

# Good Governance or Government Reform? —Transforming Governmentality in the Third Wind of Change

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## 1. Prologue

Most, if not all, African countries were colonized by the European Powers. At that time, the constitutional order of most countries was premised upon the constitutional order of the colonial masters. The most important feature of most written constitutions then was the embodiment of the principle of separation of powers, namely the executive, the legislature and the judiciary. There were no constitutional provisions relating to human rights and fundamental freedoms.<sup>1</sup> Following the First Wind of Change against colonization in 1960s, most African countries adopted ‘independence constitutions’ which served as conduits for transfer of power from the colonial masters to the African nationals.

Although most ‘independence constitutions’ retained the concept of separation of powers and also ensured supremacy of governmental authority by the executive organ over the other two branches, which led to dictatorial regimes and one party system of government in most countries.<sup>2</sup> The system of checks and balances between the three branches of government could not be guaranteed and, in fact, it was non-existent.<sup>3</sup> Human rights were a sticky issue during this period as it “was observed that constitutional provisions on human rights and fundamental freedoms tend to generate conflict and tension between the executive and the judiciary.”<sup>4</sup> After a generation, the Second Wind of Change blew in the early 1990s which led to a transition from one party rule to multi-party democracy in most African States. The Second Wind of Change was accompanied by the adoption of ‘democratic constitutions’, encompassing the principle of the supremacy of the constitution, and other democratic values such as the rule of law, respect for human rights and fundamental freedoms, transparency and accountability by state officials and periodic and genuine elections.

Notwithstanding the democratic constitutions, how can one ever explain the fact that the constitutions of most African countries have embodied fundamental principles such as human rights, rule of law, democratic governance, and accountable and transparent government; only to find them dishonoured in breach? How can one justify that access to information law is still not part of the legislative fabric of several countries at the epicentre of corruption in Africa? How

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<sup>1</sup> Msaiwale Chigawa, “The Fundamental Principles of the Constitution of the Republic of Malawi, 1994,” paper presented at the Law Commission Review Conference 2006, Capital Hotel, Lilongwe, 28-31 March 2006, p. 2.

<sup>2</sup> For example, in Malawi the President had power to appoint and dismiss the Speaker of the National Assembly, see s. 25 of the Constitution of 1966. Further, under s. 63 (1) of the constitution of 1966, the President had exclusive mandate to appoint the Chief Justice.

<sup>3</sup> Chigawa, *supra* note 1, p. 10.

<sup>4</sup> Chigawa, *supra* note 1, p. 5.

can one ever understand the executive policies that have the effect of treating persons in like situations, differently? How can one discuss good governance when what most African governments actually need is reform? These concerns underscore the need to review and reform the law in order to enhance participatory and democratic governance in Africa.

To this end, using Foucaudian lenses, this essay takes a juridical audit of the law by assessing the implementation of some fundamental constitutional tenets to expose the lacuna in the law that may need to be filled in order to enhance governmentality. According to Foucault, governmentality is the “art of government” in a wide sense, i.e., with an idea of “government” that is not limited to state politics alone, but also includes a wide range of control techniques, and that applies to a wide variety of objects, from one’s control of the self to the “biopolitical” control of populations.<sup>5</sup> In general terms, ‘governmentality’ can be understood as “the way governments try to produce the citizen best suited to fulfill those governments’ policies, the organized practices (mentalities, rationalities, and techniques) through which subjects are governed.”<sup>6</sup> In short, governmentality is all of the components that make up a government that has as its end the maintenance of a well ordered and happy society (population).<sup>7</sup>

## 2. The Governors and the Governed

The common thread that runs throughout the democratic constitutions of most African States following the Second Wind of Change is that of limited government or the rule of law. Today the exercise of executive power in most Africa countries that have experienced dictatorship is always subject to judicial review in order to ensure that executive discretion is not allowed to override clear constitutional provisions.<sup>8</sup> Chigaŵa aptly analyses that the “essence of the rule of law is that all citizens must be subject to, and below the power of, the ordinary law of the land. It is also a requirement of the rule of law that in the particular country, there must be adequate safeguards against abuse of the rights and interests of the individual.”<sup>9</sup>

Article 21(3) of the Universal Declaration of Human Rights dictates that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.”<sup>10</sup> Apart from the right to take part in government, the provision also guarantees the right to democratic governance and the right to equal access to public service.<sup>11</sup> The rationale of the right to participatory democracy is that every individual should be seen to participate in the political running of the country, either

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<sup>5</sup> See generally, Michel Foucault, “Governmentality”, trans. Rosi Braidotti and revised by Colin Gordon, in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality*, Chicago, IL: University of Chicago Press, 1991, pp. 87–104.

<sup>6</sup> Susan Mayhew (ed) *A Dictionary of Geography* (Article: Governmentality) Oxford University Press, 2004.

<sup>7</sup> C. Gordon, “Governmental rationality: an introduction”, in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality*, Chicago, IL: University of Chicago Press, 1991, pp. 1– 48. Chicago, IL: University of Chicago Press

<sup>8</sup> Chigaŵa, supra note 1, p. 21.

<sup>9</sup> Ibid., p. 22.

<sup>10</sup> See Ian Brownlie, *Basic Documents on Human Rights*, Oxford: Clarendon Press, 1992, p. 25.

<sup>11</sup> Chigaŵa, p. 47.

directly by the persons concerned or through their genuine representatives.<sup>12</sup> In Malawi, section 12 of the Constitution states as follows:-

- (i) All legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.
- (ii) All persons responsible for the exercise of powers of state do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.
- (iii) The authority to exercise power of state is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent government and informed democratic choice.

Further, Article 12 of the Constitution of the Republic of Malawi is regarded as embodying contemporary social contract theory and the principle of participatory democracy, implying that those who govern must exercise political authority taking into account the prevailing opinion of those who they govern.<sup>13</sup> Thus, the legal and political authority of governors is conditioned upon the wishes of the majority of the governed. The concept of participatory democracy hinges on the decision-making process and its legitimacy, i.e., valid decisions by those in power should emanate from the electorate.<sup>14</sup> What this means is that policies and decisions of the Executive can only be legitimate if they are consistent with the Constitution and other laws that are enacted by Parliament, which is duly elected by the people.

Therefore, where executive decisions and policies are made without consulting the grassroots that may erode democracy and democratic governance. If the governor does not take into account the wishes and aspirations of the governed then that is a flagrant violation of the democratic constitutional and political order. Such practice amounts to undemocratic governance and runs against the grain of constitutional principles of an open, accountable and transparent Government.

However, with the repealing of the provision where Members of Parliament were subject to recall by their electorates and the absence of procedure for impeachment of the President and the First Vice-President; the question is what is the remedy available for the electorates? Where were the lawyers when Parliament was repealing section 64 of the Constitution?<sup>15</sup> What are the lawyers doing to outline the impeachment procedure as required by section 86 (2) of the Constitution? Nonetheless, as the authority to govern is conditional upon the sustained trust of the governed, clearly what may be lost by the government is legitimacy.

## 2.1. Parliamentarity

The concept of democratic governance also extends to the Legislature that legislation must be passed according to the procedure laid down by the constitution or standing orders of the Parliament taking into account plurality of views. To this end, Chigaŵa is of the view that:

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<sup>12</sup> See *Denmark et al v. Greece* (Appl. Nos. 3321-3/67; 3344/67), *Yearbook of Human Rights*, vol. 11, pp. 690, 730; Decision of 5 November 1969, European Commission of Human Rights.

<sup>13</sup> Chigaŵa, *supra* note 1, p. 48.

<sup>14</sup> *Ibid.*, p. 49.

<sup>15</sup> See s. 64 of the 1994 Constitution repealed by Act No. 6 of 1995 as read with s. 86 (1) and (2) of the Constitution of the Republic of Malawi.

Although Bills are normally presented to the house by the government, debate on any such bill is necessary in order to determine the merits and demerits of the proposed law. Where a vote has to be taken on a Bill, the required majority must be present and the will of the majority in the house must be respected. It must be stressed that parliament has no legal mandate to enact a law that is unconstitutional.<sup>16</sup>

For this reason, the *Press Trust* case held that the enactment of the Press Trust (Reconstruction) Act of 1995, at a time when the House had no requisite constitutional quorum and at which no formal vote was taken, is not in line with the principle of democratic governance enshrined in the Constitution of the Republic of Malawi.<sup>17</sup> It follows that the enactment of a law without meeting the requisite legislative standard or laws that are discriminatory, amounts to undemocratic governance since the citizenry is subjected to legislation that is unconstitutional or under representative in character.<sup>18</sup>

Similarly, where there is a public outcry following the passing of a particular law by Parliament, that may indicate lack of consultation by the legislators. Again, the question is what is the remedy available to the electorate? In a perfect system of checks and balances, such unprocedural and discriminatory legislation may be declared null and void by the courts to the extent that it is inconsistent with the Constitution. In such cases, would the electorate be warranted to ask where the legislative drafters were when Parliament was passing such unconstitutional law?

## 2.2. Do not feed the greed

Greed is an inherent ingredient of human nature, and despite its disruptive and corrosive effect on society; it has been around from time immemorial. Invariably, the weak in character are easily corruptible. This may help explain why section 88A (1) of the Constitution requires that the President and Cabinet Ministers, including Members of Parliament, must disclose all their assets, liabilities and business interests – as well as those of their spouses or any assets that are held on their behalf – upon election or appointment. Such a declaration should be made in writing to the Speaker of the National Assembly within three months of their election or appointment.<sup>19</sup> Actually, section 13 (o) of the Constitution obliges the State to progressively adopt and implement policies and legislation aimed at achieving public trust and good governance as a principle of national policy by:

[introducing] measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions.<sup>20</sup>

Despite this constitutional requirement and the importance of government officials to be publicly accountable to citizens, it has proven difficult for the political elite to disclose their assets in

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<sup>16</sup> Chigawa, supra note 1, p. 56; cf. s.5 of the Constitution of the Republic of Malawi.

<sup>17</sup> Ibid. 55.

<sup>18</sup> Ibid., p. 56.

<sup>19</sup> See also section 213 of the Constitution.

<sup>20</sup> See s. 13(o) of the Constitution.

Malawi.<sup>21</sup> This lack of transparency can lead to allegations of corruption a sense of impunity. However, corruption not only destroys social cohesion and trust, it undermines talent and efficiency, rewards the undeserving, lowers standards of performance, is unjust, tarnishes the image of a nation, and has a negative effect on business and investment.<sup>22</sup>

This is why the Chinese Government has set death sentence as punishment for corruption, usually swiftly carried out. While the imposition of capital punishment does not augur well with human rights groups outside the country, the Chinese authorities insist that the stakes for their nation are too high to be jeopardized by greedy or careless individuals. Twenty years ago, China was poor; today it is an emerging Super Power in wealth creation. Although death sentence is not an appropriate punishment for corruption, it still seems reasonable to argue that if those found guilty of corruption receive mandatory stiff sentences, especially if they hold government office, it can deter potential perpetrators from plunging their hands into the national coffers.

Adequate legislation with firm punishment for corruption is imperative. The cancerous growth of corruption destroys the economic growth of a country. A good illustration of the scenario in Africa is Nigeria. When Nuhu Ribadu, was the head of the Nigerian anti-corruption authority, his zero-tolerance attitude towards corruption led to the reversing of capital flight from Nigeria. Several prominent businessmen repatriated the money they had stolen to avoid facing the anti-corruption squad. As money earned in Nigeria remained within the country record reserves accumulated enabled Nigeria to settle its foreign debts thereby boosting the economy. Talented and honest people who were came to the fore, while crooks went into hiding. However, Ribadu is no longer the anti-corruption czar in Nigeria, he left the country as he made so many enemies with his aggressive anti-corruption efforts.

Notwithstanding the Nigerians reaction to Ribadu, corruption is evil and those holding public offices should lead by example in order to combat corruption. The first step would be to declare their assets upon assuming office. This would provide the governed a sense of trust and confidence in their elected – and appointed – representatives.<sup>23</sup> It should be noted that where a public official has disclosed his or her assets the record is not made public as the Speaker is not obliged to furnish or publish the declaration. Hence, the law relating to disclosure of assets in Malawi is just a paper tiger, as no one has access to the records and there is no enforcement mechanism. However, in other progressive countries, the media is able to overcome non-disclosure to third parties by using an access to information law. Unfortunately, there is no legislation yet to access to this type of information in Malawi. Again, one may ask what the lawyers are doing to let the sleeping dog lie?

### 2.3. Aid or Trade?

There has been a heated debate in the past few years on gay and lesbian rights. Some are of the view that the donor community has threatened to withhold aid in order to persuade countries to

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<sup>21</sup> Theresa Kasawala, “Declaration of assets: No one knows what politicians own in Malawi”, Open Society Initiative for Southern Africa, 5 November, 2011.

<sup>22</sup> Anver Versi, “Let’s excise corruption once and for all,” African Business, April 2010, p. 11.

<sup>23</sup> Kasawala, supra note 21.

decriminalize homosexuality.<sup>24</sup> However, the donors contend that they are not putting gay-rights strings to its development aid to countries such as Malawi. While the political rhetoric is that the donors want to promote homosexuality, the real issue is not to promote but rather decriminalize homosexuality.<sup>25</sup> Without offence to atheists, the question is whether homosexuality is a crime or a sin?<sup>26</sup> If the objective of the law is to protect the society, what harm does an act that happens behind lock and key by two consenting adults do to the society? One persuasive school of thought argues that homosexuality is “a dirty sin, a religious and moral issue.”<sup>27</sup>

It should be remembered that certain human rights, such as the right to equality and non-discrimination, are so basic to the survival of democracy and democratic institutions that they deserve some special treatment.<sup>28</sup> The concept of equality of peoples and non-discrimination is fundamental to the concept of human rights.<sup>29</sup> Discrimination of persons in any form is prohibited under the Constitution of the Republic of Malawi. Section 20 guarantees equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.<sup>30</sup> Chigaŵa is of the view that “these attributes are given by way of example only and that discrimination is, as a general rule, prohibited on any other basis.”<sup>31</sup>

As to the difficult problem of gay and lesbian rights, the simple solution is to embrace homosexual individuals and convince them to change their ways not to ostracize them. Tolerance is the key. “To tolerate”, Rawls says, “means not only to refrain from exercising political sanction [...] to make a people change its ways,” but also “to recognize these non-liberal societies as equal participating members in good standing of the Society of Peoples.”<sup>32</sup> The theory is that granting decent homosexuals this form of respect may encourage them to reform themselves, or at least not discourage reform while denying them respect might well do so. However, there is also a non-instrumental reason to grant them respect: it is their due.

Sonke questions whether one can extort moral values with imprisonment and responds that those “would be moral standards created by fear not conviction.”<sup>33</sup> Therefore, one cannot convince homosexuals to change their ways where homosexuality is criminal as they are invariably underground. Instead of polarizing the issue of gay and lesbian rights, the appropriate approach is to convince conservatives taking into account the difference in each other’s religious beliefs and cultural values. Certainly, the values of the West are not the same as those of the rest. Africans, for instance, have a different culture based on much more fundamental religious beliefs and cultural values. Understanding, respect and dialogue is needed. The question, however, is who should initiate the debate?

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<sup>24</sup> Jan-Jaap Sonke, “Decriminalize homosexuality,” *The Nation*, Friday, November 4, 2011, p. 16.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> See, s. 20 of the Constitution of the Republic of Malawi.

<sup>29</sup> See generally, M. Galanta, *Competing Equalities: Law and Backward Classes in India*, Dehli: OUP, 1984.

<sup>30</sup> See also, Art. 2 of the Universal Declaration of Human rights.

<sup>31</sup> Chigaŵa, *supra* note 1, p. 27.

<sup>32</sup> John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999, p. 59.

<sup>33</sup> Sonke, *supra* note 24.

The perennial question on constitutional validity of same-sex marriages still lingers. Section 22(3) of the Constitution stipulates that all men and women have the right to marry and found a family. According to *Hyde v. Hyde* (1866), the definition of an English marriage still remains a “voluntary union of one woman and one man to the exclusion of all others for life.”<sup>34</sup> However, one can still question lawyers if the meaning of marriage should be fixed to what it meant in 1866, or it must adapt to the Constitutional guarantees of equality and non-discrimination and evolve with the society which currently represents a plurality of groups?

#### 2.4. Equitable or restricted access to education?

Pursuant to section 7 of the Constitution, the Executive has initiated a policy of equitable access to university education, where admission to the University of Malawi is based on one’s district of origin. In the Indian case of *Rajendran v. State of Madras*, the court annulled a quota system that distributed college places district wise stating that:-

The fact, however, that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats district wise has no reasonable relation with the object to be achieved [...] If anything, such allocation will result in many cases in the object being destroyed and if that is so, the classification, even if reasonable would result in discrimination, in as much as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted from either of the two sources.”<sup>35</sup>

Against the backdrop of the prohibition of discrimination in section 20 of the Constitution of the Republic of Malawi, there is need to determine whether the rationale behind the policy is to get the best brains for admission to the University of Malawi or that admission to the University district wise amounts to discrimination as better qualified students may be denied admission on the basis of their district of origin.

It is worthwhile to note that ‘equality in law’ prohibits discrimination of any kind whereas ‘equality in fact’ may involve the necessity of different treatment in order to achieve a result which establishes equilibrium between different situations.<sup>36</sup> In terms of section 20 of the Constitution, therefore, ‘equality in law’ prohibits the political authorities in Malawi from initiating policies or enacting legislation that apply differently – or confer different rights and obligations – to persons on the basis of their external attributes such as race, sex or tribe.<sup>37</sup>

According to the supremacy clause in section 5 of the Constitution, [a]ny act of government or any law that is inconsistent with the provisions of this Constitution shall to the extent of such inconsistency be invalid.”<sup>38</sup> It follows, therefore, that any policy or legislation that has the effect of treating persons, in like situations, differently erodes the essence of equality in law and may be invalid to the extent of such inconsistency. One question that victims of such a policy may ask

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<sup>34</sup> [L.R.] 1 P. & D. 130

<sup>35</sup> [1968] 2 SCR 786; Judgment of 17 January 1968; (1968) SC 1012, 1016 – 1017.

<sup>36</sup> *Minority Schools in Albania*, PCIJ Rep. Ser. A/B, No.64 (1935), p.19.

<sup>37</sup> Chigaŵa, supra note 1, p. 34.

<sup>38</sup> See s. 5 of the Constitution of the Republic of Malawi; see also *Republic v. Dr. Banda et al*, Crim. App. No. 21 of 1995, MSCA, (unrep), p. 20.

is whether such a policy of quota system actually provides equitable access, or in fact restricts access, to university education?

### 3. Beyond borders

While it is obvious that there is need for law reform on the domestic front, it is also clear that there is need to review some international instruments that may have withered with time such as the Charter of the United Nations (UN Charter) or those that seem to pose challenges in their implementation, for example the Rome Statute of the International Criminal Court (Rome Statute).

#### 3.1. United Nations in Africa and Africa in the United Nations

Article 4 of the UN Charter states that membership in the United Nations is open to all peace-loving States which accept the obligations contained in the Charter and are able and willing to carry out the obligations under the Charter.<sup>39</sup> Thus, each independent sovereign State is entitled to become a Member of the UN. The UN General Assembly consists of all Members of the UN.<sup>40</sup> Article 18 of the UN Charter indicates that each Member of the General Assembly shall have one vote. Although the UN Charter seems to suggest that all Member States shall enjoy equal rights and equal duties, clearly other States are ‘more equal’ and have more duties than others.<sup>41</sup>

Of particular interest is the composition of the Security Council in Article 23 of the UN Charter, which states that the Security Council shall consist of fifteen (15) UN Members of which five shall be permanent members of the Security Council (P5), namely, the Republic of China, France, the Russian Federation, the United Kingdom and the United States of America. Another noteworthy provision is Article 27 of the UN Charter. Although Article 27(1) rightly states that each member of the Security Council shall have one vote, Article 27(3) confers on P5 veto powers on non-procedural matters dictating that “[d]ecisions of the Security Council on all matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”

Considering the impasse in the Security Council during the Rwandan genocide in 1994, the question to the International Law Commission is why should grudges of the World War II still haunt the international intercourse of States today? Given the selectiveness of the Security Council to act in cases such as Libya and the unwillingness to act in Syria, how can one explain the relevance of the veto power? Wait a minute; did UN Security Council resolution 1973 sanction regime change in Libya or the protection of civilians at risk?<sup>42</sup> As regards permanent membership of the Security Council, if the rise of continental Super Powers such as South Africa and Nigeria in Africa, India in Asia, Brazil in South America is noticed, why can’t the P5 be

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<sup>39</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

<sup>40</sup> Article 9 of the UN Charter.

<sup>41</sup> Cf. Article 19 of the UN Charter.

<sup>42</sup> United Nations, S/RES/1973 (2011) adopted by the Security Council at its 6498<sup>th</sup> Meeting on 17<sup>th</sup> March 2011.

determined according to equitable geographical distribution?<sup>43</sup> In short, when is the UN Charter going to be amended, if at all?

### 3.2. The International [African] Criminal Court?

Since its establishment in 2002, all the cases before the International Criminal Court (ICC) have been from the African continent. Presently, the situations before the ICC consist of the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Darfur in Sudan, Kenya and recently Libya.<sup>44</sup> If the number of situations before the ICC are anything to go by, why can't it be called the African Criminal Court? Or better still, why can't the ICC move from The Hague and get closer to the victims and witnesses of atrocity crimes in Africa?

Yet, the conventional rhetoric that African leaders are determined to end impunity is not supported by state practice in reality. Although African States have traditionally been strong supporters of the ICC, the apparent resistance by some African states to the implementation of the Rome Statute of the ICC is a cause of concern. More worrisome is the recent refusal of the African Union (AU) to cooperate with the ICC expressed at the 15<sup>th</sup> Summit of African Heads of State and Government.<sup>45</sup> The official position of the AU is that it will not cooperate with the ICC because of the inaction on the request by the AU to the UN Security Council to defer the prosecution of the incumbent President of Sudan, Omar El Bashir, and for the amendment of Article 16 of the Rome Statute to enable other UN bodies to request the suspension of the ICC prosecutions in case of inaction by the Security Council.<sup>46</sup>

The AU also has also rejected the request by the ICC to establish an ICC liaison office at the AU headquarters.<sup>47</sup> The AU is also concerned – and rightly so – that the ICC only intervenes in Africa although mass atrocity crimes are also committed on other continents. The AU justifies its decision not to cooperate with the ICC as “a logical consequence of the stated position of the AU on the manner in which the prosecution against President Bashir has been conducted, the publicity-seeking approach of the ICC Prosecutor, the refusal by the UN Security Council to address the request made by the [AU] and other important International groupings for deferment of the indictment against President Bashir.”<sup>48</sup> According to the AU:

The decision bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice

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<sup>43</sup> Cf. General Assembly Resolution 1991 (XVII), A, para. 3.

<sup>44</sup> See generally the International Criminal Court , available at: < <http://www.icc-cpi.int/Menus/ICCthe>>, (accessed 6 November 2011).

<sup>45</sup> African Union, 15<sup>th</sup> AU Summit-Press Release N.104, Decisions of the 15<sup>th</sup> AU Summit held in Kampala, Uganda from 15 to 27 July 2010, Addis Ababa, 29 July 2010, p. 5 [“ 2010 Kampala Decision”]; see also African Union, Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec/245(VIII)Rev.1, para. 10. (Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009)[“2009 Sirte Decision”].

<sup>46</sup> See ‘2010 Kampala Decision’ *ibid* note 1; see also 2009 Sirte Decision, *ibid* note 1, para. 10

<sup>47</sup> *Ibid.*, ‘Kampala Decision.’

<sup>48</sup> African Union, Press Release “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), 14 July 2009, also available at: <[www.africa-union.org/root/.../Press%20Release%20-%20ICC.doc](http://www.africa-union.org/root/.../Press%20Release%20-%20ICC.doc)> (accessed 5 November 2011).

and peace, neither of which should be pursued at the expense of the other. Furthermore, the decision was taken after due evaluation of the situation in Darfur informed by the commitment of Member States to finding a lasting solution to the problem in Darfur with a view to restoring peace, security and stability in The Sudan and the whole region and prevent further displacement and killings in that country.<sup>49</sup>

Understandably, the AU's decision is premised on the dilemma whether to pursue justice at the expense of peace in Darfur. It is important to note that the jurisdiction of the ICC is subsidiary or complimentary to national courts; and it should be remembered that the decision by Security Council to refer the situation in Darfur to the ICC was based on the seemingly culture of impunity in Sudan despite the evidence of commission of mass atrocity crimes.<sup>50</sup> Thus, in accordance with the Rome Statute and pursuant to the principle of complementarity, the ICC would not have interfered if the Government of Sudan had shown genuine willingness or ability to prosecute.<sup>51</sup> If the jurisdiction of the ICC is complimentary to that of States, why then can't African States adopt domestic laws to prosecute perpetrators of Article 5 crimes to avoid international intervention?<sup>52</sup>

#### **4. Law reform begins at home**

The above discussion has exposed the loopholes and the practical problems in the implementation of constitutional principles engraved in the Constitution of the Republic of Malawi. While the Constitution has provided for a wide category of constitution principles in section 12 and the principles of national policy in section 13, there are lacunae in some cases to bring the promise of the Constitution into practice. This brings to the fore the relevance of section 132 of the Constitution which establishes the Law Commission that "has the power to review and make recommendations relating to repeal and amendment of laws." The question is how can the Law Commission effectively perform such a monumental task?

##### **4.1. Fourth arm of government**

Importantly, section 136 of the Constitution provides that the "Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority." To this end, the Law Commission has the powers to

- (a) review and make recommendations regarding any matter pertaining to the laws of Malawi, and their conformity with the Constitution and applicable international law;
- (b) review and make recommendations regarding any matter pertaining to the Constitution;

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<sup>49</sup> Ibid.

<sup>50</sup> Article 17, Rome Statute of the International Criminal Court, adopted on 17 July 1998 and entered into force on 1 July 2002.

<sup>51</sup> Ibid.

<sup>52</sup> Cf. Osman Hummada, President of the African Center for Justice and Peace Studies (ACJPS) quoted in International Federation for Human Rights, "The African Union defies the International Criminal Court and dares trample on the memory of Darfuri victims!" 30 July 2010, available at: <<http://fidh.org/The-African-Union-defies-the-International>> (accessed 7 November 2011).

- (c) receive any submissions from any person or body regarding the laws of Malawi or the Constitution; and
- (d) report its finding and recommendations to the Minister of Justice who shall publish a report and present it before Parliament.

Given these wide and generous powers and functions, the Law Commission may exercise its right of initiative to fill in the gaps where the law is lacking; to shape policies that are wanting, or to bring in cadence legislation – and policies – inconsistent with the Constitution.<sup>53</sup> Briefly put, the Law Commission can be regarded as the fourth branch of government to ensure a system of checks and balances insofar as review or reform of legislation and governmental policies is concerned. With sufficient financial and institutional capacity, the Law Commission holds the key to enhance governmentality in Malawi.

## 4.2. Strategic advocacy

The fact that the legal and political authority to govern is conditioned on sustained trust of the governed, implies that the governed should be included in the decision making process as well as the legislative process.<sup>54</sup> This view is buttressed by the Constitution as follows:

Section 7. The executive shall be responsible for *the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi* and which promote the principles of this Constitution.

Section 8. The *legislature when enacting laws shall reflect in its deliberations the interest of all the people of Malawi* and shall further the values explicit or implicit in this Constitution. [Emphasis added].

This means that when the Executive is initiating policies or the Legislature is enacting laws, such policies and legislation should reflect the wishes and interests of the citizenry in order to ensure legitimacy and legality. In light of the Law Commission's mandate to receive submissions from any person or body regarding the laws of Malawi and the Constitution, it is suggested that the Law Commission should also engage in strategic advocacy to enlighten the citizenry about forthcoming policies and legislation. Some laws are too complex to be comprehended by a lay man. Some policies are too political to be appreciated by a common man. This is where the Law Commission may come in to clearly explain to the citizenry the policy behind particular legislation or the *raison d'être* of a particular policy so that the citizenry should make informed choices and wishes.

## 5. Epilogue

The First Wind of Change in Africa brought about 'independence constitutions' which, to a large extent, facilitated the change of guard from the colonial masters to the locals while establishing a system of separation of powers in most African countries. The Second Wind of Change ushered in 'democratic constitutions' containing a comprehensive Bill of Rights and fundamental

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<sup>53</sup> Note that s. 136 (b) refers to review and make recommendations regarding any matter pertaining to the Constitution.

<sup>54</sup> See s. 12 of the Constitution.

principles such as supremacy of the constitution, the rule of law, respect for human rights and fundamental freedoms, transparency and accountability by state officials and periodic and genuine elections. However, the implementation of such constitutional principles in practice is challenged by the lack of enabling legislation and shortsighted policies that are only intended to save the government of the day and not the citizenry as such. In the long run, the governors do not consider the wishes of the governed; the parliamentarity (mentality or rationality of Parliamentarians) is not to debate the merits and demerits of the proposed law or to represent the will of the people but rather the intentions of their own political parties.

For example, there is still no legislation to enable the governed compel disclosure of assets by the governors. Grey areas of the law still remain grey. Such problems exist beyond the domestic legislative regime such as in the United Nations and the implementation of the Rome Statute. However, as the saying goes: charity begins at home; equally, law reform should also begin at home. In this sense, assuming the Law Commission is the fourth arm of government – by virtue of its powers and functions – it has a monumental task to shape ‘governmentality’ so that the government should have as its end the maintenance of a well ordered and informed the citizenry.<sup>55</sup> Considering that the authority of governors is conditioned upon the sustained trust of the governed, there is need for the Law Commission to clearly explain as well as to hear the views of the governed regarding legislation and policies so that the governed should not be forced to submit to law or policies they have not been privy to. All things said and done, the Law Commission has a responsibility to guide the Executive and the Legislature to initiate policies and enact law, respectively, that are in line with the Constitution and in the public interest.

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<sup>55</sup> Gordon, C (1991). “Governmental rationality: an introduction”, in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality*, pp. 1– 48, Chicago, IL: University of Chicago Press