

Malawi

Justice Sector and the Rule of Law

A DISCUSSION PAPER

AfriMAP and Open Society Initiative for Southern Africa

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Introduction

This discussion paper is based on the main findings and recommendations of a comprehensive report on the justice sector and rule of law in Malawi commissioned by the Open Society Initiative for Southern Africa (OSISA) and the Open Society Foundation's Africa Governance Monitoring and Advocacy Project (AfriMAP) in 2005. The paper is not a summary of the main report, although it draws from it the key challenges that face the promotion of the rule of law and justice in Malawi, based on the expert and public opinion that emerged in the course of the research for the main report. The paper is intended to be used as the principal tool in an advocacy initiative led by the Law Faculty of the University of Malawi, OSISA and AfriMAP, working with a wide range of stakeholders involved in the promotion of justice and the rule of law in Malawi.

The paper is also informed by certain basic characteristics of the justice sector in Malawi, including its purported philosophical connection to international values and principles; the limitations of the autonomy and accountability of institutions created by a state which historically has been highly centralised; the failure of the crime and punishment regime to modernise and cope with contemporary social and economic challenges; and the limited responsiveness of the formal justice system to the needs of the majority of the population, particularly those that are vulnerable and marginalised.

The paper makes recommendations for action which generally fall into three categories: legal and policy reforms; institutional restructuring; and changes in administrative and management practices. The recommendations vary in specificity and have not been prioritised. The latter 'omission' is deliberate in order to promote genuine discussion among practitioners who are better qualified to determine the order of priority of recommendations given their experience of what is practicable in the social, economic and political context. In any case, the list of recommendations in this paper cannot be regarded as exhaustive and remains open to informed debate and revision.

1. International human rights treaties

A. Gaps in legal tools for parliamentary domestication

The 1994 Constitution currently in force declares that customary international law which is consistent with the Constitution is an integral part of the law of Malawi, as are treaties which Parliament incorporates into domestic law. Until the early 1990s, Malawi's foreign policy was isolationist, its human rights record was poor, and the state was party to very few human rights treaties. Since the transition to a more liberal political regime in the early 1990s, the government has ratified most major global, African and regional human rights treaties, including many that relate to the justice sector and the promotion of the rule of law. The government, however, has failed to ratify several treaties that it has signed—including, most importantly, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

As is the case in most Commonwealth countries, treaties do not confer rights that can be enforced in domestic courts unless they are domesticated through a ratification process. The Constitution provides that 'any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement' (Section 211(1)). The Law Commission has observed that the wording of the section is 'somewhat confused' and has proposed that section 211(1) should be re-written to read as follows: 'Any international agreement entered into after the commencement of this Constitution shall be subject to ratification by an Act of Parliament and shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.' This recommendation has not yet been translated into a constitutional amendment.

Neither the Constitution nor other legislation provides guidance on the form that the legislation for domesticating treaties should take. Thus, in practice, Parliament has the discretion to choose whether to reproduce the content of treaties in their incorporating acts, to incorporate by reference to the treaties, or to incorporate by implication, without direct reference to the treaty in question. This has resulted in a lack of uniformity in Parliament's approach to domestication and creates uncertainty as to whether particular international standards have been incorporated at all. There should be clear guidance on the matter by amending the Constitution so that it

either sets out clearly what form should be taken by legislation that domesticates the state's treaty obligations or—like the Namibian constitution, for example—provides that any international agreement binding upon Malawi shall automatically form part of the law of Malawi.

B. The role of the Law Commission and the judiciary

The Constitution establishes the Law Commission as the institution responsible for harmonising national legislation with human rights standards. Section 135 of the Constitution mandates the commission to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law. The Law Commission makes its recommendations to the Minister of Justice and Constitutional Affairs who may then introduce them as proposed legislation in Parliament. The commission has made many recommendations for the reform of specific laws but most have not been acted upon by the executive. The situation is similar with regard to recommendations made by international bodies responsible for monitoring compliance with international treaties.

There are several possible reasons why proposals for law reform submitted by the Law Commission have not been implemented promptly or at all. 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. Nevertheless, it is important that the outstanding proposals made by the Law Commission be given urgent attention by both the executive and the legislature; apparently abstract legal reforms can be just as important to national development objectives as more immediately populist measures. An amendment to the Constitution should require the executive to present to Parliament a bill to implement recommendations for law reform submitted by the Law Commission within one year of receiving them. The Constitution should further require the Law Commission to submit to Parliament copies of its submission to the Minister of Justice so as to enable members of Parliament to determine the correspondence between the bill presented by the executive and the original recommendations by the Law Commission. In the meantime, the Law Commission should develop an advocacy strategy aimed at increasing the prospects of its recommendations being adopted by the cabinet and passed into legislation by Parliament.

Courts can also play an important role in aligning national legislation to human rights standards that are guaranteed by international law and the Constitution. Section 5 of the Constitution gives the courts the power to declare any legislation invalid to the extent of its inconsistency with the Constitution. But even where the courts take up this power, the executive has not always taken action to amend the law or change the invalid practice. For example, in the 1995 case of *Director of Public Prosecutions v Hastings Kamuzu Banda et al.*, the High Court declared sections 313 and 314 of the Criminal Procedure and Evidence Code, which oblige an accused person in a criminal trial to enter a defence and give evidence, to be invalid because they violate the right of every person 'to be presumed innocent and to remain silent during plea proceedings or trial and

not to testify during trial.’ The executive has taken no action to amend the Criminal Procedure and Evidence Code accordingly, and the status of these sections is unclear. In practice, they are still treated as valid in other courts. This is partly because of the poor publication of court judgments generally; as indicated later in this paper, law reporting is out of date and copies of unreported judgments are not always readily available, particularly to low-level justice sector officials who are often responsible for applying and enforcing the law on the ground. The executive should urgently introduce legislation to give effect to the judgment of the High Court in the *Banda* case and others where the courts have ruled that laws are unconstitutional.

c. Non-performance of treaty-reporting obligations

Malawi has largely failed to discharge its reporting obligations under the human rights treaties to which it is a party. As of 2003, Malawi had submitted only some of the reports due under the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, and none of the reports due under the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination. In June 2004, the government made some effort to redress the situation by submitting a report which combined the second, third, fourth and fifth periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women; a shadow report was prepared by the Women and Law in Southern Africa Research Trust (Malawi Chapter), the Centre For Human Rights and Rehabilitation and the National Business Women’s Association. The reports were considered by the Committee on the Elimination of Discrimination against Women during its 35th session (15 May to 2 June 2006). The committee’s recommendations included that the government should ‘set a clear time frame for the adoption of the revised Citizenship Act, Immigration Act and the Wills and Inheritance Act and for the new Marriage, Divorce and Family Relations Bill, designed to eliminate discrimination against women.’

According to the Malawi Human Rights Commission, the government has attributed its current failure to fulfil its treaty reporting obligations to the lack of human and material resources to fund the process of preparing the reports. The problem of lack of resources could be addressed by making specific provision for the reporting process in the budget of the relevant government ministries, including those of Justice and Constitutional Affairs and Foreign Affairs and International Cooperation. Development partners could also be approached to provide relevant financial and technical assistance as part of their aid programmes on governance. The preparation of these reports should not be seen as an isolated and irrelevant task, but as part of the government’s strategic planning process, identifying necessary measures to bring domestic law and practice into compliance with international obligations.

The government—through the Ministries of Justice and Constitutional Affairs and Foreign Affairs and International Cooperation, in consultation with other relevant actors such as the Inter-ministerial Committee on Human Rights and Democracy, the Malawi Human Rights Commission, the United Nations High Commissioner for Human Rights and civil society

organisations—should develop an action plan aimed at clearing the backlog of state party reports and instituting a strategy for ensuring that future reports are submitted on time. The strategy should also include a time-bound plan, with clearly assigned responsibilities, for implementing the recommendations made by the bodies to which the reports are submitted. The first set of recommendations that could form the subject of such a plan are those made in 2006 by the United Nations Committee on the Elimination of Discrimination against Women.

2. Government respect for the law

A. Executive disobedience of court orders

In recent years, government respect for the Constitution and legislation, regulations and internal procedures has been inconsistent. On the one hand, the trend since the new government came into office in 2004 is increased compliance with the Constitution and legislation, regulations and procedures in the area of fiscal management. Most of the national budget of Malawi is financed by external grants and loans and depends on the government fulfilling various conditions, particularly in the area of financial accounting and reporting. The government has thus introduced new laws to promote financial accountability (the Public Audit Act, the Public Finance Management Act, and the Public Procurement Act), and generally improved its compliance with the rules they establish.

In contrast, government obedience to the law is more inconsistent in the areas of social and political governance. Such disobedience is displayed most vividly in relation to court orders. In 2002, an investigation by the International Bar Association noted government disregard for court orders considered to be politically inconvenient. Three examples vindicate that assessment. In 2001, senior police officers and the mayor of the city of Blantyre disregarded a High Court order prohibiting the government and its agencies from interfering with a public rally organised by the opposition National Democratic Alliance. In June 2003, the government decided to deport to the United States five persons suspected of links with terrorism. The five men, suspected of channelling money to terrorist groups, were arrested by American and Malawian intelligence agents on 22 June 2003. They appealed their deportation order to the High Court, which issued an injunction to block the deportation and ordered the government to either charge them with an offence within 48 hours or release them on bail. Instead, the government on 23 June 2003 decided to hand the suspects over to American officials, who flew them to an unknown destination out of the country. In February 2006, the government defied a court order that required it to restore the security and other entitlements of the vice-president after these had been withdrawn on the grounds that the vice-president had constructively resigned from his position.

In some cases, however, government fails to comply with the law due to lack of resources rather than merely to satisfy narrow political interests. An example of this is the failure of the government to provide adequate resources to ensure that all indigent litigants have access to

legal aid, as required by the Constitution, and that conditions of imprisonment are humane and consistent with the requirements of human rights standards. The government can minimise resource problems in the sector by reviewing its funding priorities based on a better appreciation of the importance of the sector to the strategic policy goals of the government. As the Malawi Economic Justice Network noted, the proposed 2004–2005 national budget allocated almost the same amount of funding to state residences and the Presidency as it had done to the Anti-Corruption Bureau, the Human Rights Commission and the Ministry of Justice and Constitutional Affairs headquarters combined. It is not possible for the government to argue that the funding shortfalls in the justice sector are due only to absolute financial constraints.

In the case of wilful disobedience of court orders, part of the solution might be to have a law that makes state officials personally liable for contempt of court if they instigate such disobedience or contribute to it. This would have a greater deterrent effect on public officials than contempt of court penalties paid by taxpayers through the public purse. Admittedly, personal liability for government decisions is difficult to enforce in many cases, because responsibility is often diffuse. Nevertheless, the few cases in which it would be possible to place responsibility for contempt of court with identifiable officials and make them personally liable might have the salutary effect of encouraging officials generally to perform their duties in a lawful manner.

B. Investigation of government breaches of the law

There are a number of mechanisms for investigating alleged breaches of the law by public officials and government ministries, departments and other agencies. The first is the internal inquiry, which involves the concerned governmental entity investigating the conduct of its own officials. Such internal investigations were promised by the police in 2001 and 2005, following allegations that police officers had violated the law that restricts the use of deadly force, leading to the illegal fatal shooting of civilians. Second, the Constitution empowers the president to institute commissions of inquiry into matters of public interest; the detailed content of this power is still set out in the 1914 Commissions of Inquiry Act. One such commission investigated the alleged violation by a minister of education of the law governing the invitation of tenders for the supply of school materials. The third mechanism for investigation of government violation of the law consists of independent agencies such as the constitutionally mandated Malawi Human Rights Commission and the Office of the Ombudsman.

Investigations of breaches of law by the government have been largely ineffective. Internal investigations are not transparent and there appear to be limited incentives to compel the governmental organs concerned to conclude the investigations and take appropriate follow-up action. Thus, the police have never published reports of the internal investigations into the 2001 and 2005 shootings and do not appear to have acted against any of the officers involved. Commissions of inquiry have also been quite limited in their impact, partly because their findings are submitted directly to the president, who is neither obliged to release them to the public, nor to respond publicly to their findings or recommendations. External investigations by independent agencies are constrained by jurisdictional limitations that apply to the various agencies. For example, the Malawi Human Rights Commission can only investigate governmental breaches of the law if they violate human rights, while the Office of the Ombudsman can only investigate cases involv-

ing injustices where judicial remedy is unavailable or impracticable. Both institutions are limited to making recommendations, and do not have enforcement powers.

The shortcomings in the existing mechanisms can be addressed by a number of legal reforms. One approach is to enact legislation which consolidates the legal regime for all investigations of alleged government abuses and illegality, other than those by independent institutions. Such legislation would govern both internal ministerial and departmental investigations as well as those by presidential commissions of inquiry. The recommended legislation must seek to make investigations more transparent and accountable, and establish a mechanism for the effective follow-up of recommendations. As a minimum, the law must require reports of investigations to be published as widely as possible, including by being presented to relevant parliamentary committees. The relevant ministries and departments should be required to submit periodic reports indicating the action taken to implement any recommendations made following investigations.

c. Abuse of presidential discretion in granting pardons

The Constitution empowers the president, in consultation with the Advisory Committee on the Granting of Pardons, to pardon convicted offenders, grant stays of execution of sentence and reduce or remit sentences. In practice, the president has mostly exercised the power of the pardon for the benefit of individuals or groups of individuals either on humanitarian grounds or as part of a celebration such as the president's official birthday or Christmas. But on at least two occasions in the recent past, civil society organisations have alleged that the president abused his discretion in granting pardons to particular prisoners in whom he had a personal interest. The pardoned prisoner in one of the cases had been convicted of attempting to corrupt a judge of the High Court, while in the other, the prisoner in question had been found guilty of sexually abusing children.

Abuse of the power of the presidential pardon undermines the integrity of the justice system by effectively negating the judicial power to sentence offenders. In order to minimise such abuse, the process through which pardons are granted should be made more transparent. Membership of the Advisory Committee on the Granting of Pardons should be made public and should consist of people who are representative of a wide cross-section of interests, including representatives of civil society groups whose work involves advocacy for the rights of victims of crime and those of prisoners. The committee should operate on the basis of published principles and rules, and should be required to submit regular reports to the chief justice and the Legal Affairs Committee of Parliament.

3. Management of the justice sector

A. Sector-wide strategy and planning

Many state institutions in the justice sector developed institutional strategic plans between 2000 and 2005, including the Police Service, the Ministry of Home Affairs and Internal Security, the Ministry of Justice and Constitutional Affairs, the judiciary, the Malawi Human Rights Commission and the Office of the Ombudsman. During the same period, strategic plans were also developed and adopted by institutions active in the sector, including the Malawi Law Society and the Body of Case Handling Institutions (grouping together public bodies handling individual cases related to the administration of justice, including the Judicial Service Commission, Human Rights Commission and Office of the Ombudsman). However, the government did not formally adopt a sector-wide strategic plan. Although the Malawi Safety, Security and Access to Justice (MASSAJ) programme funded by the British Department for International Development (DFID) has created a sector-wide institutional framework and drafted a 'national policy framework' as a proposed sector-wide plan, the government has not yet formally adopted it as such. Neither has the government developed any mechanism for coordinating development assistance in the sector through a sector wide approach (SWAp), as recommended in 2003 by DFID, the biggest donor to the sector.

The government should urgently adopt a sector-wide strategic plan and mechanism to coordinate funding, based on the national policy framework developed by the MASSAJ programme. It should also immediately create the conditions conducive to the implementation of a justice sector SWAp for donors, including the adoption of an annual sector expenditure programme and medium-term sectoral expenditure framework, strengthening government leadership of donor coordination and facilitating the establishment of an agreed framework among major donors for the provision of support to the sector.

Most important, the government must strengthen the justice sector's capacity to implement sector-wide strategies and plans. In order to achieve this, the government must ensure that the sector is provided with adequate and predictable resources; that public officials and senior civil servants sufficiently appreciate that their discretionary powers are restricted if sector-wide plans and strategies are implemented; and that there are properly qualified personnel to undertake effective and efficient monitoring and evaluation of the implementation of the strategies adopted.

Responsibility for facilitating the adoption of the national policy framework and the creation of conducive conditions for a SWAp must be taken by the National Council on Safety and Justice (NCSJ), which is the highest policy-making body for the MASSAJ programme, chaired by the vice-president. However, the NCSJ must itself be restructured in order for it to perform its functions efficiently. Its current membership of 30 must be reduced and the chair should be given to a non-political expert.

B. Resource gaps

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.

Underfunding of justice sector institutions means that they cannot obtain material resources as basic as texts of legislation, law reports, vehicles, typewriters, computers and stationery—or even adequately maintained buildings. Perhaps more important, it means that justice sector personnel lack training in both professional and administrative fields.

Government should take over the provision of resources to the sector from donors (even if funds for this purpose are still supplied by donors to the central government budget). In order to justify increased budgetary provision for the justice sector, it is important that civil society and other advocates articulate clearly the linkage between justice and the rule of law, on the one hand, and poverty reduction, on the other. Investment in justice and the rule of law is relevant to the immediate lived realities of the majority of people in Malawi, particularly the vulnerable and marginalised.

C. Record-keeping, research and publication of information

Record-keeping by justice sector institutions is generally poor. In the judiciary, for example, information is maintained manually in records that are labour intensive and, according to the Malawi Judiciary Development Programme, files, registers and case records are neither accurate nor secure, with the result that incorrect data is collected and management decisions and cases are delayed and/or made from an uninformed position. Only the police service appears to have an effective in-house system for collecting and analysing data about its operations, although the prisons department and the judiciary also appear to be moving in the same direction. Statistics are neither collected systematically by most institutions nor collated across the sector. The establishment of the Crime and Justice Statistics Division of the National Statistical Office is a welcome first step in addressing this problem. Given the potential of consolidated sector-wide

statistics as a planning resource and a means for accounting to the public, the government and its development partners must invest in building the capacity of individual institutions to collect and manage information relevant to their operations and to facilitate the implementation of the National Statistical Office plan to collect and publish statistics on crime, justice and governance.

Sector-wide data and statistics are valuable not only as a planning resource and a means for accounting to the public. They are also a critical resource for research that can enrich both policy-making and the training of current and future justice sector personnel and legal practitioners. At present, linkages among the various research institutions in the sector, such as the Faculty of Law of the University of Malawi; the Crime and Justice Statistics Division of the National Statistical Office; the Centre for Social Research; the Research and Planning Branch of the Police Service; the Research and Planning Unit of the Prisons Department and others, are tenuous if not nonexistent. These institutions should establish a network to facilitate sharing of information, development of common research strategies and programmes, and establishing joint publications. A first practical step could be a meeting among representatives of the institutions aimed at mapping out possible areas of cooperation, identifying institutional and other challenges to increased research cooperation, and drawing up a draft action plan to guide future cooperation.

The justice sector is also poor at producing and publishing important legal materials such as texts of legislation, law reports and expert commentary on the law and other aspects of the sector. In general, only the higher-ranking staff of the justice system have ready access to the full set of the *Laws of Malawi* or copies of the *Government Gazette*. In any case, it is not easy to be confident that available copies of legislation are up to date due to the irregularity of law revision by the Ministry of Justice, and the failure of most justice sector institutions and libraries to acquire copies of amendments in a timely and regular manner. Similar problems affect law reports, which are mostly outdated—decisions made as long ago as 1994 have not yet been published—and unaffordable for most people. There are also few textbooks that comment specifically on the application of Malawian law and there is only one law journal published in Malawi.

The Internet and other electronic resources have not so far been able to fill the gap in the provision of legal information, due to infrastructural and technical constraints which make the option expensive and inefficient. Nevertheless, this is an option that should be explored further. Of course, the most obvious recommendations to improve the situation related to the provision of legal information are that the government must invest in the institutions responsible for publishing legislation, such as the Ministry of Justice and the Government Printer; ensure distribution of information resources particularly to rural justice centres; and undertake an audit of relevant electronic resources and recommend measures for increasing their efficient, cost-effective and user-friendly application to the information production and dissemination needs of the sector.

4. Independence and accountability of courts, prosecution authorities and lawyers

A. Financial autonomy of courts

The Constitution provides for the courts to be ‘independent of the influence and direction of any other person or authority.’ In general, this principle has been respected in recent years. The most serious threat to judicial independence in recent times occurred in 2001 when the National Assembly (the lower and currently only house of Parliament) used its power under the Constitution to petition the president to request the removal from office three judges of the High Court—allegedly for incompetence and misconduct, but in fact clearly for political reasons. Thanks to public outcry, the petition was, however, unsuccessful. Freedom from such political interference could be greatly increased by providing the courts with increased financial autonomy. The judiciary has derived some revenue from its own sources since the Judicature Administration Act of 2000 gave it the right to retain some of the payments made into court. However, most funding still comes from executive subventions and the courts’ budget is centrally controlled by the Treasury. The financial autonomy of the judiciary is one of the factors that was identified by the Malawi Poverty Reduction Strategy Paper as being a critical element of governance.

The Malawi Judiciary Development Programme, 2003–2008, provides for the judiciary to secure financial independence by, among other things, establishing direct reporting by the chief justice to Parliament for all budgetary matters. The programme does not elaborate the form that direct reporting by the chief justice to Parliament would entail, though it is reasonable to expect that it would include submission of budgets and accounts to the relevant committees of Parliament for their scrutiny and approval. The judiciary should, as a matter of urgency, make a submission to the Ministry of Finance and the Budget Committee of Parliament which sets out in detail what specific measures and reforms in the budget formulation and implementation process it considers to be necessary to secure its financial autonomy.

B. Transparency and accountability of judicial appointments

The Constitution establishes safeguards for judicial independence by providing for most appointments to be made by the president on the recommendation of a Judicial Service Commission, and for the chief justice to be appointed by the president subject to confirmation by the National Assembly (section 111). The members of the Judicial Service Commission are appointed by the president and consist of the chief justice (who is the chair), the chairperson of the Civil Service Commission, an appeal justice, a legal practitioner and a magistrate. Occasionally, there have been concerns that some appointments have been made by the president without reference to the Judicial Services Commission. Since communications between the president and the Judicial Service Commission are not transparent, however, it is not possible to substantiate such allegations definitively. Similarly, it is unclear how eligibility for promotion within the judiciary is determined.

Judicial appointments must be made more transparent. The criteria on which judicial officials are appointed must be made public and those who fail to be appointed must be informed of the reasons for their failure. Similar rules must be introduced with regard to promotions. In addition, the process must become more accountable to the public through their democratically elected representatives. Membership of the Judicial Service Commission must be expanded to include representation from Parliament, at the very least. The appointment of judges of the High Court should be subjected to parliamentary confirmation (as for the chief justice) to further promote democratic accountability of the judiciary.

C. Enhancing operational independence of director of public prosecutions and Anti-Corruption Bureau

The law provides safeguards for the independence of the prosecution service. The service is headed by the director of public prosecutions (DPP), who is required by section 101(2) of the Constitution to be ‘independent of the direction or control of any other authority or person and in strict accordance with the law’ but subject to ‘the general or special directions’ of the attorney-general.

In practice, it has been alleged that the executive has occasionally interfered with the independence of the prosecution service by removing an incumbent DPP from office unconstitutionally and, in other cases, by directly interfering in prosecution decisions under the guise of directions made by the attorney-general. The office of the DPP itself has also been accused of undermining the independence of the Anti-Corruption Bureau, which is a quasi-autonomous state agency responsible for prosecuting corruption cases. Section 42(1) of the Corrupt Practices Act of 1995 requires the bureau to seek the consent of the DPP before commencing any prosecution. It has been alleged that in some cases, the office of the DPP has undermined the prosecutorial independence of the bureau by withholding consent for prosecution of cases on political grounds. The independence of the Anti-Corruption Bureau also appears to be open to interference by the president who is empowered by section 6(3) of the Corrupt Practices Act to suspend the director of the bureau if he or she ‘considers it desirable in the public interest so to do’ pending a decision whether the director should be removed from office. According to

section 6(2) of the act, the president can remove the director from office for inability to perform his or her functions or for misbehaviour, subject to confirmation by the Public Appointments Committee of Parliament.

In order to enhance the independence of the prosecution service, the DPP must not be subject to professional directions of the attorney-general. This necessitates the repeal of section 101(2) of the Constitution. Alternatively, the section must be amended to indicate that, notwithstanding any general policy directions by the attorney-general, the final decision on whether to commence or terminate any prosecution is a matter for the DPP and shall be subject only to judicial review. In relation to the Anti-Corruption Bureau, section 42(1) of the Corrupt Practices Act should be repealed so as to give the bureau the final decision in prosecution of corruption cases. Section 6(3) of the same act should require the president to base his or her decision to suspend the director of the bureau on more specific grounds than 'the public interest' and must lay down a time limit by which the director of the Anti-Corruption Bureau must either be removed from office in accordance with the act or have his or her suspension lifted.

D. Professional discipline of lawyers

The legal profession in Malawi is governed primarily by the Legal Education and Legal Practitioners Act of 1965, which empowers the High Court to suspend, strike off the roll or admonish any practitioner who breaches standards of professional conduct. The act also establishes the Malawi Law Society and its disciplinary committee, composed of the solicitor-general (a state legal officer) and two other members elected by the society. The disciplinary committee conducts inquiries into allegations of indiscipline made against practising lawyers and, in appropriate cases, may refer the matter to the attorney-general. The attorney-general may then apply to the High Court for an order suspending, striking off the roll or admonishing the lawyer in question. There are reported cases from the 1980s in which lawyers have been struck off the register of legal practitioners for stealing a client's money, misleading a client or charging excessive fees. More recently, the Law Society appears to have received a number of complaints against lawyers relating to allegations of overcharging for legal services, embezzlement of clients' money and failure to secure judgments that are satisfactory to the client. However, the system for enforcing discipline in the legal profession does not appear to be working effectively or efficiently, and few members of the public are aware of the disciplinary regime.

In order to improve the accountability of lawyers, the Malawi Law Society should publicise the mechanism through which members of the public may lodge complaints about the professional misconduct of lawyers. The effectiveness of the disciplinary mechanism must be made more effective and efficient, including by being allocated sufficient funding by the Law Society and the Office of the Solicitor-General. The Legal Education and Legal Practitioners Act should also be amended to give the disciplinary committee punitive powers, subject to appeal or review by the High Court. Subsidiary legislation outlining the procedure to guide the disciplinary committee should also be developed.

E. Professional independence of lawyers

In order for lawyers to effectively contribute to the promotion of justice and the rule of law, they must be able to conduct their professional duties free from harassment and intimidation. In practice, cases of physical or verbal harassment of lawyers in relation to the performance of their professional functions appear to be relatively rare.

A more common attack on the professional independence of lawyers is that which is perpetrated by the government against lawyers whom it perceives to be supporters or sympathisers of the opposition. In what the president of the Malawi Law Society termed ‘white-collar harassment’, for example, successive governments have been suspected of withdrawing their legal business from such lawyers as a way of penalising them. Similarly, perceived affiliation to the government in power for the time being appears to be a criterion for deciding which lawyers in private practice are hired to act on behalf of the government.

Although any government must retain the freedom to hire lawyers of its choice, it must be guided by principles of transparency and accountability in that exercise. One way of improving respect for these principles would be for the Ministry of Justice and Constitutional Affairs to maintain an open list of lawyers with a sound track record in respective areas of specialisation. Lawyers can then be selected in an open process that adheres to the transparent procedures that obtain in the procurement of goods and services under the legal framework set out in the Public Procurement Act of 2003. In order for the selection process to be fair, it is recommended that the Ministry of Justice and Constitutional Affairs should issue a public invitation to tender to all lawyers and not only to those on a pre-selected list.

5. Criminal justice

A. Harmonising penal statutes with human rights standards

Criminal conduct is defined by the 1929 Penal Code and other statutes enacted both prior to and after the current Constitution came into force. Some of the criminal offences created by the various penal statutes restrict the freedom of action of individuals to an extent inconsistent with constitutional and international human rights standards. This is the case mostly with provisions that create offences that relate to public order, public security and morality. Although it is accepted that there may be legitimate grounds on which to limit the enjoyment of human rights, the Constitution requires that limitations of human rights be reasonable, recognised by international human rights standards, necessary in an open and democratic society, and not such as to negate the essential content of a right. Among the most important provisions which require review are those creating offences of criminal libel and insulting the president.

The Law Commission should conduct a comprehensive review of penal statutes to determine whether the criminal offences they create are consistent with constitutional and international human rights standards. In this exercise, the commission should be guided by principle rather than populist rhetoric in which prejudice against non-conformism masquerades as public morality and so-called cultural values. The Law Commission should also resist bogus or exaggerated claims of national security interests. Coalitions of human rights non-governmental organisations such as the Malawi Human Rights Consultative Council should urge the Law Commission to undertake the harmonisation process urgently and to complement it with the appropriate advocacy programmes.

B. Legal framework for policing and prisons

The Constitution establishes the Malawi Police Service as an independent organ of the executive, responsible for providing protection of public safety and the rights of persons according to the law. Members of the police are required to exercise their powers as ‘impartial servants of the general public and the Government of the day’ (section 158). The Police Act of 1946 which still governs the day-to-day work of the police, came into force during the colonial period, and the Law Commission has proposed a modernised statute more consistent with democratic principles and human rights standards. However, the executive has not yet introduced the Law Commission’s

proposal to Parliament so that it can be enacted into law; this should be remedied urgently.

Prisons are governed primarily by the Constitution and the Prisons Act of 1955. The Constitution obliges the Chief Commissioner of Prisons to ensure ‘proper and efficient administration of penal institutions’ in the country in a manner which protects rights and takes into account ‘the direction of the courts’ in relation to people who are incarcerated. The Constitution also creates an Inspectorate of Prisons with responsibility to ‘monitor the conditions, administration and general functioning of penal institutions taking of due account of applicable international standards.’

The Prisons Act is palpably outdated. In 2002, the government commissioned the Prisons Service to prepare a draft Prisons Bill, aimed at bringing the legal framework for the prison regime in line with constitutional and international human rights standards. The executive has not yet presented the proposed bill and its subsidiary legislation to Parliament for enactment. The government must act to bring the draft into law, if the standards set by the Constitution are to have any practical meaning to prison officers and prison inmates.

C. Sentencing discretion

The 2004 National Crime Victimization Survey reported that 85.5 per cent of respondents interviewed for the survey indicated satisfaction with the way the courts sentence perpetrators of crime. 59.7 per cent of respondents expressed confidence that courts hand down sentences which fit the crime. Nevertheless, sentences imposed in cases involving gender-based violence have often been criticised, mainly by human rights NGOs, for being too lenient and failing to take full account of the gravity of gender-based violence. Moreover, the courts rarely take advantage of provisions of the Penal Code allowing them to order that, in addition to or in substitution for any punishment, a person convicted of a crime may be ordered to pay appropriate compensation to the victim. It is recommended that the judiciary, in consultation with stakeholders including civil society organisations, should develop and implement a clear, coherent and accessible sentencing policy which properly balances the human rights of offenders and victims; is aimed at enhancing consistency, compensation for victims, and use of non-custodial sentences in judicial practice; and has a mechanism for regular monitoring and evaluation.

The death penalty is still in force in Malawi. Section 16 of the 1994 Constitution guarantees every person the right to life *except* in cases in which a person has been sentenced to death by a court, and the Penal Code makes the death sentence mandatory in cases of murder and treason, and discretionary in cases of rape and some categories of robbery. In practice, no person sentenced to death has been executed since 1992. The fact that the moratorium has not generated any significant public opposition suggests that the climate may be right either to abolish the death penalty completely or, at the very least, to make the punishment discretionary in relation to the offences to which it applies. As a minimum, Parliament should amend the law so that the death penalty is never mandatory, but always subject to the discretion of judges.

D. Conditions of imprisonment and rehabilitation of offenders

According to official figures, the total number of people in prison on 26 September 2005 was 10 232. This represented a ratio of approximately 100 prisoners per 100 000 of the general popula-

tion. Just over 26 per cent were awaiting trial, while 3 per cent were aged under 18 years and classified as juveniles. In general, the prison population has been rising: it was just 4 685 in 1993.

Reporting in 2001, the African Commission on Human and Peoples' Rights Special Rapporteur on Prisons and Conditions of Detention in Africa condemned several aspects of prison conditions in Malawi, including the quality and quantity of food and the severe overcrowding. The position remains largely unchanged. For example, Zomba Central Prison has an estimated capacity of 900, but in September 2005 had a total population of almost 2 000; some prison cells are so overcrowded that when inmates sleep, they are so tightly packed on the floor that they can only turn *en masse*. Almost all inmates in Malawian police and prison cells also sleep on the bare floor without beds or mattresses.

There are a number of urgently needed reforms that can improve the situation. The government should introduce to Parliament for discussion and enactment the Police Bill and Prisons Bill proposed by the Law Commission and the Prison Service respectively. Second, the government should form a cross-departmental group consisting of representatives of the police, the judiciary and the prison service, charged with developing a strategy for reducing prison overcrowding. Such a strategy should include a 'practice direction' issued by the chief justice instructing judicial officers to exercise restraint in imposing custodial sentences in criminal cases, particularly in relatively minor offences or involving young offenders. Third, the legal regime for the granting of pardons and remissions must be revised in order to increase the remission of sentences which may be granted under the Prisons Act, particularly for those convicted of relatively minor offences. Fourth, the government must construct more prisons and police cells, extend existing ones and equip them with proper facilities to improve not only the prisoners' welfare but also the conditions in which they can meet visitors and consult with lawyers.

The current conditions of imprisonment are not conducive to the implementation of activities aimed at rehabilitation of offenders, even though the Prison Department has promoted and set up various activities to help prisoners acquire academic qualifications and technical skills. The success of the activities in preparing prisoners for reintegration into society appears to be limited because, among other things, they are not guided by any coherent strategy, nor properly targeted at providing offenders with usable or marketable skills. The rehabilitative programme also does not have the necessary mechanism to follow up offenders after their release, partly due to shortages of staff. The Prison Service should commission a critical review of the efficiency and effectiveness of the rehabilitative programme, and the possibility of establishing post-release follow up systems as a means of reducing re-offending in the long term. Such a review should involve not only the official correctional services establishment but also academic experts and relevant non-governmental organisations active in the prisons, including Penal Reform International, the Paralegal Advisory Service, Malawi CARER, and Prison Fellowship.

E. Protecting vulnerable groups

Another aspect of crime and punishment in Malawi which raises concern is the treatment of vulnerable groups within the penal system. The most obvious of these are juveniles. The Constitution provides that if a person accused of committing an offence is a child (under 18),

he or she shall enjoy not only the rights associated with fair trial that are available to all accused persons, but also additional rights, including to be separated from adults when imprisoned; to be treated in a manner which takes into account his or her age; and to be dealt with in a form of legal proceedings that reflects the vulnerability of children. The Children and Young Persons Act of 1969 also requires that children in conflict with the law be treated humanely and in a manner consistent with their vulnerability, and that a child should not be imprisoned unless he or she 'is of such depraved character or so unruly' that it would be in her or his best interests to be imprisoned. It is counterproductive to characterise a child in conflict with the law with such a strong term as depravity; it is unduly condemnatory, stigmatising and likely to pre-empt any serious attempt at his or her rehabilitation. In any case, the provision runs counter to the spirit of the constitutional provisions which require that every child in conflict with the law should be treated in a manner which promotes his or her reintegration into society.

In practice, the constitutional principles are routinely violated. For example, according to the government's own admission, children are often tried as adults. The government has also admitted that some children are held in detention without charge, many are not informed of their right to bail, and their trials are delayed. Juveniles are also not always segregated from adult prisoners, although this problem has been partly addressed by the opening in 2004 of three juvenile-only facilities. The government must urgently update the Children and Young Persons Act and implement administrative measures to establish more juvenile-only institutions which also have adequate facilities to meet the constitutional requirement that any child in conflict with the law must be treated in a manner which 'promotes his or her re-integration into society to assume a constructive role'.

The law also seeks to protect the rights of people who become vulnerable through arrest and incarceration. The most extensive human rights provision of the Constitution is section 42, which lays out the rights of people who are arrested, detained or accused of crimes. The provision guarantees such people a wide range of rights including the right to be detained under conditions consistent with human dignity and the right to not be compelled to make a confession or admission of an offence alleged against him or her. Despite these norms, abuse of people in police and prison custody has been one of the most serious and divisive human rights violations in Malawi. In 2001, the Special Rapporteur on Prisons of the African Commission on Human and Peoples' Rights reported allegations of police beatings and ill-treatment of suspects aimed at extracting confessions. In 2005, Amnesty International similarly observed that 'the torture and ill-treatment of suspects and deaths in custody were reported to continue.' The first obvious recommendation is that the police and prison services, working in close collaboration with the Malawi Human Rights Commission, must strengthen their internal investigation mechanisms and take strong action against any of their officers who are guilty of the abuse of people in custody. This must include referring the cases to the DPP for his or her action. More likely to be effective, however, is the establishment of an independent agency to investigate complaints against police abuses. Such an agency is proposed under the Police Bill which awaits enactment by Parliament; this is further reason for urgent enactment of the bill.

There are indications that intimidation of victims and witnesses has, in some cases, resulted in charges being brought or dropped. At least one study has found intimidation of complainants to be the reason for the withdrawal of charges in relation to crimes such as domestic violence, property grabbing from widows and similar offences arising in domestic settings. The vulnerability of witnesses in these cases is heightened because most of them are women. The only formal victim support in the criminal justice system is provided by the police service. Victim support units were established in 2001 at various police stations as part of a new community policing initiative. These units aim to assist crime victims who have suffered harm 'such that only special care and attention can restore their normal being', and includes cases that require victims to be assisted in private in order to respect their dignity. Between 2003 and 2005, 1 982 cases were reported to victim support units across the country. Of these, 38.2 per cent involved domestic violence, 13.4 per cent child or spousal neglect, 11.9 per cent defilement (sexual intercourse with a minor) and 8.5 per cent rape. The further expansion of victim support units need not await the enactment of the Police Bill and can be done administratively. It is recommended that the police service invest in the development of material and human resources available for victim support units, including by training more personnel, providing necessary physical facilities at police establishments and widely publicising the work of the units.

6. Access to justice

A. Impediments

By 2005, many actors in the justice sector were of the view that Malawians were generally aware of their rights and the institutions which are available to assist them, but that the vast majority of people are not able to enforce their rights because they cannot access formal justice delivery institutions, including the courts. Poor people, especially women, are disproportionately impeded by the various physical, financial and linguistic barriers.

Physical barriers are mainly geographical. The majority of the people live in remote rural areas, and in some cases, people have to walk for up to eight hours to reach their nearest court. The effect of the distance is made worse by the fact that most rural areas do not have regular public transport. Where public transport exists, it is prohibitively expensive. Asylum seekers and refugees are confined to camps, and thus are almost completely excluded from the formal justice system. The design of some courts and other justice institutions in Malawi make no provision for the mobility of people with physical disabilities; an example is the High Court in Blantyre which has no ramps for wheelchair access.

Financial barriers consist mainly of the relatively high financial cost of paying court and lawyers' fees and transport costs. Although court fees may appear to be low, the majority of Malawians live below the poverty line, on an income of less than K140 (approximately US\$1) per day. These income levels also mean that only a minuscule number of Malawians can afford to hire private lawyers, who demand as much as K10 000 (approximately \$70) for an initial deposit and K7 000 (approximately \$50) per hour thereafter. Unfortunately, neither the Ministry of Justice's Department of Legal Aid nor non-governmental organisations have sufficient resources to provide the poor with a way round the barrier of lawyers' fees.

Another factor that limits access to the formal justice system by the majority of people is the fact that English is the official language of the courts—although it is estimated that only a negligible proportion of the population is fluent in it. The Constitution does guarantee every person the right to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted, at the expense of the state. In practice, the judiciary ensures that there is an interpreter in any case in which the defendant does not understand English. However, standards of interpretation are generally poor, particularly in relation to technical words.

In order for the constitutional right to have access to justice and legal remedies to have practical meaning, the judiciary, the Malawi Law Society, the Ministry of Justice and relevant non-governmental organisations should develop a plan aimed at removing the major obstacles which impede access to formal justice, particularly by the poor and other marginalised social groups. Such a plan should include measures aimed at expediting the establishment of courts located close to the people in rural areas; improving the physical infrastructure of justice institutions so that they can be accessed by all, including people with physical disabilities; reducing court fees; expanding the availability of pro bono legal services; and introducing flexibility in the language policy of the courts to allow more use of local languages in official proceedings. The proposed plan to increase access to justice should take special account of the needs of historically disadvantaged groups. With regard to women, for example, the following recommendation made by the UN Committee on the Elimination of Discrimination against Women in June 2006 must inform the plan: '[The Committee] further urges [Malawi] to take special measures to enhance women's awareness of their rights, legal literacy and access to the courts to claim all their rights.'

B. Non-state fora and traditional courts

As a result of these barriers, most people in Malawi do not rely on formal court systems to deliver justice. Instead they depend on non-state institutions, of which the most frequently used are traditional leaders, traditional family counsellors (*ankhoswe*), religious leaders, and community, non-governmental and faith-based organisations. The most common types of disputes dealt with in these fora involve land, chieftaincy, marriage and domestic violence, and the most prolific of the various non-state justice fora are those presided over by traditional leaders. It has been estimated that the country has over 20 000 traditional leaders of varying levels of seniority who administer justice in almost every village. The activities of the non-state fora, which are sometimes referred to as primary justice or informal mechanisms, do not appear to be factored sufficiently into the strategy and plans of most state-connected justice sector institutions. Although the Constitution allows for 'traditional or local courts' to be established, no legislation has been enacted to give effect to this provision; the Traditional Courts Act dating from the colonial period and expanded in authority under the regime of Hastings Kamuzu Banda remains technically in force, but the courts it regulated were abolished with the transition to a multi-party system in the early 1990s.

The government should integrate the non-state or primary justice mechanisms more coherently into the planning and funding for the justice sector. If formally established and governed by legislation, 'traditional or local courts'—which the constitution provides shall be presided over by 'lay persons or chiefs'—have the potential to make the formal judiciary more accessible for more people. Some traditional authorities are likely to be integrated into the state's judicial structure if the Law Commission's current recommendations for the reform of the Traditional Courts Act are adopted and implemented by the state. However, in order for that accessibility to be optimised, the amendment of the Traditional Courts Act recommended by the Law Commission and subsidiary legislation should provide for the use of local languages in proceedings and fees

that are affordable by the poor. The law should require traditional authorities who preside over traditional courts not to perform executive functions, in order to avoid violating international standards such as those set out in Chapter Q of the 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. These include the requirement that traditional courts be independent of the executive branch.

Once the 'traditional or local courts' become operational, it will also be important for the chief justice to instruct them to uphold human rights, with emphasis on the right to equality of persons before the law—particularly as between male and female litigants, bearing in mind the poor record of most traditional institutions in perpetuating institutionalised socio-cultural bias against women. The state, in collaboration with other parties interested in improving access to primary justice such as civic education and human rights groups, as well as development partners, should provide basic training in constitutional principles of fair trial to primary justice institutions (such as traditional leaders) at all levels.

At its 35th 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.

c. Office of the Ombudsman

The constitutionally established Office of the Ombudsman provides a means of accessing justice which is not affected by most of the impediments hindering access to the courts. The Ombudsman is mandated to provide, free of charge, remedies to people who have 'suffered injustice or violation of their human rights in circumstances in which there is no judicial or other remedy that is reasonably available'. The Ombudsman Act of 1996 restricts the jurisdiction of the Office of the Ombudsman to complaints arising from the conduct of public officials. However, because the Constitution grants the ombudsman the wider remit to handle 'any and all cases' of injustice, the ombudsman has in practice dealt with complaints against private institutions as well. The office therefore operates to some extent as a cheap substitute for the courts. Since its establishment, it has investigated a wide range of complaints against various government ministries, departments, statutory corporations and other institutions, making it a very popular means of accessing justice.

In spite of its strengths, the Office of the Ombudsman faces a number of challenges that limit its potential. The first challenge is posed by legal restrictions on the types of remedies that the ombudsman can grant. The other limitation is that the Office of the Ombudsman has offices only in the country's three main cities (Blantyre, Lilongwe and Mzuzu), although occasionally the ombudsman also visits some rural districts to handle complaints. The ombudsman should explore the possibility of working with other institutions in the justice sector which have a permanent presence in rural communities. The capacity of such institutions could be strengthened

so that they are able to receive complaints on behalf of the ombudsman and transmit them to the ombudsman for action.

Despite the limited physical presence of the Office of the Ombudsman across the country, it has proved to be such a popular institution that it has been overwhelmed by the demand for its services, partly because it is perceived as a more efficient means of accessing justice. The popular demand has resulted in increasing inefficiency because it has not been matched by a corresponding expansion in the office's capacities. In recent years, the office has accumulated a considerable backlog of cases, resulting in significant delays in the handling of particular cases. If the office has to continue to act as the cheaper and more efficient alternative channel for accessing justice, the government must commit more financial and human resources to it. The government should also put in place a sustainability strategy that aims at weaning the office from its direct reliance on donors for most of its programme activities (currently as much as 80 per cent of the funding for the activities of the office). For its part, the Office of the Ombudsman should implement a practical and time-bound strategy and action plan to clear its backlog of cases and, therefore, regain its efficiency.

D. Human Rights Commission

The Human Rights Commission is established by the Constitution and has the primary mandate of protecting human rights and investigating their violation. The Constitution expressly states that the commission does not have any judicial powers but empowers it to receive applications from individuals or groups of people requesting it to discharge its mandate in relation to specific events or situations. In comparison to the Office of the Ombudsman, the mandate of the Human Rights Commission is narrower as it is limited only to the protection of human rights and does not cover other forms of injustice. Nevertheless, the commission has provided a means by which people have been able to get redress for a wide range of injustices, including suspicious deaths of criminal suspects in police custody; alleged abuse of firearms during the policing of public demonstrations; discriminatory allocation of housing benefits for civil servants; and undue restriction of the freedom of members of Parliament to belong to political associations outside Parliament.

The potential of the Human Rights Commission to make a significant contribution to improving people's access to justice is limited by a number of factors. The most obvious of these is that the commission lacks sufficient presence across the country. Although officers of the commission occasionally conduct field visits to various parts of the country, most of their time is spent at their headquarters in the capital city. The commission is, therefore, less physically accessible than the courts. In its annual report for the year 2000, the commission requested the government to fund the establishment of regional and district offices in order to alleviate the problem; this request is one that Malawi's development partners should also consider responding to as part of their assistance to the justice sector. As a supplementary strategy, as with the Office of the Ombudsman, the Human Rights Commission could establish strategic partnerships with institutions, including civil society organisations, that already have a presence across the country, particularly in rural areas. The commission may then act through such institutions to perform its investigative mandate as well as undertake activities aimed at raising rights awareness in communities.

E. Enhancing effectiveness of remedies

According to section 42 of the Constitution, the right of every person to have access to courts of law and other tribunals goes together with the right to be provided with effective remedies by those institutions. One factor constraining the delivery of effective remedies in Malawi is the delays with which most justice institutions dispose of matters before them. A survey conducted in 2005 found that court proceedings are characterised by long delays at all stages, including in delivering judgment after finishing hearing the case; as noted above, the Office of the Ombudsman increasingly shares this problem. Delays in the delivery of justice may not only render remedies ineffective but may also undermine public confidence in the justice system as a whole. The judiciary, the ombudsman and other institutions must undertake an in-depth empirical analysis of the fundamental causes of delays in their case-handling and institute measures to increase efficiency. Such research can build on preliminary studies that have already been undertaken by others.

Remedies may also be ineffective if they do not offer substantive correction of the injustice for which they were sought in the first place. This may be because the law has restricted courts or tribunals from granting certain remedies. Consider, for example, section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act, which prohibits courts from granting an injunction against the government. Yet, in some cases, the only effective remedy may be to stop the government from undertaking or continuing a particular action. Although this prohibition undermines the right to an effective remedy, the High Court has occasionally upheld it, while in other cases granting injunctions despite the provisions of the legislation.

In some cases, it is the Constitution itself which limits the effectiveness of remedies. This is the case in relation to the ombudsman who is restricted to offering only the following as remedies for injustice: directing that appropriate administrative action be taken to redress the grievance in question; causing the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress the grievance in question; and referring the matter to the DPP with a recommendation for prosecution. The ombudsman has no power to enforce his or her determinations and the High Court has held that it has no power to directly enforce determinations of the ombudsman. The Law Commission must review this restriction in order to propose legislation that would make remedies granted by the ombudsman more effective. Using similar reasoning, section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act should be repealed, as should all other legal provisions which unduly restrict the courts and other justice delivery institutions from granting remedies which substantively correct injustices.

Conclusion

Most of the recommendations in this paper require cooperation among institutions in the sector if they are to be implemented successfully, and discussion of the issues should be conducted at a sector-wide level. It is understandable that progress in this regard might be slow. However, 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 sector, including government ministries and departments, non-governmental organisations 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 a necessary first step to devising realistic means for removing obstacles to reform.