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## The Survival of Malawi's Enfeebled Democracy

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In 1994 Malawians went to the polls for the first multiparty elections in 30 years. The results brought an end to the rule of aging “President for Life” Hastings Kamuzu Banda, who had governed Malawi for three decades under a ruthless authoritarian state. Peacefully, Banda and his Malawi Congress Party exited the statehouse as Bakili Muluzi, leader of the United Democratic Front, became the president of the new democracy.

Seven years later, democracy survives in Malawi. Elections have become a regular feature, and basic civil and political freedoms remain intact. What is striking about Malawian politics is not only that democratic institutions have persevered since 1994, but that they have done so in a setting where the possibilities for their survival appear tenuous. Certain supportive elements, such as a deeply rooted civil society and stable economy, are absent in Malawi. More immediately, authoritarian impulses from the state and an undercurrent of violent and highly contentious politics haunt the present dispensation. The prospects for a gradual dismantling of democracy or breakdown of civil order appear quite real.

While many factors have shaped the progress of Malawi's democracy, a primary reason for its survival is the behavior of central political elites. Specifically, despite occasional dysfunction and improprieties in the operation of electoral institutions, and despite the risks posed by a system of institutionalized competition, the key players in Malawian politics have avoided strategies that might fully destabilize the system. In this sense, understanding why democracy endures in Malawi

demands attention to why both governing and opposition elites have opted to leave the system intact. Of central importance in this regard is how Malawi's judicial institutions have shaped the choices and behaviors of these key players.

### SITUATING MALAWI'S DEMOCRACY

Malawi presents dual, though not necessarily contradictory, images of the health of its democratic experiment. Clearly, the accomplishments of the new system should not be understated. The political and civil freedom rankings provided by Freedom House (<http://www.freedomhouse.org>) offer an initial benchmark on the progress of democracy. With exception of Namibia and South Africa, Malawi's freedom rankings are equal to or better than those of any country in southern or eastern Africa that initiated political reforms during the late 1980s and early 1990s. Moreover, unlike several other recent African reformers, notably Zambia, Niger, and Guinea-Bissau, Malawi has not witnessed significant deteriorations of civil and political freedoms.

Two national elections, dozens of parliamentary by-elections, and local elections have been effectively conducted since the one-party system collapsed in 1993. The vigor with which the opposition has contested these elections suggests that the outcomes are not predetermined. Some degree of checks and balances has become a reality at the state level. This is especially evident in court challenges to executive actions. High Court decisions have repudiated presidential orders dismissing municipal officials, nullified executive efforts to handpick traditional authorities, and even given jail terms to governing party municipal officials who have ignored court injunctions. Moreover, the national ombudsman, a constitutional office granted considerable legal

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authority to investigate issues of “maladministration” and injustice, has become active in recent years—especially in openly criticizing and challenging the legality of government efforts to dismiss state employees on political grounds.

Of equal significance are conditions in society about the health of the emerging democracy. Although the initial explosion of independent newspapers has tapered off since the dawning of democracy, three major newspapers continue to contribute to spirited public debate and encourage critical perspectives on the actions of government officials. In addition, a small but vocal civil society has also emerged. With the exception of Malawi's churches, however, most civil society organizations have little or no presence outside major urban areas. Yet even the “briefcase” civil society in Malawi has contributed to the new democracy, as NGOs have voiced important challenges against questionable government actions. Moreover, Malawi's churches, leading protagonists in the struggle against Banda's one-party regime, have not wholly retreated from the political sphere. To the contrary, church leaders have been primary contributors to national political discourse—raising important issues such as the spread of corruption and the fractious behavior of political elites. They have also intervened to foster discussions among opposing elites whose disagreements have aggravated political tension in the country. Indeed, clergy interventions helped end an opposition boycott of parliament that impeded the government's operation for more than six months in 1996–1997.

Along with the fact that political instability has been neither severe nor sustained, such features lead some to suggest that democracy is not only working, but also taking deeper root. Yet the image of sure-footed democratic progress must be placed against the picture that emerges from other dimensions of Malawian politics, a picture that presents a more disturbing view and that suggests the prospects for democratic stability and longevity are in question.

One can begin with the authoritarian impulses that have emerged in recent years. Apparent press freedom notwithstanding, opposition papers have encountered real difficulties at the hands of the state. Journalists reporting negative stories about government officials have been harassed and jailed, and ruling-party thugs have attacked the headquarters of opposition papers. In addition, bans on state advertising in “opposition” papers in 1998 cut the primary revenue source of many emerging papers, leaving only an established few to represent the print media (government advertisements in opposition

papers have reappeared, but most of the advertising still goes to the progovernment daily, *The Nation*). The status of NGOs has also come into question as President Bakili Muluzi has chastised and threatened unspecified action against those who “meddled in politics” instead of serving the people. Attacks on the neutrality of the civil service have occurred, as the government has openly stated that it will “chase” opposition sympathizers from the bureaucracy.

Of even greater significance are developments that have limited the possibility for effective political contestation in Malawi. Without resorting to openly authoritarian practices, the Muluzi government has tilted the playing field in its favor and crippled the capacity of other players to effectively compete. The result is not only the undermining of an important principle of any democratic system, but also the heightening of political tension in the country to such a degree that both local and international observers fear for Malawi's overall stability.

### CONSTRAINTS ON CONTESTATION

The limited possibilities for contestation can be understood on a number of levels, beginning with the power of the government—specifically President Muluzi and the United Democratic Front—relative to other political actors. Much of this power lies in the economic realm. Since taking power, the UDF, and Muluzi in particular, have aggrandized economic resources and in turn used them to consolidate and perpetuate their hold on power. The mechanisms are varied. Corruption, an increasingly visible problem since Malawi's transition to democracy, offers one avenue for those in government. Beyond this, most individuals in government are also active businesspeople, and it is they who have been some of the primary beneficiaries of lucrative government contracts. The president himself is alleged to have his own properties leased to government ministries. A report from a local NGO prepared for the United States Agency for International Development in 1997 claimed that President Muluzi's own company controlled 60 percent of the country's lucrative sugar-distribution business. Other distributors received quotas on the basis of political connections. Finally, as head of state, Muluzi has been able to garner resources from international actors. Of particular interest are Muluzi's connections to Arab countries—notably Libya—who, unlike Western donors, allow the president much greater discretion in distributing donations.

Control over important streams of income offers the UDF and the president the ability to dispense

patronage, a critical resource during periods of electoral contestation. During campaigns, churches receive donations of building materials, hospitals are presented gifts of sugar, and communities are promised health clinics. Several opposition candidates have allegedly been “bought” by the government as well, withdrawing their candidacies shortly before polling dates. Moreover, the effective management of such economic resources and opportunities by the president enabled the development of, until recently, a relatively cohesive party organization.

The growing power of the UDF and President Muluzi has been accompanied by the weakening of the primary opposition power in the country, the former ruling Malawi Congress Party (MCP). Much of this weakening is the result of actions of the government. Since the first year of the Muluzi government, key leaders in the party have been charged with various offenses. These range from crimes allegedly committed when they were in office and plots to assassinate ministers in the present era to charges of slandering the president during campaign rallies. Although virtually none of the leaders has been prosecuted, the charges have distracted the MCP leadership and drained important financial resources from the party. Of even greater importance has been the effective undermining of the economic basis of the party. Legislation stripped the party leadership in 1997 of the Press Trust, the giant economic conglomerate, estimated to control 40 to 60 percent of the formal economy. In addition, government-supported court cases have challenged, and suspended distribution of, the contents of Kamuzu Banda’s will, which specified that key MCP insiders should obtain the lion’s share of his assets. Given the heavy-handed and exclusive manner in which these assets were obtained during the Banda years, the state efforts are justified. But the MCP’s resulting economic difficulties have made it difficult for the party to hold national conventions, make rent payments, and pay party workers.

Economic factors also account for the inability of the MCP to retain members and cohesion. For example, businesspeople associated with the party have been punished with the loss of government contracts. As one informant put it, “to be in the opposition, you need to be rich, but not in business; nobody will associate with you on an economic level if you are in the opposition.” This, in the view

of some, helps account for the number of defections from the MCP by parliament members who operate side businesses. Moreover, ongoing leadership squabbles and more recent splits in the MCP are linked to disputes over access to party assets, which are critical for party leaders to maintain their own patronage networks and political followings.

The possibilities for effective political contestation are also curtailed by weaknesses and biases in the electoral process itself. Although complaints about the fairness and efficacy of the electoral processes have been voiced regarding parliamentary by-elections, the 1999 presidential and parliamentary elections represent perhaps the most telling case. In the lead-up to the polls, the MCP undertook an alliance with the lesser opposition party in the country, the Alliance for Democracy (AFORD), led by Chakufwa Chihana. Numerically less powerful but rooted in the ethnoregional identity of northern Malawi, AFORD

has remained an important force in Malawian politics even if its hope of capturing control of the state has not

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been realized. However, the alliance between the MCP and AFORD posed a challenge for Muluzi and the UDF. In the 1994 polls, the presidential candidates of the two parties claimed a combined 52 percent of the electorate, suggesting the possibility of displacing Muluzi in 1999.

Perhaps contributing to its ultimate loss in the polls, the opposition encountered a tilted playing field throughout the campaign. Some of its most significant problems emerged from the government-appointed electoral commission. Suspicions about the impartiality of the commission heightened in August 1998 when President Muluzi replaced the board of the commission with a new set of members—only eight months before the presidential and parliamentary elections were to be conducted. Subsequent actions by the commission’s leadership confirmed these fears. Shortly after the MCP–AFORD alliance was announced, the head of the commission claimed that joint tickets were illegal and would not be recognized. Although subsequently overturned by the courts, the decision clearly frustrated the initial efforts of the opposition alliance to mount an effective campaign. Beyond this, the commission clearly mismanaged the registration process before the polls. Whether this was by design or the result of incompetence remains unanswered. Regardless, the registration mishaps clearly worked against the

interests of the opposition. Only weeks before the polling date, more than 100 voter-registration centers reported that they lacked materials to carry out the registration process. Opposition parties and civic groups accused the commission of failing to conduct its operations transparently and pointed to biases in the distribution of registration materials. Subsequent pressure by these groups as well as international donors forced the electoral commission to extend the registration period by three weeks. Despite the extension, when registration centers were closed, it was estimated that up to 160,000 eligible voters in the north of the country had not yet registered.

As had been the case in many by-elections in the preceding years, highly contentious rhetoric and violence marred the campaign period, despite pledges by the parties to preserve civility. Partisan supporters clashed repeatedly, and one pro-opposition protester was allegedly shot by police during the president's visit to northern Malawi. Although the May 1999 polls went relatively smoothly, the announcement of Muluzi and the UDF as winners heightened political tension in the country. The opposition immediately pointed to irregularities and intimidation during the polling process. In the north, protesters took to the streets, calling for army intervention and ransacking a number of mosques—a reflection of hostility toward the religion of President Muluzi. Clashes between partisan supporters led to the deaths of at least five people, and more than 50 families identified as UDF supporters reportedly fled Mzuzu, the capital of the northern region. While the grassroots outbursts dissipated with modest state intervention, political tension remained high. As the opposition challenged the UDF victory in court, bellicose rhetoric came to typify the political discourse. Echoing allegations made during the campaign, the government claimed that AFORD and the MCP were preparing to “go to the bush,” while the opposition stated that the UDF had retained Libyan assassins to help eliminate opposition leaders.

The success and staying power of Malawi's democracy is thus in question. The recent operation of the system suggests that it may not offer the possibility for effective and fair political contestation. Moreover, the political tension and instability that has emerged raises concerns about the possibility of a return to authoritarian rule or, worse still, a breakdown in civil peace.

#### POLITICAL ELITES AND DEMOCRATIC SURVIVAL

Despite the climate of instability and tension, democracy continues to survive in Malawi. One

important reason is that key players in the opposition and the government have not adopted strategies that might lead to the dismantling of the democratic system. Consider the behavior of the opposition. Although it has been harassed and weakened by the state, it has not resorted to political violence or undertaken efforts to delegitimize the democratic machinery. Grassroots supporters called for military intervention, but opposition leaders did not.

So too the government has opted to leave the democratic machinery intact, even though it has tried to manipulate the political terrain to its advantage. Attacks on the press notwithstanding, basic press freedom has survived. Very few formal or legal constraints have been placed on opposition campaigning activities. And despite the prospect of losing the 1999 election, the government neither foreclosed legal contestation nor disrupted the electoral machinery to such a point as to make its own victory a foregone conclusion.

The critical question that emerges is why elites in Malawi have avoided strategies that might destabilize the democracy. Why have they, in effect, opted to leave the democratic system intact?

The basic factor shaping the behavior of opposition elites is the relatively limited capacity to pursue political strategies that might disrupt the democratic process. The horizon of strategic alternatives is relatively constrained. Owing partially to their financial enfeeblement at the hands of the state, MCP elites do not have access to income streams that can be used to challenge the political status quo through extralegal tactics.

Complicating this situation is the considerable distrust among the MCP elite themselves, especially regarding use of party funds. Their primary concern, however, is keeping such monies from their opponents within the MCP who claim leadership positions in the party. Their resulting strategy has been to deny access to such funds and “play poor.” The prospects for disruption from AFORD, the other opposition group in the country, are also limited. Although AFORD leader Chakufwa Chihana has alluded to the possibility of armed conflict and even the secession of the north, his resource base affords few means to carry out such threats.

#### THE JUDICIAL OPTION

Since the transition to multiparty politics, the judiciary has emerged as a primary locus of political activity, deciding numerous cases relevant to the political and personal interests of the opposition. Although subject to charges of bias and occasional

incompetence, the judiciary has nonetheless operated with a significant level of probity. This has provided the opposition with a viable arena to pursue and preserve its interests. Absent such possibilities, the prospects that it would employ more disruptive tactics would likely increase.

Understanding the important role of the judiciary demands reference to Malawian history. Like other patrimonial regimes in postcolonial Africa, that of Kamuzu Banda effectively downgraded the importance of institutions in the exercise of power. Banda was unique, however, in his eagerness to retain the trappings of a modern “civilized” state. This desire shaped his approach to other institutions inherited from the colonial era. In the late 1960s it became apparent that the court system established by the British could effectively interfere with the prerogatives and objectives of his government. To deal with this problem, Banda created a system of “traditional courts” that could be used to deal with criminal (and political) cases. In turn, the formal courts were relegated the task of handling civil and lesser criminal cases.

The subsequent character of the judiciary under Banda reflected this development. In one respect the courts were clearly subjects of and sometimes accomplices to a highly repressive order. Fearing for their own safety, judges remained wholly subservient to Banda and judicial decisions avoided any line of reasoning that might upset the “Life-President.” Moreover, magistrates appointed to serve with chiefs on traditional courts were compelled to write judgments in cases against Banda’s political opponents. At the same time, the formal courts were never used as primary instruments of repression. Their scope of authority was specifically limited to a narrow set of legal issues. In this context, an important degree of professionalism characterized their operation. Education and bar experience, for example, remained important (though certainly not the only) bases for judicial appointments. Moreover, a legal culture emerged wherein highly formalistic approaches to judicial reasoning predominated. In their marginalized role, judges adopted strict methods of interpretation guided by training in common law techniques, albeit consistent with the survival strategies necessary during the Banda regime.

The transition to democracy catapulted the courts to a much more visible and active role in Malawian politics. The new constitution enacted in 1995 empowered the High Court and Supreme Court of Appeal of the country to “review any law, and any action or decision of the Government, for conformity

with the Constitution.” Rights to litigate in the courts offer fairly extensive grounds for access to the judicial system by those whose rights have been threatened or infringed. But while the political role of the courts has changed considerably, the formalistic approaches that developed during the Banda era have endured. Well-placed observers of the judiciary maintain that the same kind of jurisprudence prevails. Indeed, this is one of the major criticisms of the courts. Rather than uphold the philosophical tenets of liberal democracy, judges’ methods of interpretation tend to be rule-driven and text-bound. Yet in taking this approach, the courts indicate that cases will be adjudicated on their legal merits, not on the basis of the political affiliations of the petitioners.

An aura of neutrality is reinforced by certain features of the Malawian system. First, many judges appointed under Banda remain on the bench. Appointment powers lie with the Judicial Service Commission, a statutory body. In principle the president has considerable control over the commission’s composition and can reject its choices for justices. But as many observers noted, the talent pool in Malawi is small. This limits the possibility of politicized appointments to the bench. The president may have the power to remove judges, but this is constrained by constitutional provisions that parliament must endorse the action. To date, no judge has been removed, and legal insiders claim that the president has not formally politicized the judiciary.

The independence of the judiciary or the suggestion that its neutrality is untainted should not be overstated. A fairly common allegation that surfaces in Malawi is that patronage connects the Supreme Court to the president, with judges receiving sugar-marketing quotas and lucrative positions on statutory commissions.

Still, the record suggests that the opposition can preserve and advance its political and personal interests through the judiciary. This first became evident during Mwanza trial of 1995, when key MCP insiders, including Banda himself, were tried on charges of murdering four government officials in the early 1980s. During the case, important court rulings on evidence and testimony favored the accused, greatly enhancing their prospects for acquittal, which was the ultimate outcome of the trial. Since that case, efforts to press opposition elites on criminal charges have met with limited success. And attempts to prosecute MCP leaders for embezzlement of state funds were dropped for lack of evidence in July 1997. The courts also suspended investigations of opposition journalists charged

with inciting disorder through their reporting of antigovernment rallies after the 1999 elections.

Court decisions have also enhanced prospects of opposition success in the political process. Since 1996 the High Court has granted several injunctions to delay the conducting of parliamentary by-elections after the opposition challenged the fairness of registration processes. In the run-up to the 1999 elections, the High Court ultimately overturned the electoral commission decision to disallow the joint MCP-AFORD candidacy for the executive. When the registration process was extended, the High Court forbade the commission from holding elections on the originally set date, effectively requiring an extension of the campaign period. Subsequent opposition challenges to the election results have been supported by the courts, which have ordered the electoral commission to release all election material for inspection by opposition lawyers.

Of course, the courts have also acted and rendered decisions contrary to the opposition's interests, leading to accusations of bias and political favoritism. But at a minimum, the courts have protected opposition members from government harassment and have offered them an arena in which they at least can envision prevailing in political contests. In turn, one of the opposition's primary strategies has been to operate through the judicial system. Opposition leaders have turned to the courts for injunctions to halt government actions antithetical to their interests—whether state efforts to go ahead with poorly managed by-elections, extralegal state attempts to block opposition rallies, or plans to strip assets from MCP elites. They have also used the courts to challenge the results of electoral contests that they feel were rigged or inappropriately conducted. Indeed, while the results of the 1999 elections generated violent outbursts by opposition supporters at the grassroots, party leaders immediately took their case to the courts, investing time and money (to the point of hiring British attorneys) in the judicial process.

The avoidance of disruptive strategies and investment in the judicial process clearly reflects the reality that the opposition has few strategic alternatives, given their resource base and power relative to the government. Indeed, some observers in Malawi suggest that the opposition actually has little faith in the neutrality and integrity of the system, much less in outcomes in its favor. Yet even with this consideration in mind, it is difficult to suggest that the judiciary has not contributed to democratic survival in Malawi; the political climate might be much more

volatile if the judicial route were not available to the opposition. Without their successes in the courts, Malawi's opposition elites could have been backed into a corner by the Muluzi regime. Acts of desperation—appeals to the military or extralegal behavior—would likely emerge as the “only option.” In this respect, the judicial system has shaped opposition strategies in a manner that helps keep the democratic game intact.

## MALAWI IN THE BROADER PICTURE

Malawi's encounter with democracy offers some potential clues that might guide efforts to understand the trajectories of different African countries. First, the Malawi case suggests that the nature of the economic resources available to governing and opposition elites can have an impact on elite strategies to accept or jettison democratic processes. If opposition elites have access to income streams that enable the acquisition of disruptive resources, the prospects for democratic survival may diminish. In effect, such resources present the option of engaging in extralegal tactics to pursue political interests. Even if such a strategy is never implemented, the mere suspicion that it is possible can provide a pretext for the government to preemptively curtail civic and political freedoms. Resources affect government strategies as well. If governing elites have access to considerable resources, this may allow them to avoid international pressures to keep democratic institutions intact. In Malawi's case, neither condition obtains, which narrows the realm of strategic choices available to elites.

Second, Malawi reminds us that institutions matter. Institutions can distribute protection and political opportunities to actors who otherwise might become disloyal opponents of democracy. In Malawi the judiciary has offered opposition elites the possibility of preserving and advancing their interests through legal means. Although this represents an imperfect option, it nonetheless may present a surer payout than the benefits that might be garnered by disruptive tactics. Finally, Malawi suggests that the legacies of authoritarian states are important for contemporary Africa, especially the extent to which authoritarians bequeath viable legal and administrative structures to their democratic inheritors. In their very restricted role under the Banda regime, the courts retained an important level of operational efficacy and developed a strict interpretive approach to judicial reasoning. In the post-Banda era, these institutional characteristics have contributed to the overall stability of the democratic system. ■