



Party Law in Modern Europe

The Legal Regulation of Political Parties in Post-War Europe

Regulations of political parties and party functions in Malawi: incentive structures and the selective application of the rules.

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Regulations of political parties and party functions in Malawi: incentive structures and the selective application of the rules.

The party system in Malawi has been characterized by instability and fragmentation since the re-introduction of multiparty democracy in 1993. In part this instability is rooted in the legal framework regulating political parties as organizations and the functions that parties perform in a democracy. The paper outlines the constitutional and legal framework of political parties, But more importantly for party system developments are how regulations of the functions which parties perform in a democracy, such as candidate nomination, campaigning and representation in parliament, interact with the structure of the political system, leading to party system instability. Moreover, the effect of regulation of political parties and their activities are strongly influenced by ‘selective’ application of the formal regulations and weak party organizations. Formal rules meant to strengthen political parties have therefore not functioned as intended.

Introduction

This paper describes the legal regulations of political parties in Malawi and discusses the implications of these regulations for the way political parties function.

I first discuss what Malawi can be seen as a case of, including some contextual background information against which we must see the development of the Malawian polity. I then provide a brief overview of the structure of the political institutions in Malawi, followed by an overview of types of regulations that apply to political parties or to their functions.

The main body of the paper explains how the rules for registration of political parties and the structure of the political system impact on the development of the party system. In addition to the rules regulating the formation of parties, several legal acts, regulatory agencies and paragraphs in the constitution are relevant for three important functions of political parties: nomination of candidates, electoral campaigns and representation in parliament.

Malawi as a case.

Although the paper is a case study, Malawi is also an example of more general categories of political systems. First, Malawi is a case in a group of recently democratized countries in South-Eastern Africa. It shares with countries like Tanzania, Uganda, Kenya and Zambia a history of one party system and a transformation to multiparty elections in the early 1990’s.

These countries also share a past as British colonies and have ‘inherited’ some constitutional features, which are important for how political parties are structured. In particular, the adoption of the first past the post electoral system for parliamentary elections impact on how parties nominate candidates and on how representatives relate to their constituencies, two functions of political parties strongly affected by public regulations.

On the other hand, Malawi, as other countries in the region, has adopted a strong presidential political system. As has been discussed by for instance Samuels and Shugart (Samuels and Shugart 2010) this type of institutional choice has implications for the nature of political parties. Presidentialism tends to “hinder parties’ organizational development” (13). Malawi seems to confirm this hypothesis¹. The new democracies in South-Eastern Africa are a sub-group of the general class of newly democratized countries. As a sub-group, the South-Eastern African democracies are distinct from many other new democracies in being economically less well-off than for instance new democracies in Central and Eastern Europe. Economic variables are generally considered to be the most important predictors for democratic consolidation (Przeworski 1997; Gasiorowski and Power 1998) . Malawi scores very poorly on many such indicators. Thus, to the extent that socio-economic factors are important for democratization in general, and by extension for the development of an institutionalized party system (Rueschemeyer, Stephens et al. 1992) Malawi faces an uphill struggle. Malawi’s rank as number 171 of 187 countries on the overall Human Development Index for 2010 (<http://hdrstats.undp.org/en/countries/profiles/MWI.html>) captures the problematic socio-economic level of development.

Party system development in new democracies is also made difficult in a context of complex patterns of ethnic, linguistic, regional and religious divisions (Mozaffar, Scarritt et al. 2003; Cheeseman and Ford 2007). Where there is an absence of a dominant ethnic group political leaders need to build alliances across groups, but with the absence of clear ideological dimensions, the party system is volatile. Malawi is clearly a case among such countries. Regional divisions among the North, Central and Southern regions are many. Malawi has English as official language but not all Malawians have a command of English. According to Kayambazinthu (Kayambazinthu 1998) only 2% of Malawians have English as their first language, and she characterizes English as the language of the elite, while 36 and 47 per cent use English as a second or third language. In addition to English there are 12 languages

¹ Although other hypothesis, such as few political parties and national parties, do not apply to Malawi.

spoken in Malawi. Chichewa, the language primarily spoken by the population in the central region is used by 58.8% of the population², Lomwe 6.7%, Yoa 11,6%, Tumbuka 9,8 %, Nyanja 7.2% with the rest of population dispersed among smaller language groups (Cheeseman and Ford 2007). Malawi has a low rate of literacy; between 42 and 50 per cent according to Matiki (Matiki 2006), although among those 15-24 years, the literacy rate is officially 84% (UNDP 2010).

Partly overlapping with regional and linguistic division, Malawi has also several religious groups. Malawi comprises Christians (79.9%), Muslims (12.8%), and other religions (3%). Among the Christians, Catholics are in majority with the rest primarily Presbyterians, who are particularly strong in the Central and Northern regions while most of the Muslims live in the Southern region (Kayambazinthu 2013). Party divisions reflect in part these divisions (see below).

Malawi scores also very high on various corruption measures (Nawaz and Hodess 2012). Transparency International for instance, ranks Malawi (2010) as 88 of 137 countries, with a score of 37 of 100 (<http://www.transparency.org/country#MWI>). Another report found that nine out of ten citizens believe corruption is a serious problem, although fewer think it is wide spread.

Malawi is therefore a case of several groups of democracies:

- Of recently democratized states in Sub-Saharan Africa,
- Of new democracies in general,
- Of previously British governed territories,
- Of countries with poor economic record, and
- Of countries with a complex pattern of regional, ethnic and cultural divisions.

Thus, against the background of all the factors that the democratization literature have identified as important for democratic consolidation (Svåsand 2011). Malawi faces an uphill struggle. Prior to the end of the Banda period in 1994, Malawi scored 6 or 7 on the Freedom

² Malawi's former dictator, Hastings Banda, promoted the central region, by having the capital moved from Zomba in the South to Lilongwe in the Central region and also promoted the Chichewa language. A proposal to make Chichewa a national language is controversial, also by citizens living in the Central region.

House (FH) indicators. During the first years of the new democratic dispensation, the scores improved to 2 or 3, with some variations from year to year until the 2004-2009 period when the scores regressed to 4. Since then, there has been a slight improvement to '3' for political rights and '4' for civil rights.³ Overall, it means that, according to FH, Malawi went from 'Not Free' during the Banda period to 'Free' from 1995 until 2000. After 2000 the FH classifies Malawi as 'Partly Free'. To the extent that the FH scores are indicators of democratic consolidation, the most recent years are actually less promising than the years around the turn of the century.

It is against this backdrop that we must see the attempts to regulate political parties and the problems associated with implementation of the regulations. Before turning to the rules related to political parties, the following paragraphs briefly describes the nature of Malawi's political institutions and the development of the political parties. Both the structure of the institutions and the party system development are strongly impacted by the failure to secure a proper implementation of the legal instruments available for regulating political parties. In Rothstein's and Teorell's term Malawi's polity scores poorly on 'impartiality' (Rothstein and Teorell 2008).⁴

Malawi's polity

In 1993 the one-party regime of Kamuzu Banda and his Malawi Congress Party (MCP) was rejected by the Malawian voters in a referendum, with 63 per cent voting in favour of (re)-introducing a multiparty system. In the first multiparty election in 1994 the opposition movement, United Democratic Front (UDF) won the presidency and became the largest party in parliament – although without a parliamentary majority (table 1). A new constitution was drafted and adopted by parliament in 1995. Freedom to establish political parties and freedom of expression and to engage in political activities, fairly competitive elections and an independent judiciary were the main ruptures with the past; de jure as well as de facto.

³ <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013>

⁴ According to the indicators in the World Justice Project Malawi scores 0.43 (0.00 bottom score 1.00 top score) on the indicator "Open government and regulatory enforcement", which includes the issue "Government regulations applied without improper influence". On these WJP indicators Malawi ranks as 68 out of 97 countries for which data is available. Agrast, M. D., J. C. Botero, et al. (2012). The World Justice Project. Rule of Law Index 2012-2013. Washington, D.C., The World Justice Project.

However, in terms of *structure* of the formal political institutions, the presidency and the parliament, there has been less change.

The most important political institution is the presidency. The president – and vice president – is elected by simple majority in a nation-wide vote for a five year term and with a limitation of two terms for the same person. The constitution also provides for a second vice-president, to be appointed by the elected president. However, the second vice-president is an option available to the president, there does not have to be a second-vice president. The second vice-president must be from a different party than the elected president and vice-president. The constitutional provision was made to accommodate a coalition between the UDF and AFORD (Alliance for democracy), the party based in the Northern Region.

The single chamber Parliament is elected at the same time as the president and for the same term length in single member constituencies by simple majority, but the powers of the parliament are clearly secondary to those of the president. Parliament for instance does not control its own budget or agenda. Some of the constitutional provisions from 1995 were never implemented and some were later repealed, while other paragraphs have only partially been observed. Although on paper the parliament has a number of committees, most of them did not function until recently due to lack of finances and between 2005 and 2011 parliament was without a parliamentary building. Initially, the Constitution provided for a second chamber of parliament, the Senate, but it was never organized and this paragraph was repealed in 2001. Similarly, the original constitution contained a paragraph allowing voters to recall their MP, but this paragraph was also removed. The constitution also contained provisions for local elections, to be held one year after national elections. These were held in 2000, but when the term of office for the councillors expired in 2005, new elections were not held. Several times new local elections have been announced, but they have so far each time been postponed for various reasons, some of which are related to the state of political parties. Elections are now planned to be held simultaneous with the next presidential and parliamentary elections in May 2014.

Legislation and political parties in Malawi.

Political parties in Malawi are affected by constitutional rules, legal acts and regulations issued by institutions mandated by law. Direct effects are those rules that specifically target

political parties as institutions. These include some of the constitutional rules that specify the right of citizens to join and form political parties and the affiliation of elected MPs to party caucuses in parliament. There is also the Political parties' registration act. In addition, several paragraphs in the constitution and other legal acts are equally significant for political parties when regulating political activities where political parties dominate, but do not have a monopoly. Among the most important functions parties perform in a democracy (Dalton and Wattenberg 2002) are: nomination of candidates, campaigning, and the representation of citizens in parliament and other elected bodies. The legal regulations of such functions are not exclusively targeting parties, but as parties are the dominant players in these arenas, they are nevertheless affected by them. Examples of such regulations are the acts specifying the administration of elections and acts regulating mass media communication.

Thus, there are three types of regulations of political parties:

- The Constitution,
- Acts directly related to political parties,
- Acts regulating functions that parties perform, but which are not necessarily monopolised by parties.

The current Constitution of Malawi dates from 1995. Political parties are mentioned several places, as part of people's democratic rights (the right of citizen to join and to campaign), as part of the organisation of parties in parliament (the neutrality of the elected speaker, the financial contribution for parties, and the implications for MPs of changing party affiliation after they have been elected).

The Political Parties and Registration act specify the requirements to be fulfilled for those seeking to establish a new party.

The Malawi Electoral Commission Act, the Parliamentary and Presidential Elections Act, the Communications Act all contain elements impacting on political parties because the acts address functions that political parties perform⁵.

⁵ There is also the Local Government Elections Act, but as only one local election has been held, this act and its revision will not be discussed in this paper.

As will be made clear in the following, there are important *interaction effects* of the various rules: the primacy of the presidential office, the electoral system and the registration rules interact to fragment the party system. Similarly, the anti-defection clause of the constitution (Section 65) interacts with the ability of MEC to function. These formal rules in turn interact with the weakness of political parties as institutions. Political parties have elaborate formal organisations, which in practice do not function. The political parties are heavily dependent on the leadership. In addition, the absence of clear ideological differences between parties blurs the distinctions between them.

Overall, the combination of the formal rules, the selective application of the rules and the weakness of party organisation has not lead to the development of a stable party system.

Party system development and the registration of political parties.

During the two first elections (1995 and 1999) Malawi had a three-party system, based on a regional division. UDF dominated in the Southern region, which is also the most populous; the old state carrying party MCP (Malawi Congress Party) in the Central region and AFORD in the North. In the run-up to the 2004 elections, and following that election and in the years since, the party system has become increasingly fragmented. UDF won the two first presidential elections, but did not win a majority of seats in parliament (table 1).

Table 1. Percentage of seats for the major party alternatives, 1994-2009. (Per cent vote for elected presidential candidate)

	MCP	UDF	AFORD	Ind.	RP	PPM	NDA	Others	DPP	% votes for winning presidential candidate.
1994	31.6	48.0	20.3	0						47.2 (UDF)
1999	34.2	48.7	15.0	2.1						51.4 (UDF)
2004	31.5	26.7	3.2	20.9	8.0	3.7	4.3	1.6		36.0 (UDF/DPP)
2009	14.5	8.8	0.5	17.4				1.0	58.5	66.1 (DPP)

(see appendix for party abbreviations)

UDF also won the presidential election in 2004, but early in 2005 the elected president (Bingu wa Mutharika) defected from the party and launched his own party, DPP (Democratic Progressive Party). DPP subsequently won the 2009 elections and for the first time in Malawi the president's party also won a majority of parliamentary seats. Another twist in the development of the party system came in 2011 and 2012. On 5 April 2012 President Mutharika suddenly passed away due to heart failure. For a few days the country was at the brink of a political and constitutional disaster, caused by a previous rift in the governing party. Although Malawi has a vice-president elected on the same ticket as the president, Mutharika fell out with his vice-president, Joyce Banda, because she and several fellow party members objected to the designation of Mutharika's brother as the party's presidential candidate for the next presidential election in 2014. She and her supporters were expelled from the party and the president tried every trick in the book to exclude her from any vice-presidential functions and tried to remove her privileges as vice-president. However, she could not be fired since she had been elected. While continuing to serve nominally as vice-president she formed her own party, PP (People's party), which quite unexpectedly became the current governing party when President Mutharika passed away, without ever having contested a single election.

At a formal level there has been a dramatic increase in the number of registered parties (table 2). The increase is at least partly explained by the splits that have occurred in each of the three largest parties; MCP (Malawi Congress Party), UDF and DPP.

Since the 2009 elections, at least four additional parties have been registered, or applied for registration.

- NASF (National Salvation Front)⁶. NASF's leader, James Nyondo ran as an independent presidential candidate in 2009,
- PDM (People's Development Movement)⁷. PDM was formed by politicians defecting, or expelled from, DPP, following opposition inside the DPP, particularly from the Northern region in Malawi, and

⁶ Registered January 2011 (<http://www.nyasatimes.com/politics/nyondo%E2%80%99s-nasaf-party-officially-registered.html>) (Accessed 10.05.2011)

⁷ Registered January 2011 (<http://www.nyasatimes.com/politics/high-court-rules-pdm-is-registered-party.html>) (Accessed 10.05.11)

- PP (People's Party), led by the vice-president of Malawi, Joyce Banda, who was expelled from DPP in December 2010, but the party has also attracted politicians from UDF and other parties,
- and (New) Labour party, formed by F. Jumbe who lost the bid to lead the UDF and subsequently defected to form his own party.

Table 2. Registered political parties, 1994-2009⁸

	Before May 1994	Before May 1999	Before May 2004	Before May 2009
Political parties	AFORD, UDF,UFMD, MDP, MNDP, MCP, MDU, CSRM	CDP (later changed to SDP), NPF, NUP, MFP, PDP, LP, UP (de-registered in.2002), SNDP, FP, MMY, NSM, CONU,	NIP, MAFUNDE, PFP, PETRA,NDA, (de-registered in 2004) New Dawn for Africa, PPM, PPF, MGOODE, Mtendere Ufulu Party, The RP, NCD	UDP, DPP, NRP, MPP, NARC, CODE,
Parties registering	8	12	13	6
Total registered	8	20	32	37

- See appendix for party abbreviations.

The increase in the number of registered political parties is at least in part, explained by a combination of the structure in the political system and the ease with which to register a new

⁸ Table from Magolowondo, A. and L. Svåsand (2009). One man ownership: Political parties and their struggle for democratic standards. *Democracy in progress. Malawi's The 2009 parliamentary and presidential elections*. M. Ott and F. E. Kanyongolo. Blantyre, Kachere Books: 265-294.

party. As pointed out above, the presidency is by far the most important political institutions that party leaders or ambitious politicians have their eyes on. As a party can only nominate one candidate there are fierce battles for control of party organizations. Whoever is elected party chairman inevitably becomes the party's presidential candidate.⁹ The first-past-the-post electoral system for the presidency means that it is sufficient with a plurality of the votes to be elected. Thus, the electoral threshold is low – and made lower the more competitive candidates there are. Ambitious politicians with some resources therefore have an incentive to defect from their parties if they lose the nomination battle. This is further aided by the extremely low threshold for registering a new party. Even if they do not succeed in winning the presidency, they may succeed in winning parliamentary seats and therefore become potential coalition parties (Rakner, Svåsand et al. 2007).

The Political Parties Registration Act requires new parties to be registered with the Registrar of Political Parties. In principle, there are very few requirements. Applications must include a list of the party officials and also include a party manifesto. The name and symbol of the party cannot be similar to other already existing parties. Applications must also be signed by 200 registered voters. Nevertheless, there have been several examples of party initiatives that have been either denied registration, or the Registrar has simply failed to implement the procedure. The party founded by President Mutharika in 2005 soon fractured into several parties and provides several examples of how registration is used to prevent opposition. As shown above, the regional dimension underpinned the party system from 1994, but after the collapse of AFORD in the North when its founder passed away, Mutharika's DPP filled the void. Soon however, the 'regional dimension' again surfaced inside DPP with conflicts over a regional quota in university admission which would disadvantage applicants from the North. A breakaway party initiative based in the North, PDM (People's Democratic Movement) was denied registration on various grounds, but in the end the High Court ordered the Office of the Registrar of Political Parties not to continue withholding the registration¹⁰. The most recent case is the initiative of Vice- President Banda to register her People's Party. This party as well had to take the Registrar's office to court, forcing the Registrar to act.

⁹ An exception is UDF in 2004. As Muluzi was barred from the two-term limitation rule for presidential candidates he ensured the nomination of Bakili Mutharika, hoping to govern from the back-seat by maintaining chairmanship of the UDF.

¹⁰ Malawidemocrat.com 23.01.11

Once registered, however, a party stays registered until it decides to dissolve itself according to its own statutes. The expanding number of registered parties reflects that many party initiatives remain on the books, although the parties fail to nominate a single candidate (see table 3).

Thus, the combination of three factors; the constitutional powers of the president, the first-past-the post method for the presidential elections, and the ease with which new parties can be registered contribute to the increase in the number of parties.

Nomination of candidates

Although nomination of candidates is one of the central functions of parties in democracies, the parties do not monopolize the supply of candidates running for parliament. The constitution specifies conditions for individuals applying for registration as candidates, but do not say anything about parties per se. Parties are free to choose their own nomination method. Even so, nomination issues frequently end up in the courts.

a. Candidates for the presidency.

As explained above, the presidency is by far the most important office to occupy and it is therefore a battle inside parties to capture the leadership position, and it is also therefore there is an increase in the number of parties.

The legal and administrative hurdles for candidates are small. Party nominated candidates must provide a signed document by an authorized office-bearer in the party conforming the candidate's status as that of representing the party. All candidate nominations must be supported by at least ten registered voters in each of the 26 districts of Malawi; hardly a difficult task to fulfil. More significant is probably the authority of the Malawi Electoral Commission (MEC) to decide upon a registration fee. Until the 2009 election this fee was Kw. 100.000 when it was increased to Kw. 500.000 (ca USD 3000).

b. Candidates for parliament.

The overall number of candidates for parliament has almost doubled over the four parliamentary elections, from ca. 600 to almost 1200.

Table 3 displays the number of candidates registered for each of the parliamentary elections between 1994 and 2009. Several patterns can be identified:

First, there are only three parties (MCP, UDF and AFORD) which have had candidates in all elections, but only MCP and UDF have been able to cover the whole territory.

Second, the ease with which parties can be established means that many parties are ‘briefcase’ parties. They exist on paper, but do not perform the function of nominating candidates in more than a few constituencies.

Third, note the increase in the number of candidates running as independents, from a dozen in 1994 to almost five hundred in 2011. The increase is primarily due to inability of parties to establish and to implement a set of rules regulating the nomination process, but also no doubt, helped by the low threshold for registration. Thus, in each election there are numerous instances where defeated aspirants in the nomination process either take the party to court, or decide to run as independents.

Table 3. Registered parliamentary candidates, by year, party and independents.

Party	YEAR OF ELECTION			
	1994	1999	2004	2009
AFORD	159	75	39	29
CODE				12
CONU		5	2	1
DPP				193
CSU	6			
Independents	12	114	362	487

MAFUNDE			21	1
MCP	177	187	172	134
MDP	29	24	9	1
MDU	2	7		
MGOE			22	
MMYG		1		
MNDP	10			
MPP				11
NARC				35
NCD			21	
NDA			185	
NPF		4		1
NRP				25
NSM			1	
NUP			9	1
PETRA			18	19
PFP			2	1
PPM			110	51
RP			109	7
SDP		10		
SNDP		2		
UDF	177	191	164	171

UFMD	36			
Total number of candidates	608	620	1246	1182
Number of constituencies	177	193	193	193

Sources:

1994-1999: (Magolowondo and Svåsand 2009)

2004: (Ott, Immink et al. 2005)

2009: (Makupe 2009)

(See appendix for party abbreviations.)

As for presidential candidates, party nominated candidates must be confirmed by an authorized person in his/her party. Nominations must be supported by at least ten registered voters in the constituency¹¹ and candidates must pay a registration fee determined by the MEC. Before 2009 the fee was Kw 5.000, which was increased to Kw. 100.000 in 2009.

The nomination of candidates are not particularly affected by the constitutional rules, but primarily by the parties' own statutes and the failure to apply these rules in an impartial manner. The decision by MEC to increase the registration may have made it more difficult for smaller parties and for individual candidates. Nevertheless, as we can see in table 3 the overall number of candidates increased, also of independents. How parties and candidates dealt with the registration fee varied enormously. The incumbent party (DPP) paid the nomination fee for all of its candidates, while in other parties it was common for the candidates themselves to pay the fee.

¹¹ The smallest constituency in 2009 had ca. 3000 voters, the largest almost 60.000 (Rakner, L. (2009). The management of the 2009 electoral process: The role of the Malawi electoral commission. Democracy in progress. Malawi's 2009 Parliamentary and Presidential Elections. M.Ott and F. E.Kanyongolo. Blantyre, Kachere: 25-46.

Parties in the election campaign.

The Parliamentary and Presidential Elections act contains several articles that give all political parties the right to campaign for elections. The act also requires the Malawi Broadcasting Corporation (MBC) to “maintain neutrality in the manner of reporting the news of the campaign propaganda of political parties and generally in its commentaries” (PPE Act 63(b))¹².

In theory the act provides for a level playing field between political parties during the campaign, but in practice there have been several problems, particularly regarding MBC’s neutrality. The role played by the MBC is important because almost all Malawians have access to a radio, even in the countryside where more than 80 per cent of the population lives, and until recently only MBC had national coverage. Newspapers on the other hand are only available in the towns and have a small circulation. With the exception of the first multiparty election in 1994, for all other elections observer reports point out the failure to secure a level playing field (Rakner 2009). In 2004, for example, during a period of 15 weeks prior to the polling date, the Malawi Broadcasting Corporation gave 92.9 per cent of positive election coverage in the main news bulletins to the governing coalition of UDF, Alliance for Democracy (AFORD) and New Congress for Democracy (NCD) leaving 7.1 per cent to be shared between all opposition parties and candidates.¹³ The 2004 election campaign also witnessed newspaper reports and televised events showing the incumbent party’s presidential candidate handing out money at public rallies. Vehicles from government para-statal were also used for campaign purposes. Observers of the 2009 elections again criticized the biased playing field (Commonwealth 2009; EU 2009). Again MBC provided the incumbent party with four fifths of its election coverage (Chiyamwaka 2010).¹⁴

Although the Malawi Electoral Commission is authorized to monitor and supposed ensure a level playing field, it has no authority to sanction MBC for failing to observe neutrality. But

¹² Also newspapers must report on various parties’ campaign.

¹³ Neale, T. (2004): “Malawi’s Media- 2004 and Beyond”, in Ott et al., pp 181-195.

¹⁴ With the exception of Joy Radio which heavily favored UDF, other radio stations provided fairly equal coverage Chiyamwaka, B. (2010). The media: Political players and honest brokers? Democracy in progress. Malawi's 2009 parliamentary and presidential elections. M. Ott and F.Kanyongolo. Blantyre, Kachere: 339-364.

according to Chiyamwaka (Chiyamwaka 2010), neither MEC nor MACRA (Malawi Communications Regulatory Authority) “took any action to address the biased coverage by the state controlled media.... the regulator failed to discipline MBC and TVM (Television Malawi) under its very nose” (362). He attributes this failure to the lack of autonomy, particularly in the case of MACRA, from the political authorities.

Political parties in parliament.

Political parties in parliament are regulated both by the constitution and by the standing orders of parliament. The constitution regulates the relationship between the MPs, the political party caucus and the voters through the so-called Section 65. The constitution also specifies that parties receiving at least 10 per cent of the national votes are eligible for public funding and that parliament regulates its own organization and procedures, the Standing Orders, some of which impact on parties.

Section 65: A case of complete failure?

Representation through political parties is a characteristic of modern democracies. In the political science literature parties are assumed to have advantages over other ways of organising the link between voters and representatives (Aldrich 1995). Because representatives usually would like to be re-elected party control with the nomination process reduces the problem of agency loss (Przeworski, Stokes et al. 1999). Thus, vertical accountability should be ensured in a political system where parties dominate the selection of candidates. Section 65 in the Malawi constitution is a paragraph meant to minimize the problem that elected MPs defect from the parties that nominated them which the plurality of voters voted for in the election. According to Section 65 the Speaker shall declare vacant the seat of an MP who voluntarily leaves the party he/she was elected to represent if he/she joins another political party. Thus, the rule does not apply to individuals who declare themselves independent, or MPs who have been elected as independents and later join a party caucus, or MPs who are expelled from their party caucus. Nevertheless, Section 65 has been one of the most contentious issues in Malawi (Lembani 2007; Chinsinga 2010) and has not prevented defections.¹⁵ Young, for instance, (Young 2009) found that between 1994 and 2007 131 MPs

¹⁵ Politicians’ ability and willingness to move between parties can be illustrated by the case of Brown J. Mpinganjira. In 1994 he became a leading member of UDF. He defected in 2004 when Muluzi tried to amend the constitution to allow himself a third presidential term, and founded the NDA (National Democratic Alliance). The party was disbanded shortly after the 2004 election when Mpinganjira was offered a cabinet position in the DPP government. He later lost the cabinet post and re-joined the UDF before the 2009 elections. He was

defected from the party they had been elected to represent. Of these, 72 joined the governing party in the period. Why is section 65 unable to prevent these defections?

All MPs elected as nominated by a party joins that party's parliamentary caucus. The ability of the caucus to function as a body building internal party cohesion is made complicated by each MPs attempt to address the concerns of his/her constituency. As the parties are not organized around clear ideological alternatives (Mpesi 2011) there is also little in terms of 'collective incentives' to prevent an MP from defecting from their party. It may be to the MPs personal advantage to defect from an opposition party to the governing party because of the selective benefits to the MP. But it may also aid the MP in his/her role as securing benefits for the constituency. In theory defection should lead to a new election where the defecting MP would have to re-contest his/hers seat (Section 65 of the constitution). However, a reason why President Mutharika could function in the 2005-2009 period without a single MP initially elected to parliament for his party, was because of the Section 65 was not applied, simultaneously with the paralysing of the MEC (Malawi Electoral Commission). In 2006 four of MEC members' mandate expired, but under the existing norms and practice the President could not appoint members of DPP to the commission since DPP had few official MPs. In an attempt to bypass the legal and administrative procedures established, in November 2006 the President appointed six new members - without consulting with the party leaders in parliament, which he is constitutionally obliged to do. A court injunction sought by the opposition party leaders blocked their appointments. The conflict between the President and the opposition meant that between October 2006 and January 2008 MEC had only two out of the minimum six members needed to function (Rakner 2009). Mutharika also argued that Section 65 contradicted the Constitutional rights of citizen to join any organization of their choice, but the validity of Section 65 was upheld by the courts. Nevertheless, although almost 80 MPs defected to his party, MEC was unable to organise new elections and as the controversy moved through the judicial system, the closer the next general election got. Hence, the motivation to pursue the issue declined.

(temporarily) expelled from UDF when he unilaterally decided to join the MCP ticket as vice-presidential candidate. However, the UDF-MCP alliance became necessary when Muluzi, UDF's nominated candidate, was denied registration because he had already served two terms as president. Mpingjira was subsequently re-admitted to UDF. When the PP became the governing party in April 2012 he again switched party affiliation.

In an almost complete re-run of the story, the sudden ascendance of Joyce Banda to the presidency in April 2012, and by default the PP as the governing party, created a rush among MP's to join the party. According to newspaper reports, by August 20, 2012, 110 MPs had joined the new party, primarily from DPP – to which Banda had also belonged – but also from UDF, AFORD and among independents. Not only MPs but also leading officers and politicians from other parties joined PP.¹⁶

Clearly, section 65 which was meant to ensure vertical accountability, has failed to constrain defections among MPs elected on a party ticket, and most defections are towards the incumbent party. One type of justification given by MPs when defecting is that they have 'consulted' their constituency supporters back home. Thus they claim they are responding to the demands of the grass-roots. Another often cited reason is that defection is done to attract more resources to their constituencies; thus in this way defection is a way of strengthening – not weakening – vertical accountability.

Section 65 has been applied in a few individual cases, but it seems that when a 'tsunami' of defections occurs, there are many opportunities to delay taking any action until the next election approaches. As the outcome of by-elections is only valid for the remaining electoral term, the political parties have incentives to save resources needed for the approaching general election campaigns.

Party funding.

There are no limitations on campaign spending or any rules about how parties raise funds in general.

According to Section 40(2) in the Constitution political parties gaining at least 10 per cent of the national votes qualify for financial support from the state. Nevertheless, the formulation '10 per cent of the votes' has been interpreted as 'at least 10 per cent of the seats'. Thus, only a few of the parties winning seats have benefited from this rule. It is difficult to assess the

¹⁶ The defections did not only involve regular MPs but also leading figures, including in the leadership, of the opposition parties, such as deputy secretary general of the UDF, a former Minister of Finance in DPP, and the Secretary General of DPP among others. The precise number of MPs who have defected is unclear, as some have declared themselves independent, but vote with the government, while others have joined the PP. A number of MPs have also first defected to the PP, but later declared the return to DPP (Nyasa Times, 18.06.12)

consequences of party funding for party organization¹⁷, but it is likely that public funding has contributed to the centralisation of power in the parties as the funding is paid out the bank account managed by the party leader. As party finance in general is considered a well-kept secret it is not possible to know how significant public subsidies in general are. But inside political parties issues concerning finances are frequently a source of conflict. (Parties are not obliged to account for how the funding is spent). Thus, while public subsidies may strengthen political parties, it is also likely to increase leadership control with parties, given the weakness of internal party organization.

Standing orders of parliament

The Constitution gives the National Assembly the right to regulate its own organization and procedures. The standing orders do not regulate internal party affairs, but after the election in 2009 an attempt was made to change the rules for the election of Leader of the opposition. For the first time, the president's party also won a majority of the seats in parliament (see table 1). Normally, the Leader of the opposition is the leader of the largest opposition party in parliament. However, the new rule allowed *all* MPs to vote in the election. As a consequence, the parliamentary majority, consisting of DPP MPs, elected a freshly elected MCP parliamentarian MP, Abele Kayembe, as Leader of the Opposition, side lining the MCP party president John Tembo¹⁸. The decision fuelled an internal conflict in the MCP where a group of younger MPs had argued for the resignation of the party president. Tembo took his case to the court. When the case was before the court the Attorney General intervened to get a court injunction against the court's handling of the case, but in May 2010 the High Court declared the change unconstitutional and ordered the Parliament to recognize Tembo as Leader of the Opposition. Nevertheless, it took another court order to force the Speaker¹⁹ to act on the matter.

Conclusions.

¹⁷ It has not been possible to obtain data from parliament how much is paid out to parties, but according to a report in Nyasa Times 28. November 2009, three parties (DPP, MCP, and UDF) shared Kw. 33 million (Ca USD 20.000) annually.

¹⁸ Kayembe later defected from MCP to become an independent MP, «associating with Democratic Progressive Party because this is what my people say», (cited in Nyasa Times, 2. June, 2011)

¹⁹ The Speaker is the former DPP secretary general, but is supposed to be politically neutral.

This paper has outlined some of the most important constitutional and legal regulations of political parties in Malawi, as well as how some functions of political parties are impacted by the decisions of institutions empowered to make decisions binding for the political parties. As demonstrated above there are contradictory patterns. Formally, the constitution, the elections' acts and the communication act should provide for the basic democratic right and a level playing field during elections. But partly due to selective application of the rules and partly because of the weakness of the political parties as organizations, the regulations have not contributed to a stable party system.

Party registration, candidate registration and parliamentary parties are affected by selective application of the rules. On the one hand, the rules for party registration and nomination of candidates are simple, but in practice there are attempts by the governing party to intervene when new parties seek registration and which are considered to be challengers to the incumbent party. The ease with which candidates can register (before the hike of the registration fee in 2009) has probably contributed to increase the number of independents as well as to new parties. Some of the party regulations have therefore contributed to a de-institutionalization of the party system.

The application of Section 65 – and particularly failure to apply the rule - depends strongly on the preference of the incumbent party – regardless of which party it is.

The controversy over the election of Leader of opposition is another example of how the incumbent party have attempted to change the rules in its favour.

In Malawi as elsewhere, political parties are among the least trusted institutions (IFES and Group 2006) (15). Opposition parties have been even less trusted than the ruling party (Logan 2008). A likely reason for this is that all parties are seen as vehicles for ambitious politicians who move from one party to another.²⁰

Throughout this paper, references have been made to the role of the courts. The courts have ruled on all aspects of political parties: on nominations, on registration, on election disputes, and on internal party affairs (Kanyongolo 2005; Gloppen and Kanyongolo 2007; Kanyongolo

²⁰ In 2009 66 candidates classified as 'prominent politicians' lost the seat they contested for Makupe, C. M. (2009). Electoral results in statistics. Malawi's 2009 Parliamentary and Presidential Elections: Democracy in Progress? M.Ott and F. Kanyongolo. Zomba, Kachere: 411-438.

2010). On the whole, decisions by the judiciary tend to be upheld, although it may require several rounds in the courts. Political parties as institutions are weakly organized and the country's rules and regulations are twisted this way or that to suit the incumbents, both by the government and internally in the parties by the party leadership, but the courts have emerged as fairly reliable in seeking to uphold the rule of law – but even court rulings are sometimes ignored.

Appendix. Party labels:

AFORD: Alliance for Democracy

CDP: Christian Democratic Party (Social Democratic Party from 1995)

CNU: Congress for National Unity

CSRМ: Congress for the Second Republic of Malawi

CODE: Congress of Democrats

DPP: Democratic Progressive Party

FP: Forum Party

LP: Labour Party

MAFUNDE: Malawi Forum for Unity and Development

MCP: Malawi Congress Party

MDP: Malawi Democratic Party

MDU: Malawi Democratic Union

MFP: Malawi Freedom Party

MGOДE: Movement for Genuine Democratic Change

MMYG: Mass Movement for the Young

MNDP: Malawi National Democratic Party

MPP: Malawii People's Party

NARC: New Rainbow Coalition

NASF: National Salvation Front

NCD: New Congress for Democracy

NDA: National Democratic Alliance (de-registered 2004)

NIP: National Independent Party (de-registered 1999)

NPF: National Patriotic Front

NRP: New Republican Party

NSM: National Solidarity Movement

NUP: National Unity Party

PDM: People's Development Movement

PDP: People's Democratic Party

PETRA: People's Transformation Party

PFP: Padmozi Freedom Party

PPF: People's Popular Front

PPM: People's Progressive Movement

PP: People's Party

RP: Republican Party

SDP: Social Democratic Party

SDNP: Sapitwa National Democratic Party

UDF: United Democratic Front

UFDM: United Front for a Democratic Malawi

UP: United Party (de-registered 2002)

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