, do more in its efforts to expand access to justice for the poor. In this regard, Malawi's greatest challenge lies in persuading politicians, the judicial profession and the general public to share this view. More education, consultations, participation and research needs to be encouraged, and the focus should be on what passes for justice among the poor. The legal profession, law schools, paralegals and civil society organisations have a unique opportunity and a corresponding obligation, to ensure that issues concerning access to justice occupy a central place in their curricula and programmes, and that **pro bono** activity plays a central role in law students' educational experience, as well as in the legal profession's practice. As a nation, Malawi should strictly adhere to its unique and transformative Constitution and thus aspire for an ideal that **'denial of justice on account of poverty shall forever be made impossible in Malawi.'** That ideal should remain Malawi's aspiration, and occasions like the debates leading to

the passing the 2011 Legal Aid and Local Courts Acts should serve to remind us of the challenges that still stand in the way.

In terms of what still stands in Malawi's way in expanding access to justice for the poor, this paper has highlighted several dilemmas, and below we summarise the key challenges. Having preferred and adopted, in chapter 2, a human rights framework for advancing our analysis on the question of expanding access to justice for the poor, the key challenges below have similarly been grouped under 'duty bearer' and 'rights holder' challenges:

#### Duty Bearer Challenges

While the concept of access to justice has been framed in a number of international and regional human rights instruments to which Malawi is a party, and is entrenched in Malawi's Constitution (1994), what still lacks is 'disciplined implementation'. Thus, as the paper has shown, access to justice for the poor remains an elusive and 'implausible ideal' as 'rhetoric far outlines reality';

Lack of political will to formulate and implement the necessary enabling law and policy appears to top the list of barriers to expanding access to justice for the poor. The comparative analysis of the recent parliamentary debate leading to the passing of the new Legal Aid and Local Courts Acts in February 2011 which this paper has presented, demonstrates how such political and governance challenges lead to 'missed opportunities' for poor peoples' expanded access to justice;

The lack of political will is further demonstrated by the inadequate levels of resources (human, financial etc.) allocated to the justice sector in general, and to legal aid services and informal justice systems in particular. As the paper has shown, the levels of resource provision are 'capped at such ridiculously low levels that it makes implementation a statistical impossibility'.

Negative and hypocritical attitudes among key policy makers, legal professionals, and donors towards both the informal justice systems and concept of access to justice for the poor are other key barriers. Having highlighted shifting attitudes and perceptions among such key justice stakeholders, the paper argues that not enough is being done to transform recent well intended policy directives into programme implementation. This is largely due to deeply entrenched perceptions that 'formal justice systems' comprise the sum total of the justice

sector, compounded by negative attitudes towards informal justice systems that magnify the negative attributes of such systems;

### **Rights Holder Challenges**

Lack of knowledge and awareness of rights among the majority of Malawi's poor appears to be the main barrier to accessing and claiming rights by the poor.

The lack of awareness is compounded by the general high levels of poverty among the majority of Malawians, which means that most of the legal services are out of their reach. Consequently, the poor have little choice but to access justice through the informal justice systems, which are regarded not only as geographically more proximate, but also, more importantly, offer familiar concepts of justice in both process and outcomes.

The paper has also shown that having gone through '70 years of colonial rule immediately followed by 30 years of dictatorship under Dr. Kamuzu Banda', Malawians have come to perceive state justice institutions as closely associated with colonial and authoritarian domination. Consequently, Malawians have taken to a 'culture of suffering in silence' leading to low levels of case reporting and to trusting 'their own local chiefs' with dispute resolution.

Perhaps most importantly, the 'culture of suffering in silence' has a more worrying

consequence as it presents the poor with the challenge of 'lack of demand for accountability' from their authorities and leaders whom they have put in power. The implication of this is that, as an example, the majority poor Malawians may not even question their members of parliament for the 'missed opportunity' in debating the Local Court Bill in parliament.

While all the above may be challenges that lay in Malawi's way towards expanding access to justice for the poor, they are not insurmountable. The paper has demonstrated that there are 'revealing and valuable lessons' which Malawi could learn from other related jurisdictions within the African region and beyond. Key lessons include:

#### **Zambia:**

- While the Local Courts provide a valuable guide to the independence of the judiciary, the major lesson is that judicial officers should not only be independent from the manipulation of the executive branch, but should also be sufficiently secure in material needs and resources so as not to fall victim to corruption;
- The Zambia scenario presents another lesson that a highly centralised state system cannot effectively design institutions which reflect the justice needs of the grassroots;
- Zambia provides a further lesson that in urban areas, customary law is increasingly becoming a myth as the Local Courts have become institutions for resolving community

disputes, with the guiding principles being simple logic and common sense.

#### **Uganda:**

- The dilemma of interpretation of customary law in the context of additional jurisdiction for applying written law. The lesson here is that there is the danger of looking down upon customary law as being 'inferior' when compared to written law. However, the dilemma is that Uganda's Local Council Courts (LCCs) did not have the necessary capacity to interpret and apply written law;
- The lesson that, in order to promote women representation in the bodies presiding over LCCs, there is a need for adopting affirmative approaches to doing so - including adoption of clearly agreed quotas of women representation in membership of the LCCs;
- The lesson that even though LCCs may be legitimate in law, they may not necessarily be legitimate in the eyes of the people. Such legitimacy, in the case of Uganda's LCCs was eroded by public perceptions that LCCs were corrupt and were partisan.

#### **South Africa:**

- The lesson that, in tackling deeply entrenched cultural issues such as gender, there is a need for adopting a 'gradual reform agenda' grounded in continuous 'consultations, lobbying and political organizing'. In this regard, South Africa adopted a 'progressive alignment' approach to bringing negative cultural practices into alignment with

requirements of the Constitution and human rights.

#### **General Lessons Common to all Jurisdictions:**

- The common mistake of ‘underestimating impediments’ to expanding access to justice for the poor;
- The need to promote active ‘listening’ and ‘learning by doing’;
- The need for policies and programmes in the justice sector to have an explicit focus on the poor, in the conception, design, implementation, monitoring and evaluation phases;
- The need to gain an understanding of a particular society’s past history, and assess its ‘readiness to accept change’;
- The need to harness the positive role of political leadership and judicial leadership in order to nurture ‘policy champions’ who can promote the ‘expanding access to justice for the poor’ cause.

In its review of current literature on the subject of access to justice and informal justice systems, the paper observes that generally, there is no systemic effort to synthesise and compare lessons from similar jurisdictions at a regional level nor across the globe. It comes as no surprise, therefore, that Malawi’s recent efforts to propose, debate, and pass the new Local Courts Act in Parliament was met with hurdles, which could have been anticipated and surmounted, if lessons as the ones outlined above were systematically shared among countries.

In the final analysis, the paper concludes that given the context and manner in which the Legal Aid and Local Courts Bills were passed into law, prospects for their implementation are ‘less than encouraging’. To say the least, the government’s move of the Local Courts Bill in Parliament, in particular, was badly timed and poorly executed. It failed to read the ‘signs of the times’ and therefore ‘missed a golden opportunity’ to adopt a law aimed at expanding access to justice for the poor. In so doing, the government did not endear itself well with the poor - the majority of whom supported the adoption of the Local Courts Act, but were wary of granting criminal jurisdiction to Local Courts given the history of their predecessors, the Traditional Courts. One can safely say that this was not only a ‘missed opportunity’ but it was also the government’s disregard and betrayal of the trust and confidence Malawians placed in the Bingu administration, by virtue of Section 12<sup>206</sup> of the Republic of Malawi Constitution 1994.

## **8.2 GENERAL RECOMMENDATIONS**

In view of the foregoing analysis, a set of recommendations are presented below for serious consideration by justice sector stakeholders, in order to move this important process forward while recognising that “innovative projects and reform proposals are not in short supply.”<sup>207</sup>

### Legal Empowerment and Awareness Raising among the population of Malawi:

- Education of justice users through general civic education and information provision, education on national laws, provision of legal education materials and guidelines, legal literacy, and training in different techniques of dispute resolution;
- Providing increased linkages between the population and legal aid providers to promote free person-to-person legal assistance, advice, and education from volunteer lawyers (**pro bono**), law students, paralegals, and NGOs.

### Advocacy for Social/Legal Justice with decision makers:

- Support consultative and participatory advocacy processes on possible reforms to the Local Courts Act, in order to either remove or limit criminal jurisdiction to minor statutory offences appropriate for Local Courts;
- Support civil society advocacy campaigns aimed at removing the major legislative obstacles which impede access to justice, particularly for the poor and other marginalised social groups, and which aim at harmonising such legislation with the Constitution and international human rights standards;
- Facilitating the inclusion of development programming focusing on supporting advocacy for improved resource allocations to legal aid and informal justice services.

### Capacity Building:

- Assisting engagement of IJS providers in participatory standard setting processes inspired by human rights standards;
- Supporting “self-statement” attempts at assisting communities to document their own substantive customary law, with a view to promoting awareness, consistency, and democratic processes among communities;
- Supporting selection of adjudicators by promoting requirements as to qualifications and procedures for selection, discipline and removal of IJS adjudicators in order to secure adequate qualifications, gender balance and open, transparent, and accountable selection processes;
- Supporting efforts by the Legal Aid Board aimed at expanding the availability of **pro bono** legal services, legal advice, and legal education services, and expanding access to justice for indigent clients;
- Supporting education of IJS adjudicators through:
  - Compulsory education in national laws and/or human rights standards;
  - Provision of legal materials and guidelines;
  - Training in techniques for documentation of case outcomes;
  - Training in different techniques of dispute resolution.
- Supporting the development and implementation of guidelines for:
  - The Malawi Judiciary and the Chief Justice (for effective regulation, supervision and guidance of Local Courts);

- The Legal Aid Board (for promotion of Pro-bono, legal education and legal advice work by Lawyers, Law Students, Paralegals and Civil Society Organisations);
- Local Courts (for promotion of Principles for Democratic Accountability, Respect for human rights of women, children and other vulnerable groups etc.).

**Proposed Research Agenda:**

- Promoting systemic efforts to synthesise and compare/share lessons on IJS from similar jurisdictions at African regional level and across the globe, and feeding the Malawi experience into the dialogue such as through international academic networking in this field.

As a final point, we agree with the observation once made by Dr. Edge Kanyongolo that;

**” Most of the recommendations in this paper have also been made before; there are many strategies and plans that lie on the shelves of many institutions involved in the [justice] sector, including government ministries and departments, non-governmental organizations and donors. The most important issue is therefore how to ensure that these recommendations are implemented in practice. This will require a frank discussion of the political, economic and social challenges context of justice and the**

**rule of law in Malawi, not as some intellectual justification for defeatism, but as a necessary first step to devising realistic means for removing obstacles to reform.”<sup>208</sup>**

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The Legal Aid Act (Chapter 4.01 of the Laws of Malawi) 1964

The Chiefs Act (Chapter 22.03 of the Laws of Malawi) 1967

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Report of the Law Commission on the Review of the Legal Aid Act, and the Proposed Draft Legal Aid Bill.

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4<sup>th</sup> Meeting, Serial No.002, 2<sup>nd</sup> day, Tuesday, 1<sup>st</sup> February, 2011  
4<sup>th</sup> Meeting, Serial No.003, 3<sup>rd</sup> day, Wednesday, 2<sup>nd</sup> February, 2011  
4<sup>th</sup> Meeting, Serial No.006, 6<sup>th</sup> day, Monday, 7<sup>th</sup> February, 2011  
4<sup>th</sup> Meeting, Serial No.002, 7<sup>th</sup> day, Tuesday, 8<sup>th</sup> February, 2011  
4<sup>th</sup> Meeting, Serial No.002, 8<sup>th</sup> day, Wednesday, 9<sup>th</sup> February, 2011

- The New Access to Justice Legal Framework as passed and gazetted by the National Assembly  
The Legal Aid Act No. 7 of 2011, published in the gazette on 8<sup>th</sup> April, 2011  
The Local Courts Act No. 9 of 2011, published in the gazette on 8<sup>th</sup> April, 2011

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# NOTES

## INTRODUCTION

1 Siri Gloppen and Fidelis Edge Kanyongolo, **Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law**, in the International Journal of Constitutional Law, Vol 5, 2007 at p.259.

2 Malawi Law Commission, Report of the Law Commission on the Review of the Traditional Courts Act, September 2007 at p.13. While deliberating on the issue as to whether “geography” is a key determining factor in accessing justice by the poor, the Law Commission states:  
“The Commission, however, observed that 4<sup>th</sup> grade magistrate courts are housed in what used to be Grade A and B Traditional Courts, and concluded that the issue is not geography but rather functionality and effectiveness of these courts. Consequently, the Commission conceded that the absence of these courts may have contributed to the denial of access to justice significantly in the rural areas since people are deprived of access to familiar courts and familiar court procedures. Further, the inability of the present magistrate

courts to competently handle customary civil matters is a further factor to warrant re-introduction of these courts.” (emphasis added).

3 See section 2.0 of this Research Report- Analysis of the Access to Justice Concept at the International Level- for an elaborate discussion on our adopted definitions and meanings of such key terms as the “poor”, “pro-poor”, “access to justice” etc.

4 **Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law**, supra note 1, at p.269.

5 Joseph DeGariele and Jeff Handmaker, **Justice for the People: Strengthening Primary Justice in Malawi**, at p.151 in African Human Rights Law Journal, Vol. 5, 2005 p.148. The authors state that:  
“where formal justice systems, in particular courts, are not accessible to the majority of the population, primary justice systems offer encouraging alternatives and, in many cases, more appropriate solutions. They should not be viewed as a substitute for the formal system, but as a dynamic complement to it.” (emphasis added).

- 6 B Van Rooij, **Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation**, Working Paper (2009) available at <http://ssrn.com/paper=1368185>. See also International Development Law Organization, *Towards Customary Legal Empowerment- Inception Paper*, 2010 at p.4. This paper acknowledges that:
- “Such an approach is consistent with the rise of so-called ‘bottom-up’ legal development cooperation approaches, which seek to directly reach the poor or marginalized groups through their interventions, instead of hoping that state law reform projects ‘trickle down’ to benefit those at the bottom of developing societies”.
- See also The Commission on Legal Empowerment of the Poor, **Making the Law Work for Everyone**, Volume 2, 2008. At p.2. The Commission observes that:
- “More generally, bottom-up and empowerment approaches have been part of the development agenda since the late 1990s and they have now become building blocks of programmes such as the World Bank’s work in Community Driven Development and, more recently, its Justice for the Poor programme.”
- 7 Commission on Legal Empowerment of the Poor, **Making the Law Work for Everyone**, Volume 1, 2008. At p.ii.
- 8 **Making the Law Work for Everyone**, Vol 1, *ibid* at p.75.
- 9 **Making the Law Work for Everyone**, Vol 2, *supra* note 6, p.4.
- 10 Department for International Development, **Briefing: Non-state Justice and Security Systems**, May 2004, available at <http://www.oecd.org/dataoecd/6/57/35243076.pdf>, pp.9-13.
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- 15 Open Society Foundation, *Malawi- Justice Sector and the Rule of Law, Review by AfrMap and Open Society Initiative for Southern Africa*, Report written and Researched by Professor Fidelis Edge Kanyongolo, 2006, at p.132.
- 16 **Making the Law Work for Everyone**, Vol 1, *supra* note 7 at p.34).
- 17 *Malawi- Justice Sector and the Rule of Law, Review by AfrMap and Open Society Initiative for Southern Africa*, *supra* note 15, at p. 135.
- 18 **Making the Law Work for Everyone**, Vol 1, *supra* note 7 at p.75.
- 19 Malawi Law Commission Report, *Supra* note 2, p.11.
- 20 See The Local Courts Act No. 9 of 2011, published in the gazette on 8<sup>th</sup> April, 2011.

21 The Legal Aid Act No. 7 of 2011, published in the gazette on 8<sup>th</sup> April, 2011.

22 Ibid, at p.3.

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23 Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies Report of the UN Secretary-General; S/2004/616 of 23 August 2004.

24 **Making the Law Work for Everyone**, Vol 2, p. 3.

25 **Making the Law Work for Everyone**, Vol 1, p. 34.

26 See generally Ayesha Kadwani Dias and Gita Honwana Welch: **Justice for the Poor- Perspectives on Accelerating Access**, 2009 (UNDP; Oxford).

27 The exact phrasing of this article is to be found under Article 16 of the United Nations Covenant on Civil and Political Rights (ICCPR) to which Malawi is a party.

28 Article 14 of the ICCPR is in the following terms:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in any suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 2(3) of ICCPR outlines the obligation of the state in matters of access to justice in the following terms:

"Each State party to the present Covenant undertakes

· To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

· To ensure that any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

· To ensure that the competent authorities shall enforce such remedies when granted."

29 See generally Andrew Nyirenda, Thomas Trier Hansen and Desmond Kaunda: **A Comparative Analysis of the Human Rights Chapter under the Malawi Constitution in an International Perspective (2003)**.

30 See generally Francesco Francioni: **Access to Justice as a Human Right**, 2007 (Oxford University Press) and Ayesha Kadwani Dias and Gita Honwana Welch: **Justice for the Poor- Perspectives on Accelerating Access**, 2009 (UNDP; Oxford University Press).

31 See generally Francesco Francioni: **Access to Justice as a Human Right**, 2007 (Oxford University Press).

32 UNDP (2005), *Programming for Justice: Access for All*, A practitioner's guide to a human rights-based approach to access to justice. in UNDP- *Doing Justice*, p.8.

33 *Supra*, footnote 31.

34 UNDP *Access to Justice Practice Note*, 2004 p.2.

- 35 UNDP Access to Justice Practice Note, 2004 p.6.
- 36 UNDP Access to Justice Practice Note, 2004 p.3.
- 37 UNDP Practice Note p.3 See also UNDP- Doing Justice, 2006 at p.8: Consistent with UNDP's strong commitment to the Millennium Declaration and the fulfilment of the Millennium Development Goals, access to justice is a vital part of UNDP's mandate. Access to justice is essential for human development, establishing democratic governance, reducing poverty and conflict prevention in the sense that:
- Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent.
  - The poor and disadvantaged, due to their vulnerability are more likely to be victims of criminal and illegal acts, including human rights violations. Crime and illegality are likely to have a greater impact on poor and disadvantaged people's lives as it is harder for them to obtain redress. As a result, they may fall further into poverty. Justice systems can provide remedies which will minimize or redress the impact of this.
  - Fair and effective justice systems are the best ways to reduce the risks associated with conflict. The elimination of impunity can deter people from committing further injustices, or from taking justice into their own hands through illegal or violent means. In many countries, the reduction of violence is critical for achieving the MDGs.
- 38 Making the Law Work for Everyone, Vol 1, p. 32.
- 39 See generally Open Society Foundation, **Malawi- Justice Sector and the Rule of Law, Review by AfrMap and Open Society Initiative for Southern Africa**, Report written and Researched by Professor Fidelis Edge Kanyongolo, 2006.
- 40 Making the Law Work 4 Everyone, Vol 2, p. iii.
- 41 UNDP: Access to Justice Practice Note, 2004 p.5.
- 42 World Bank- Justice for the Poor Briefing Note- Access to Justice for Women, Indonesia case Study, p. 1.
- 43 World Bank- Justice for the Poor Briefing Note- Access to Justice for Women, Indonesia case Study, p. 1. An example of a country program is the Justice for the Poor (J4P) in Indonesia which is part of the AusAID-World Bank collaboration on the East-Asia and Pacific Justice for the Poor Initiative. This Initiative includes work in Solomon Islands, Vanuatu, Papua New Guinea, Timor-Leste, and Indonesia, as well as on other regional thematic activities.
- 44 **Making the Law Work for Everyone**, Vol 1, p. 77.
- 45 Danish Institute for Human Rights, (forthcoming), **Study on Informal Justice Systems**. 2011, UNDP, UNICEF and UNIFEM.
- 46 See generally the Commission on Legal Empowerment of the Poor, **Making the Law Work for Everyone**, Volume 1, 2008.
- 47 Wilfried Scharf, **Informal justice systems in Southern Africa: How should Governments Respond?**, Institute of Criminology, University of Cape Town, South Africa, 2009.



48 See generally Deborah Rhode: **Access to Justice**, Fordham Law Review, Vol.69, issue 2, 2001.

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49 Tikambenji Malera, G. (2005), **The Socio-Legal Status of Malawian Women in Politics: Opportunities and Challenges**. The Danish Institute for Human Rights.

50 See Ayesha Kadwani Dias and Gita Honwana Welch: **Justice for the Poor- Perspectives on Accelerating Access**, 2009 p.420.

51 Leila Chirayath, Caroline Sage and Michael Woolcock (2005) state that: "In most cases customary systems have, in fact, been substantially altered and re-shaped by different eras of colonial and post-colonial rule. Different regimes have tried to formalize, co opt or recast existing systems within colonial or post-colonial legal frameworks, often substantially changing the nature of a given system. British revision of indigenous judicial systems in Africa was fundamentally hypocritical: on the one hand, they sought to preserve custom by recognizing customary institutions, and on the other, 'they were to be a vehicle for remolding the native system 'into lines consonant with modern ideas and higher standards.' For example, indirect rule often distorted 'native' authority by strategically assigning duties to certain individuals and fundamentally altering the pre-existing balance of power." p.8.

52 Leila Chirayath, Caroline Sage and Michael Woolcock: Customary Law and Policy Reform- Engaging with the Plurality of Justice Systems July 2005 p.13 & 14.

53 Supra, Footnote 15.

54 Dispute resolution processes before Informal Justice Systems is described to be as follows: Chiefs, assisted by their ndunas (advisors, all men) preside over customary justice forums. The system is characterised by its relaxed yet respectful atmosphere, an outdoor rural setting (often under a tree), informality of dress, common-sense language and a natural flow of story-telling and questioning. The dispute is dealt with in a holistic manner, taking into account interpersonal relationships, community status, local values and community perceptions. A participatory or consensual approach to decision-making is adopted. Victim, offender and family members or relatives are called to appear before the chief or elders. The aim is first to ascertain the facts, thereafter, the forum will reach a decision that satisfies the victim, and is considered reasonable by the chief and the wider community. Factors at play include the interests of the chief to promote his authority and prestige, political influences and pressure, and the current human rights and democratic changes that have influenced some members of certain communities. Additional factors are the respective status of the disputants, and the likelihood of the case being taken to the formal state courts. Adapted from

Wilfried Scharf, Non-state justice systems in Southern Africa: How should governments respond? and Wilfried Scharf, Chikosa Banda, Ricky Rontsch, Desmond Kaunda, Rosemary Shapiro, Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums.

55 Open Society Foundation Report, *supra* footnote 15, p26.

56 Repugnancy clauses were the subject of great debate in newly independent African states. These “were a colonial creation to prevent enforcement of customary laws or practices if they offended western moral standards. Conforming to the Constitution does not impose the same burden on customary law since it is much broader than colonial policy.” See South African Law Commission Report (2003), p25.

57 Leila Chirayath, Caroline Sage and Michael Woolcock (July 2005): **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** p8.

58 Leila Chirayath, Caroline Sage and Michael Woolcock : **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** July 2005 p5. This report also acknowledges that “in many communities, traditional systems not only reflect prevailing community norms and values, but the state systems lack legitimacy; they are seen as mechanisms of control and coercion used by oppressive regimes. State

systems are often seen as vehicles for elite political or economic interests, with fragile institutions and lack of an empowered citizenry in many developing countries leaving institutions open to corruption and elite capture”.

59 See Chapter Two for a full citation of Section 41 of the Malawi Constitution.

60 Malawi Law Commission Constitutional Review final Report (2004) p.41.

#### THE MALAWI POST -2011 ACCESS TO JUSTICE LEGAL FRAMEWORK

61 See Africa Watch, 1990, **Where Silence Rules, The Suppression of Dissent in Malawi**. London and New York: Africa Watch, p.1.

62 See generally Chijere Chirwa, W. (2006), Report on Political Participation, Second Draft. Governance Monitoring Project Malawi.

63 Open Society Foundation: **Malawi Justice Sector and the Rule of Law- A Discussion Paper**, 2006 at p.4.

64 See Malawi Law Commission, **Report of the Law Commission on the Review of the Traditional Courts Act**, September 2007.

65 See Malawi Law Commission, **Report of the Law Commission on the Review of the Traditional Courts Act**, September 2007.

66 See, Malawi National Assembly Daily Debates (Hansard), Third Meeting, 42nd Session, 9th December, 2010. The motion to move the Bill was tabled by Hon.

Dr. Chaponda, Minister of Justice and Constitutional Affairs.

67 Legal Aid Bill No 7 of 2011, at p.3.

68 Ibid. Hansard, p.710.

69 Among the eligibility criteria for granting legal aid in civil matters which may favour the poor and indigent clients under the Legal Aid Act include:

Section 20(a) - "has reasonable grounds for instituting or defending the matter for which he seeks legal aid"

Section 20(b) - "has insufficient means to enable him to obtain the services of a private legal practitioner."

70 Among the eligibility criteria for granting legal aid in criminal matters which may favour the poor and indigent clients under the Legal Aid Act include:

Section 18(2)(a) - "the offence is such that if the applicant were convicted it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or to serious damage to his reputation"

Section 18(2)(f) - "The accused would, if convicted, be given the option of a fine and the fine would remain unpaid for more than one month after imposition of sentence".

71 For example, strained diplomatic relations between the Bingu regime and the British government led to the drastic scaling down of DFID funding to Malawi. This may impact heavily on Malawi's delivery of justice services since DFID was by far the Malawi's largest traditional donor for many years.

72 Ibid. (Hansard) p. 711

73 Ibid. p.719. Nonetheless, Hon. Dr.

Mwalwanda was quick to propose that the Legal Aid Bill should properly define categories of people eligible for Legal Aid so that people such as MPs do not abuse the service intended for the poor.

74 Ibid. p. 711

75 Ibid. p.712- Malawi's Anti-Corruption Bureau has over the years attracted several development partner support besides funding from government. The DFID and EU Rule of Law Programme have pumped large sums of money into the institution- and yet it still has failed to retain lawyers. This is perhaps an indication of the imbalance between supply and demand of legal services in Malawi- i.e. very high demand for legal services chasing very few lawyers.

76 Ibid. (Hansard) p.713. Note that K30million is approximately equivalent to 1million Dkr.

77 Ibid. (Hansard) P. 714

78 Ibid. p. 715

79 Ibid. p. 718

80 Ibid. p. 716

81 Ibid. p. 721

82 Ibid. p. 723

83 Ibid. p. 720

84 In many ways, one would have thought that, as read together, the Legal Aid Act would complement the Local Courts Act in expanding access to justice for the poor and indigent Malawians. The debate in Parliament was soon to upset this view.

- 85 See, Malawi National Assembly Daily Debates (Hansard), Third Meeting, 42nd Session, 7th February, 2011. The motion to move the Bill was tabled by Hon. Dr. Chaponda, Minister of Justice and Constitutional Affairs.
- 86 Malawi National Assembly Daily Debates (Hansard), Third Meeting, 42nd Session, 7th February, 2011, p.192.
- 87 Ibid. p. 192.
- 88 See the contributions to the debate by Hon. Anna Kachikho, Minister of Local Government and Rural Development- Hansard, 8<sup>th</sup> February, 2011 P.230.
- 89 As Honorable Goodall Gondwe observed, under the old Traditional Courts, “a Chief.. paralleled the Chief Justice”. Hansard 8<sup>th</sup> February, P.226.
- 90 In the United Kingdom, for example, under the 1996 Arbitration Act, private religious arbitration on some disputes between spouses conducted by Jewish and Muslim organisations is recognised by the State.
- 91 UNIFEM, (2008/2009), **Progress of the World’s Women 2008/2009. Who answers to women? Gender and Accountability.** p.68).
- 92 See generally: Leigh T. Toomey : **A Delicate Balance: Building Complementary Customary and State Legal Systems** , 2010.
- 93 Similar views were expressed in the South African context in debating the Traditional Courts Bill, some Members of Parliament pointed to “the need to align the traditional justice system with the constitution, for the said system to embrace the values enshrined in the constitution, including the right to human dignity; the achievement of equality and the advancement of human rights and freedoms; and non-racialism and non-sexism.” See: South Africa: Bill Sets Out Traditional Courts’ Limits.
- 94 As Professor Wiseman Chijere Chirwa wrote prior to the enactment of the Local Courts: “The Constitution creates possibilities for conflicts in relation to the separation of powers between the Executive and the Judiciary should the traditional leaders handle judicial matters”. See: Wiseman Chirwa- Afrimap Governance Report Supra at footnote 62.
- 95 Professor Chirwa raises the following further dilemma: “should the Constitution, or any other law, stop the traditional leaders from exercising “judicial” or semi-judicial functions, the Constitution or that law would kill the very essence of traditional leadership and hence amount to the abolition or transformation of the institution of chieftaincy”. See: Wiseman Chirwa- AfriMap Governance Report. However, as the Malawi Law Commission recognises, Traditional Leadership shall continue to play this parallel judicial role regardless of whether Chief preside over local Courts or not. Nonetheless, Prof. Chirwa is in support of creating a Chiefs Council in order to confer other and similar responsibilities on Traditional Authorities: “Traditional leaders have constantly

advocated for the establishment of the Chiefs' Council through which they could consult with government on matters of national interest. The council could also play oversight functions. With the repeal of the constitutional provision on the Senate, the proposal for the Chiefs' Council makes some good sense. The Council could be an important alternative dispute resolution mechanism in addition to performing oversight functions. There is need for debate on this issue." Wiseman Chirwa- AfriMap Governance Report.

96 Report of the Law Commission on the Review of the Traditional Courts Act, at p.17.

97 Ibid. p. 193. Ironically, the Malawi Congress Party (MCP) was the single party which rule Malawi for more that 30 years (1961-1994) under Dr Kamuzu Banda's autocratic rule. The MCP ushered in the so called "notorious Traditional Courts."

98 Ibid (Hansard) 7<sup>th</sup> February, p. 200. Hon. Uladi Musa went further to accuse the Executive as being strongly behind the Local Courts Bill. He said "I know what the problem is. I know this bill is not coming from the Law Commission...I have been a Cabinet Minister for 10 years. I know what happens. Things can appear [as if they are] coming from the Law Commission, yet originally, they are coming from the Executive."

99 Referring to the Hon. Minister of Justice and Constitutional Affairs, Hon. Uladi Mussa said: "...at the time we were suffering, he had been

outside the country, but that should not warrant bringing [such] things..". Hansard 8<sup>th</sup> February, 20011 at p.225.

100 Ibid. p. 194.

101 Hon. Dr. Cassim Chilumpha also observed that "Traditional Courts were established by the Colonial Government well before 1964. But what happened was is that because these courts were created by an Act of Parliament, government kept on changing their nature and this is how they ended up trying treason cases, murder cases and this is how they ended by being presided over by chiefs." Hansard, 8<sup>th</sup> February, 2011. P.231.

102 Ibid, Hansard 8<sup>th</sup> February, p.232.

103 Some of the criminal matters which may have to be handled by Local Courts under Statutory include, for example: possession, publication or importation of prohibited material (under Section 47(2) of the Penal Code); prohibition of publication of false news likely to cause fear and alarm to the public (under Section 60 of the Penal Code); conduct likely to cause breach of peace (under Section 181 of the Penal Code); Use of insulting language (under Section 182 of the Penal Code).

105 Ibid. Hansard, 7<sup>th</sup> February, 2011, p. 201.

106 Ibid. Hansard, 7<sup>th</sup> February, p. 196.

107 Ibid. Hansard 7<sup>th</sup> February, 2011, p. 197. However, the Special Law Commission was of the view that "if personnel of Local Courts [were] properly qualified and

trained [they] should be able to exercise diligence in criminal matters and live up to the standards set by the Constitution." (see Hansard 9<sup>th</sup> February, 2011 p.291).

- 108 Ibid. Hansard, 8<sup>th</sup> February, 2011 P.237.
- 109 Ibid. Hansard, 7<sup>th</sup> February, 2011, P.198.
- 110 Ibid. p. 199.
- 111 This point was supported by Hon. Uladi Mussa who said: "if the intention is to reduce the number of cases heard by Magistrate Courts in the country, why can't we empower the Magistrate Courts or increase the number of Magistrate Courts in the Country?" Hansard, 8<sup>th</sup> February, p. 224.
- 112 Ibid. p. 199.
- 113 Open vote by call of names of individual MPs to end the debate.
- 114 Malawi Law Commission, Report of the Law Commission on the Review of the Traditional Courts Act, September 2007 at p.23.
- 115 These are matters I have dealt with elsewhere within my Masters Thesis. See generally Desmond Mudala Kaunda: State Obligations for Past Human Rights Violations of Former Regimes- the Case of Malawi, Essex University (1995).
- 116 Siri Gloppen and Fidelis Edge Kanyongolo, **Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law**, in the International Journal of Constitutional Law, Vol 5, 2007 at p.259.
- 117 See generally: Leigh T. Toomey : **A Delicate Balance: Building**

### **Complementary Customary and State Legal Systems, 2010.**

- 118 See the First Schedule to the Local Courts Act which lists the criminal Jurisdiction of Grade A and Grade B Local Courts.
- 119 Section 27(1) of the Local Courts Act provides: "The aggregate of any terms of consecutive sentences of imprisonment which a Local Court may impose on an offender shall not exceed two years."
- 120 **Making the Law Work for Everyone**, Vol 1. p.76.
- 121 See generally Bruce Baker: **Linking State and Non-State Security and Justice**. 2010.
- 122 See generally Malawi Law Commission, Report of the Law Commission on the Review of the Traditional Courts Act, September 2007.

### THE SHIFT TOWARDS ENGAGEMENT WITH INFORMAL JUSTICE SYSTEMS – STAKEHOLDER PERSPECTIVES

- 123 Penal Reform International: **Access to justice in sub-Saharan Africa – the role of Traditional and Informal Justice Systems**, November, 2000 at p. 1).
- 124 Leila Chirayath, Caroline Sage and Michael Woolcock: **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** p. 4 The authors continue to argue that:  
"Despite the prevalence of traditional and customary law, these systems have been almost completely neglected by the

international development community, even at a time when justice sector reform has become a rapidly expanding area of assistance. In the past decade, for example, the World Bank has dramatically increased its efforts in promoting justice sector reform in client countries, yet none of these projects deal explicitly with traditional legal systems, despite their predominance in many of the countries involved. Of the 78 assessments of legal and justice systems undertaken by the Bank since 1994, many mention the prevalence of traditional justice in the countries looked at, but none explore the systems in detail or examine links between local level systems and state regimes”.

- 125 Michael Anderson- **Making Legal institutions Responsive to the Poor**- p.6.
- 126 UNDP Practice Note, p.4.
- 127 Minneh Kane- **Reassessing Customary Law Systems a Vehicle for Providing Access to Justice for The Poor** p. 17.
- 128 Ibid Leila Chirayath, Caroline Sage and Michael Woolcock: **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** p.1.
- 129 "Herein then lies the crux of the matter – attitudes and beliefs are difficult to change, making legal reform a long-term process. It is not enough to pass a law in the Parliament – people need to be made aware of the law, and they need to accept it in order to implement it." Emmi Hypponen- **Legal Reform - the Key to Social Change? Experiences from Rural Zambia**, p.2.
- 130 DFID Briefing Note, p.9.
- 131 Other examples of shifts in engagement with IJS include: United States Institute for Peace, Fletcher School of Law and Diplomacy who in collaboration with the Centre for Humanitarian Dialogue, have studied the extent to which informal justice systems can play a role in post-conflict reconstruction of the rule of law, and the extent to which, and how, international and national policy makers can engage them. Countries of focus have included: Burundi, East Timor, Mozambique, Guatemala, Somalia, Afghanistan, Liberia, Papua New Guinea, Sierra Leone, and Sudan. See UNDP- **Doing Justice** p43.
- 132 UNDP- **Doing Justice**- p.12.
- 133 UNDP **Doing Justice**. See also Ewa Wojkowska: **How Informal Justice Systems can Contribute**, December 2006, p.6 This realisation is collaborated by similar findings by the International Development Law Organization (IDLO) who state that: "The limited effect of reforms in the state justice sector on the majority of the poor, coupled with increased recognition of the wide reach and accessibility of customary justice systems has led to a changing attitude among donors towards customary justice systems, and an interest to build on their positive elements for the benefit of the poor. Such an approach is consistent

with the rise of so-called 'bottom-up' legal development cooperation approaches, which seek to directly reach the poor or marginalized groups through their interventions, instead of hoping that state law reform projects 'trickle down' to benefit those at the bottom of developing societies. This new donor engagement not only focuses on enhancing the positive aspects of customary justice systems, but also tries to overcome a number of negative aspects of such systems." IDLO Inception paper P4.

134 UNDP Practice Note, p.4 An Open Society Justice Initiative review of donor assistance to justice sector reform in Africa also states that "any examination of the experience of poor and excluded persons accessing justice in Africa must conclude that formal state institutions may not be the most relevant". UNDP- Doing Justice, p.9.

135 Ibid, UNDP Practice Note- p.11. Consequently, over the past few years, UNDP has supported the enactment of pro-poor and human rights legislation, treaty ratification, and capacity development for the analysis, scrutiny and drafting of legislation. Such assistance has helped governments address key grievances that trap disadvantaged people into poverty, such as women's property rights. It has also helped consolidate jurisprudence, and has assisted governments in efforts to link traditional with formal legal systems.

136 UNDP, Doing Justice, p.13, For example, UNDP's Indonesia Legal Empowerment and Assistance for the Disadvantaged (LEAD) project was developed on the basis of the findings of an access to justice assessment. The project features a grant making facility primarily to civil society organisations. Grants are provided to organisations seeking to improve access to justice through informal mechanisms. The project is employing the following approach:

- raising the legal awareness, power and assistance available at the grassroots village or community level;
- building paralegal capacities for specific villages or NGO members who will develop greater levels of legal knowledge and skills;
- supporting legal services provided by lawyers and related services by NGOs and other professionals;
- Analysis of the problems and progress that LEAD and its partners meet will contribute to policy and legal reform advocacy.

137 This shift is largely premised on the fact that "traditionally, donor-led legal reform projects have emphasized formal institutions, such as the judiciary, legislators, the police, and prisons, and paid less attention to customary justice systems. The prominence of customary justice systems has often been regarded as incompatible with the modern nation-



state and therefore as something to be discouraged or ignored rather than strengthened or engaged with. However, a growing body of evidence suggests that poor people in developing countries have limited access to the formal legal system and that their lives are largely governed by customary norms and institutions. As such, customary justice systems play a much more important role in the lives of many of the world's poor than state justice systems. One study refers to figures collected by development cooperation departments in Britain and Denmark, indicating that in some countries up to 80 percent of the population lives under customary justice systems and has little to no contact with state law. These figures are corroborated by findings from academics studying African law showing that customary law 'governs the daily lives of more than three quarters of the populations of most African countries', while according to one author 'up to 90 percent of cases in Nigeria are settled by customary courts.'" DIIS Inception paper p. 2.

138 Available at [www.danidadevforum.um.dk](http://www.danidadevforum.um.dk).

139 Danida- How-to Note p.3 available at [www.danidadevforum.um.dk](http://www.danidadevforum.um.dk)

140 DFID Briefing Note- Non State Justice and Security Systems, May, 2004 p.1- available at [www.dfid.gov.uk](http://www.dfid.gov.uk).

141 Ibid- DFID Briefing Note, p.3. DFID's Briefing Note provides practical examples of critical areas to pay

attention to Including: where NSJS systems discriminate against women and marginalised groups as highlighted by local civil society organisations (CSOs) to be justification for reform. The International Development Law Organization also notes:

"Thus, while there is growing recognition of the importance of customary justice systems, there are a number of issues regarding their operation that need to be addressed, including elite capture, human rights protection, and, in certain cases, the integration of non-state arrangements in wider capital markets. It is on these issues that legal reform projects could possibly play a role." DIIS Inception paper p. 6

142 DFID gives the example of a person who exercises judicial (or quasi-judicial) authority through a non-state justice system and who may also have executive authority over the same property or territory. Thus IJS systems may be used to control the distribution of land and resources by local elites, who may abandon "traditional" norms in favor of their own material interests.

143 DFID Non-State Justice in Bangladesh and Philippines 2003 p.1.

144 See- Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems. Referred to in UNDP- Doing justice, p. 12.

- 145 The World Bank Justice for the Poor program in Indonesia was established to develop strategies for an approach to justice reform which builds popular constituencies to demand justice. The program commenced with research, which focused on success stories rather than a problem analysis – what allowed poor people to defend their interests successfully in an unfavorable institutional environment? For example, the village judicial autonomy research project aims to strengthen informal dispute resolution mechanisms at the local level. It is tracking dispute resolution processes, norms and actors with a specific focus on the experiences of poor and marginalised members of the community. The Justice for the Poor program subsequently evolved into an experimental stage where research and analytical findings are trialed through operational programs. Outcomes from the experimental phase of the Justice for the Poor program are informing a scaling-up of activities. This includes both stand-alone justice sector reform projects and the mainstreaming of legal empowerment through World Bank community development programs. See UNDP- Doing Justice p.44.
- 146 World Bank- **Justice for the Poor**- Kenya Concept Note.
- 147 Some times, instead of trying to block legal reforms outright, powerful actors may subtly manipulate them to their advantage – a phenomenon known as ‘elite capture.’
- 148 DFID Briefing Note 2004, p.6. As a possible solution, DFID proposes that “one approach is to get the backing of the legal profession and judiciary in an incremental way by working with those individuals and groups that already see the need to engage with IJS systems. These might include lower level magistrates, lawyers and provincial administrators who are already involved in community-based initiatives, such as training paralegal workers. Donors can help to broaden the debate on reform of IJS systems”.
- 149 DFID- **Review of How East Africa has worked with Informal Justice Systems**. p.30.
- 150 See Malawi Law Commission: Report of the Law Commission on the Review of the Traditional Courts Act, September 2007, p.2 In debating the Local Court Bill in Parliament, Hon. Pro. Danton Mkandawire also observed that “this is a judicial reform that has been spearheaded by the Judiciary itself. Those who have read this document will know that the Law Commission we are talking about had five Judges of Appeal and all together there were 12 lawyers.” Hansard, 8<sup>th</sup> February, 2011, p. 243.
- 151 Schärf W., Kaunda D. and Banda C. (2002), **Access to Justice for the Poor of Malawi? An Appraisal of access to Justice provided to the poor of Malawi by the Lower**

### Subordinate Courts and the Customary Justice Forums.

152 World Bank 2011 World Development Report p.196. The World Bank states: "International assistance needs to be sustained for a minimum of 15 years to support most long-term institutional transformations. Longevity is something that some international NGOs have understood for some time while bilateral and multi lateral donors have started to adopt longer time frames. Witness the U.K. DFID's 10-year partnership agreements, the recent Dutch agreement with Burundi on a 10-year security-sector reform plan, and the 10-year exceptional assistance to post-conflict countries from the World Bank. Short project duration and small project size compound the problem."

### THE CURRENT MALAWI STATE OF ACCESS TO JUSTICE BY THE POOR AND PROSPECTS FOR IMPLEMENTATION OF THE NEW LEGAL AID AND THE LOCAL COURTS ACTS

- 153 World Bank: World Development Report 2006, p.171.
- 154 Supra footnote 91 at p.53.
- 155 See for example, **The Illusion of Inclusion**- Kenya Research Report 2008 p.40.
- 156 **Making the Law Work for Everyone**, Vol. 1, p.32.

- 157 **Making the Law Work for Everyone**, Vol. 1, p.76.
- 158 Leila Chirayath, Caroline Sage and Michael Woolcock: **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems**. p. 26.
- 159 Wiseman Chirwa- AfriMap Governance Report, supra at footnote 62.
- 160 UNDP Practice Note- 2004, p.11.
- 161 **Making the Law Work for Everyone**, Vol 1 p.76.
- 162 The Malawi Law Commission (MHRC) litigation work has been partly assisted through and Memorandum of Understanding which the Commission has entered into with the Malawi Law Society (MLS). The same has been the arrangement with one of the local NGOs- the Centre for Legal Assistance which has and MoU with the MLS- Lilongwe Chapter. While appreciated, the contribution of lawyers to such pro bono programmes has been minimal.
- 163 Debora Rhode- **Access to Justice**. Supra footnote 48, p. 1809.
- 164 Debora Rhode- **Access to Justice**. Supra footnote 48, p. 1809.
- 165 Schärf Wilfred, Kaunda Desmond. and Banda Chikosa. (2002), **Access to Justice for the Poor of Malawi? An Appraisal of access to Justice provided to the poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums**.
- 166 Minneh Kane- **Reassessing Customary Law Systems a Vehicle for Providing**

- Access to Justice for The Poor p. 17.
- 167 **Making the Law Work for Everyone**, Vol. 1, p.80.
- 168 **Making the Law Work for Everyone**, Vol. 1, p.80-81.
- 169 Open Society Foundation: **Malawi- Justice sector and the Rule of Law**, supra note 63 p.12.
- 170 See Hansard, 9th December, 2010, at p.713.
- 171 Open Society Foundation: **Malawi- Justice sector and the Rule of Law**, supra note 63 p.27.
- 172 Danish Institute for Human Rights, (forthcoming), **Study on Informal Justice Systems**. 2011, UNDP, UNICEF and UNIFEM.
- 173 UNDP: **Doing Justice- How Informal Justice Systems can Contribute**, p.18.
- 174 See Supra footnote 91, p. 71.
- 175 Leila Chirayath, Caroline Sage and Michael Woolcock : **Customary Law and Policy Reform: Engaging with the Plurality of Justice System**. p. 5.
- 176 **Making the Law Work for Everyone**, Vol. 1, p.80.
- 177 The Minister of Justice and Constitutional Affairs Hon. Mganda Chiume has been reported by various local media, including Zodiac on line news, to be planning to initiate a process of public consultations, through the Malawi Law Commission, leading to the review and amendment of several 'unpopular' laws and bring them in line with peoples' interests and expectation.
- COMPARATIVE CASE STUDIES: LESSONS TO BE LEARNED FROM OTHER SELECT INFORMAL JUSTICE SYSTEMS
- 178 UNDP **Doing Justice: How informal justice systems can contribute-** Ewa Wojkowska, December 2006, p.6.
- 179 **Making the Law Work for Everyone**, Vol. 1, p.76.
- 180 World Bank- 2011 World Development Report, p.198. The states that the African Development Bank (AfDB), UNDP, and the World Bank all now have specific South-South facilities- the AfDB's being notable for its size and focus on fragile states. There is also recognition that learning from recent transformations in middle-income countries can be particularly valuable.
- 181 UNDP Practice Note, 2004, p.10.
- 182 **Making the Law Work for Everyone**, Vol. 1, p.76.
- 183 Leila Chirayath, Caroline Sage and Michael Woolcock: **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** p. 3.
- 184 Leila Chirayath, Caroline Sage and Michael Woolcock: **Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems** p. 15.
- 185 Ibid. Leila p. 16.
- 186 **Open Society Justice Initiative, National Criminal Justice Reform, Donor Assistance to Justice Sector Reform in Africa: Living up to the new agenda?** in UNDP- **Doing Justice**, p. 9.

- 187 See Afronet Report (1998): **The Dilemma of Local Courts in Zambia.**
- 188 Adapted from Chirayath and others (2005) in World Bank World Development Report 2006, p.160.
- 189 Ibid. Adapted from Chirayath and others (2005) in World Bank World Development Report 2006, p.160.
- 190 **Making the Law Work for Everyone**, Vol. 2, p.45.
- 191 DFID- Review of how East Africa has worked with IJS, p.24.
- 192 See the Local Council Court Act 2006.
- 193 Minneh Kane **Reassessing Customary Law Systems as Vehicle for Providing Equitable access to Justice for the Poor** 2005. LCCs were set up to provide “grassroots” justice as part of the struggle against a government that was seen as oppressive. They were an attempt to de-formalise or ‘popularise’ the administration of justice and were hailed as both an attempt to bring justice closer to the people and to re-connect people to their customary traditions.
- 194 UNDP- **Doing Justice**, p.26 Since LCC courts are presided over by LCC Councilors who also play local government roles, there has been extensive discussion on whether they should be under the supervision of the Ministry of Local Government or the judiciary. Calls to have them placed under the judiciary have come largely from the legal profession who view the combining of administrative and judicial functions as out of step with democratic practice. The compromise appears to be that both the judiciary and the Ministry of Local Government exercise joint supervision.
- 195 See the Local Council Court Act 2006.
- 196 awards exceeding five thousand shillings are referred to the Magistrates Courts for the purposes of execution of the order.
- 197 See the Local Council Court Act 2006.
- 198 See the Local Council Court Act 2006.
- 199 Supra Minneh Kane- **Reassessing Customary Law Systems as Vehicle for Providing Equitable access to Justice for the Poor** 2005.
- 200 Lynn S. Khadiagala, **Justice and Power in the Adjudication of Women’s Property Rights in Uganda**, Africa Today, Vol.49, No. 2, Women, Language and Law in Africa 2 (Summer, 2002) p. 101- 121.
- 201 Legitimacy is normally a result of acceptance by the society or a product of the law: see- Thomas Sikor and Christian Lund, Access and Property: A Question of Power and Authority, Development and Change 40(1) p. 1-22 (2009).
- 202 See Minneh Kane, Joe Oloka-Onyango and Tejan-Cole, **Reassessing Law Systems As a Vehicle for Providing Equitable Access to Justice for the Poor**, Paper presented at the World Bank Conference in Arusha Tanzania “New Frontiers of Social Policy”, December, 2005, p.12-15.
- 203 Minneh Kane, **Reassessing Customary Law Systems as Vehicle for Providing**

**Equitable access to Justice for the Poor**  
2005.

- 204 Lynn S. Khadiagala, **Justice and Power in the Adjudication of Women's Property Rights in Uganda**, *Africa Today*, Vol.49, No. 2, Women, Language and Law in Africa 2 (Summer, 2002) p. 101- 121.

#### GENERAL CONCLUSIONS AND RECOMMENDATIONS

- 205 **Making the Law Work for Everyone**, Vol. 2, p.iii.
- 206 Section 12 of the Malawi Constitution (1994) provides in part as follows: "This Constitution is founded upon the following underlying principles:
- (i) All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
  - (ii) All persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
  - (iii) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice." (emphasis added).

- 207 Malawi AfriMap Report- p.31 The set of recommendations outlined in this Report are motivated by the recent UNDP, UNICEF and UNIFEM sponsored: **Study on Informal Justice Systems- Access to Justice and Human Rights**, undertaken by the Danish Institute for Human Rights (DIHR) ( forthcoming).
- 208 Open Society Foundation: **Malawi Justice Sector and the Rule of Law discussion Paper – supra note 63 p.31.**









