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# REPORT ON CITIZENSHIP LAW: MALAWI

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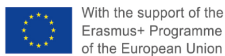
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# Report on Citizenship Law Malawi

*Tabeth Masengu*

## 1. Introduction

Malawi is one of the few African countries that has decided to retain gender discrimination present in its nationality laws, despite amending its constitution within the last three years. Malawi's Citizenship Act permits foreign wives to attain their Malawian husbands' citizenship, but no clause allows foreign husbands to acquire their wives citizenship.<sup>1</sup> In contrast, the Constitution of Malawi, which was amended as recently as 2017, enshrines gender equality as a principle of national policy and explicitly states that gender equality will be obtained by implementing non-discrimination principles other measures as required.<sup>2</sup> This discrimination is even more curious because, in 2018, the Malawian Parliament voted to amend the Citizenship Act by allowing for dual citizenship for both adults and children.<sup>3</sup> This amendment was hailed by the Minister of Homeland Security Nicholas Dausi as proof that the Government was at "the heart of women's emancipation"<sup>4</sup> because the new amendment meant that a Malawian woman would not lose her citizenship upon marrying a foreigner and acquiring his citizenship.

Gender and other forms of discrimination in the Citizenship Act are remnants of a colonial past commencing in 1891 when the British colonised Malawi.<sup>5</sup> This paper begins with that colonial past when Nyasaland (now Malawi) was a member of the Federation of Central Africa and its subsequent independence on July 6, 1964. After a historical overview of Malawi, the paper examines post-independence changes to citizenship rules before examining historical migration patterns that have affected claims for citizenship in Malawi. This is followed by a discussion on the current citizenship laws concerning acquisition and deprivation of citizenship before concluding remarks.

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<sup>1</sup> Malawi Citizenship Act, No.28 of 1966, section 16.

<sup>2</sup> Republic of Malawi Constitution (Amended), No 20 of 1994,section 13. The Constitution has over 15 amendments to date with the last being Amendment 36 of 2017.

<sup>3</sup> Malawi Citizenship (Amendment Act) No 11. of 2019.

<sup>4</sup> Austin Kakande "Malawi adopts Dual citizenship concept" *MBC Malawi*, 13 December 2018.

<sup>5</sup> A discussion on this follows later in the chapter.

## 2. The History of Malawi

### 2.1 The Colonial Period

Malawi was previously known as British Central Africa (1891–1906) and Nyasaland (1906–1964) before it was renamed Malawi upon acquiring independence in 1964.<sup>6</sup> Malawi's formal history is said to have commenced with Dr Livingstone, who pointed to the Shire Highlands “as a suitable district for some description of colonisation by Europeans”.<sup>7</sup> After the missionaries came the traders, the most notable of these being the African Lakes Corporation which had branches throughout Nyasaland and Northern Rhodesia.<sup>8</sup> Then followed the conflict between the tribal chiefs and Portuguese in Lake Nyasa's vicinity in 1881 before a British protectorate was declared over southern Malawi in 1889.<sup>9</sup>

As in other former British colonies in southern Africa, racial and ethnic categorisations were institutionalised under colonial rule, but clearly to a lesser degree than in the more extreme cases of South Africa and Zimbabwe (then Southern Rhodesia).<sup>10</sup> The racial and ethnic labels attached to people in present-day Malawi are, to a large extent, those used during the colonial period. On October 23 1953, the Federation of Rhodesia and Nyasaland—an amalgamation of three central African colonies, Southern Rhodesia (now Zimbabwe), Northern Rhodesia (now Zambia) and Nyasaland (now Malawi), was created.<sup>11</sup> The Federation was initially created as a single economic system to provide a more attractive investment field than the three small territories, but the Federation encountered numerous problems.<sup>12</sup> By 1955, African Nationalist organisations such as the Nyasaland African Congress wanted more parity with Europeans on the Legislative Council.<sup>13</sup> Once Dr Hastings Kamuzu Banda assumed the Nyasaland African Congress's leadership, he called for immediate independence in January 1959.<sup>14</sup> It was later agreed that Nyasaland would have a new self-governing constitution with cabinet government under Dr Banda as Prime Minister. The Federation came to an end on March 29, 1963.<sup>15</sup>

### 2.2 Independence and a New Citizenship Regime

Malawi attained independence from Britain on July 6, 1964, a year after the Federation had come to an end. It has been argued that newly independent countries with colonial domination behind them<sup>16</sup> were confident of their development potential and “not predisposed to find neo-

<sup>6</sup> Elias Mandala. "Feeding and Fleecing the Native: How the Nyasaland Transport System Distorted a New Food Market, 1890s-1920s". *Journal of Southern African Studies* 32, no.3 (2006), 507:

<sup>7</sup> Allfred Sharpe, "Recent Progress in Nyasaland". *Journal of the Royal African Society* 9, no.36 (1910): 338

<sup>8</sup> Ibid.

<sup>9</sup> Laurie Fransman QC *Fransman's British Nationality Law*, (London: Bloomsbury Professional, 2011), 1067.

<sup>10</sup> Wiseman Chijere Chirwa, *Malawi: Democracy and Political Participation* (2014) Johannesburg.

<sup>11</sup> J. J. B. Somerville; "The Central African Federation", *International Affairs* 39, no.3 (1963): 388.

<sup>12</sup> Ibid.

<sup>13</sup> The Legislative Council was composed of 12 official members and 11 unofficial, of whom 6 are elected from a non-African common roll, while 5 are Africans elected from the Provincial Council.

<sup>14</sup> This led to widespread disturbances and Federal troops were flown in from Southern Rhodesia and a state of emergency declared on 3 March 1959.

<sup>15</sup> Ibid.

<sup>16</sup> A number of other British colonies gained independence in the 1960's such as Kenya, Zambia, Nigeria, Botswana, Uganda, Tanzania and Sierra Leone.

Malthusianism-with its crisis rhetoric and identification of a demographic barrier to development-persuasive.”<sup>17</sup> The Malawi Independence Act of 1964 was described as an Act "to make provision for and in connection with the attainment by Nyasaland of fully responsible status within the Commonwealth".<sup>18</sup>

The Malawi Independence Constitution of 1964 addressed who became a Malawian citizen when it attained independence.<sup>19</sup> It stated that anyone born in the Nyasaland Protectorate was a Citizen of the United Kingdom and Colonies (CUKC) or a British Protected Persons(BPP) immediately prior to July 6 1964, on that day became a citizen if at least one of his parents were born in Nyasaland.<sup>20</sup> It also stated that anyone born outside Nyasaland, was CUKC or BPP immediately prior to July 6 1964, became a Malawian citizen if “his father became a citizen of Malawi by birth” or would have become one but for his death.<sup>21</sup> Those persons born in the country whose parents were both born outside the country were entitled to citizenship by registration, based merely on proof of facts. Others who were ordinarily resident in the country could naturalise, through a discretionary process. These citizenship conditions were not peculiar to Malawi because former British colonies followed a standard template, known as the ‘Lancaster House’ template, that structured the negotiations with each African State's independence leaders.<sup>22</sup>

For those born after independence, the constitution established a *ius soli* rule, providing for citizenship to be attributed at birth to any person born in Malawi. This did not apply if the father was a diplomat or a citizen of a country at war with Malawi; but this exclusion itself did not apply if the mother was a citizen. Section 4 of the Independence Constitution mirrored the complicated language establishing this rule in other former British territories, stating that:

Every person born in Malawi after 5th July 1964 shall become a citizen of Malawi at the date of his birth:

Provided that a person shall not become a citizen of Malawi by virtue of this section if at the time of his birth—

(a) neither of his parents is a citizen of Malawi and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Malawi; or

(b) his father is a citizen of a country with which Malawi is at war and the birth occurs in a place then under occupation by that country.

Section 5 provided that a child born outside of Malawi would become a citizen of Malawi at birth if at the time of birth , the father was a citizen of Malawi and himself born in Malawi (that is, transmission of citizenship to those born outside the country was through the father only and restricted to one generation).

At independence, Malawi's constitution also used a multi-party parliamentary system following the British Westminster model, in which Dr Hastings Kamuzu Banda became Prime Minister. Within three months of independence, Banda was challenged by a coalition of

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<sup>17</sup> Chiweni Chimbwete, Susan Cotts Watkins, and Msiyaphazi Zulu, "The Evolution of Population Policies in Kenya and Malawi", *Population Research and Policy Review* 24, no.1 (2005): 87.

<sup>18</sup> Malawi Independence Act, chapter 46 of 196.

<sup>19</sup> Schedule 2 to the Malawi Independence Order 1964/916.

<sup>20</sup> Section 1 (1) of the Malawi Independence Constitution.

<sup>21</sup> Section 1(2) of the Malawi Independence Constitution.

<sup>22</sup> Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Portland: Hart Publishing, 2018),61.

younger politicians who criticised his critical decisions and leadership style.<sup>23</sup> The challenge was crushed, but it drove Banda to consolidate his power. He did so by introducing a new constitution in 1966. The parliamentary and multi-party system was abolished, and the Malawi Congress Party (MCP) became the sole legal political party. The MCP controlled all aspects of political life. The 1966 constitution extended the lifespan of the existing Parliament for another five years.

Dr Kamuzu Banda became President for Life, thus closing all democratic openings inherited at political independence in 1964 and erecting the structures of a corrupt and highly repressive one-person and a one-party state.<sup>24</sup> The entrenchment of a one-party State and the decades of authoritarian rule that followed was possible because Banda had played a central role in uniting Malawians in a shared struggle against imperial power.<sup>25</sup> His campaign promised that everybody would find their needs met in an independent Malawi, and he entrenched the image of himself as the Father of the Nation.<sup>26</sup> As a Father of the Nation, it was his duty to care for Malawians, and this duty of care was mainly couched in a cultural manner that emphasised unity and nationalism.<sup>27</sup>

### 2.3 Demography and Politics

After decades of authoritarian leadership by Dr Kamuzu Banda, a Constitutional referendum was held on June 14, 1993, prompted by various calls for political reform and multi-party democracy.<sup>28</sup> It was a watershed moment when the presidential and parliamentary elections were won by Bakili Muluzi and the United Democratic Front (UDF).<sup>29</sup> President Muluzi served two terms from 1994 to 2004. Kees van Doge submits that very soon after the liberalisation of political life; regionalism was the dominant force. He contends that up to the present, the political spectrum is fragmented along such lines.<sup>30</sup> For example, the voting patterns in the referendum of 1993 and the elections of 1994, 1999, and 2004 have reflected regional and tribal or ethnic preferences.<sup>31</sup> Malawi's three regions are each dominated by one political party. Still, unlike other African countries such as Kenya, Togo, or the Democratic Republic of Congo, this has not led to a fundamental breakdown in consensus or even disintegration of the democratisation process.<sup>32</sup>

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<sup>23</sup> Wiseman Chijere Chirwa, *Malawi : Democracy and Political Participation*, Open Society Initiative for Southern Africa, 2014, 37.

<sup>24</sup> Julius O. Ihonvbere "From Despotism to Democracy: The Rise of Multiparty Politics in Malawi", *International Studies* 34, no.2 (1997): 225.

<sup>25</sup> Daniel Wroe "Remembering Kamuzu: The Ambiguity of the Past in Malawi's Central Region", *Journal of Southern African Studies* 46 no.2 (2020): 251

<sup>26</sup> Ibid.

<sup>27</sup> Hailing from the central Chew region, he made Chewa the national language and regularly referred to himself as *Nkhoswe* Number One. This denoted that he was a guardian to all families.

<sup>28</sup> Paul Sturges, "The Political Economy of Information: Malawi under Kamuzu Banda, 1964-94", *International Information and Library Review*, 30 no.3 (1998):195.

<sup>29</sup> Bakili Muluzi drew 1 404 754 votes (47.16%); Dr Kamuzu Banda came second with 996 363 votes (33.45%); while Chakufwa Chihana finished a distant third with 552 862 votes.

<sup>30</sup> Jan Kees van Donge, "Kamuzu ' s Legacy : The Democratization of Malawi : Or Searching for the Rules of the Game in African Politics", *African Affairs* 94, no.375 (1995): 229.

<sup>31</sup> For instance, supporters of the UDF were the Yao-Lomwe ethnic group concentrated in the southern region; the MCP was supported by the Chewa ethnic group which is concentrated in the central region; and AFORD drew its support from the northern region dominated by the Tumbuka ethnic group.

<sup>32</sup> Kees van Donge, "Kamuzu ' s Legacy : The Democratization of Malawi : 229.

When Muluzi's attempt to obtain a third term failed in 2004, his chosen successor as party leader Bingu wa Mutharika was elected president in 2004.<sup>33</sup> In 2005, after falling out with the UDF leadership after becoming president, Mutharika formed the Democratic Progressive Party (DPP), which then became the ruling party.<sup>34</sup> After his death in April 2012, Vice President Joyce Banda was sworn in as Malawi's first woman president. Her ascension to the presidency was constitutionally permissible but extremely contentious because she had been fired as one of DPP's vice presidents in December 2010.<sup>35</sup> The 2014 elections ended Banda's hopes of a second term when she was defeated by Peter Mutharika, who had become the DPP's president in April 2013. Mutharika only lasted for one presidential term before losing in a re-run of the 2019 presidential elections.<sup>36</sup> In February 2020, Malawi's Constitutional Court's landmark ruling annulled the 2019 election, which saw President Peter Mutharika narrowly re-elected. The judges found widespread irregularities in the May 21 vote.<sup>37</sup> On June 23, 2020, a re-run saw Dr Lazarus Chakwera of the Malawi Congress Party (MCP) winning the presidential election with 58.57% of the votes.<sup>38</sup>

Notably, despite the many political changes that have taken place since 1994, the issue of citizenship has never been used to silence or interrogate the legitimacy of an opposition leader. Citizenship has previously been used to question the legitimacy of political leaders in several countries.<sup>39</sup> One memorable instance is neighbouring Zambia, where founding president Kenneth Kaunda (president from was 1964-1991) was accused of not being a Zambian national. Kaunda was born in Zambia to parents from Malawi. In 1995, to prevent his political comeback, the Zambian Government announced plans to deport Kaunda to Malawi because he was an illegal alien.<sup>40</sup> In early 1996, the Constitution was changed to require that both parents of presidential candidates be Zambian by birth or descent.<sup>41</sup> This disqualified Kaunda from the elections, and his citizenship was finally confirmed in 1999 after court reviews.<sup>42</sup> It is encouraging that citizenship has not been used as a weapon in Malawian politics. Kaunda's experience reveals how citizenship can become a political tool to meet a government's objectives.

Political power is also relevant for this discussion in an additional way. Legislative amendments require a majority vote in the National Assembly, and the distribution of parliamentary seats among the political parties is critical. The majority would determine whether a progressive or retrogressive amendment can be made to the Citizenship Act, and this could be a potential area of concern. In contrast, some constitutional amendments, including those that affect the substance of the guarantees of human rights and those related to citizenship, require a referendum supported by the majority of voters. All other amendments require a two-

<sup>33</sup> Wiseman Chijere Chirwa, *Malawi: Democracy and Political Participation* (2014) Johannesburg,:150.

<sup>34</sup> *Ibid.*

<sup>35</sup> In 2011, she formed the People's Party after she was expelled from the ruling DPP when she refused to endorse President Mutharika's younger brother Peter Mutharika successor to the presidency for the 2014 general elections.

<sup>36</sup> General elections were on 21 May 2019 but the results were annulled by the Constitutional Court.

<sup>37</sup> See *Chilima and another v Mutharika and another* Constitutional Reference Case Number 1 of 2019) [2020] MWHC 9 (03 February 2020).

<sup>38</sup> BBC "Malawi opposition leader Lazarus Chakwera wins historic poll rerun", *BBC* 27 June 2020.

<sup>39</sup> There have been debates about the nationalities of leaders such as Malawi's Hastings Banda, Uganda's Yoweri Museveni, Tanzania's Julius Nyerere and President Jerry Rawlings while he was a sitting president.

<sup>40</sup> Beth Elise Whitaker, "Citizens and Foreigners: Democratization and the Politics of Exclusion in Africa", *African Studies Review* 48, no.1 (2005):114.

<sup>41</sup> Constitution of Zambia Act, no. 18 1996, section 34(3).

<sup>42</sup> Prior to the Kaunda Saga, two high ranking members of his United National Independence Party (UNIP) William Banda and John Chinula were deported to Malawi in 1994 which the government claimed was their birthplace.



thirds vote of the National Assembly.<sup>43</sup> Since citizenship rights are substantive and demand a referendum, Chirwa argues that a constitutional amendment to the right to citizenship is unlikely because the costs of organising one would be prohibitive and unlikely to be borne by donor governments and agencies.<sup>44</sup>

### 3. Post-Independence changes to citizenship rules

#### 3.1 The 1966 Constitution and Citizenship Act

The 1966 Constitution Amendment Act did not have detailed citizenship provisions but rather provided for continuity of citizenship.<sup>45</sup> As mentioned earlier, this constitutional amendment was primarily for the consolidation of Kamuzu Banda's political power, and hence citizenship provisions were delegated to law.

When the Citizenship Act was enacted on June 14, 1966, it stated that amongst other matters, the Act was intended “to make provision, consequent upon the enactment of a Republican form of Constitution in Malawi, for the acquisition of citizenship of Malawi by birth or descent, or by registration in certain cases; to regulate the manner and circumstances in which aliens may be naturalised as citizens of Malawi...”.<sup>46</sup>

The Act stipulated how one could acquire citizenship and how one could be deprived of their citizenship. The Act contained a clause allowing citizenship by registration and naturalisation if a Commonwealth citizen met specific criteria.<sup>47</sup> The 1966 Citizenship Act removed the provision that a person born in Malawi automatically became a citizen at birth. Thus *ius soli* rights for citizenship were removed, and an additional exclusion measure was included. Section 4 (1) of the Act stated:

Every person born in Malawi after the 5th day of July 1966 shall become a citizen of Malawi on the date of his birth if one of his parents is a citizen of Malawi and is a person of African race.

Similar language in section 5 applied to those born outside the country. This racial discrimination clause was not present in the Independence Constitution. At the same time, however, it is notable that the *ius sanguinis* rights were changed in this Act to grant equal rights to both women and men to pass on citizenship to their children.<sup>48</sup>

#### 3.2 The 1971 Amendment to the Citizenship Act

An amendment to the Citizenship Act was included in a Statute law Amendment Act containing “miscellaneous amendments”.<sup>49</sup> Section 2 of this Act repealed section 4(2) of the Citizenship

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<sup>43</sup> Wiseman Chirwa, Nandini Patel, and Fidelis Kanyongolo, *Democracy Report of Malawi* (2000) Stockholm:9.

<sup>44</sup> *Ibid* at p.15

<sup>45</sup> The Constitution of the Republic of Malawi (Amendment) no.39 of 1966.

<sup>46</sup> Preamble of the Malawi Citizenship Act, No.28 of 1966.

<sup>47</sup> Malawi Citizenship Act 1966, section 13 read with section 28.

<sup>48</sup> Section 5 of the Citizenship Act 28 of 1966.

<sup>49</sup> Statute Law (Miscellaneous Amendments) Act 5 of 1971.

Act, which had permitted people born in Malawi who did not meet requirements as per section 4(1) mentioned above to register as citizens of Malawi. This was only possible if section 15 (having a close connection to Malawi) applied.<sup>50</sup>

### 3.3 The 1992 Amendment to the Citizenship Act

The racial discrimination clause introduced in 1966 gave preferential treatment for registration of citizenship to those "of the African race," or with Commonwealth or Malawian ties. The grant of nationality has historically been regarded as being within the discretion of the state concerned. However, racial prohibition on citizenship by birth has increasingly come to be seen to conflict with international norms.<sup>51</sup> A 1992 amendment of the Citizenship Act deleted the definition "person of African race" in section 2 and the words "and is a person of African race" in sections 4 and 5.<sup>52</sup>

Despite the amendment, the citizenship status of people of South Asian origin was the subject of debate at the 1995 National Constitutional Conference. Some delegates insisted that Asians in Malawi should not expect to have certain political rights because most of them were unwilling to commit themselves sufficiently to the country to adopt Malawian citizenship.<sup>53</sup> However, the amendment is still valid, and hence citizenship rights now apply to any child born in or outside of Malawi to a parent who is a Malawian citizen, with no requirement as to African race.

### 3.4 The 1994 Constitution and its impact on Citizenship Rights

The 1964 Constitution dealt with citizenship in respect of who qualified to be a national of Malawi, and there was no mention of children's rights. This was also absent in the 1966 amendments to the Constitution. The 1994 Constitution, however, included an essential clause in section 23 by stating that:

All children shall have the right to a given name and a family name, and the right to a nationality.<sup>54</sup>

In section 24 it also stated that women have the right not to be discriminated against on the basis of their gender or marital status which includes the right to acquire and retain citizenship and nationality.<sup>55</sup>

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<sup>50</sup> Section 15 will be discussed further in a subsequent section on acquisition of citizenship.

<sup>51</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-citizens*, 2005.

<sup>52</sup> Act No.22 of 1992

<sup>53</sup> Chirwa, Patel, and Kanyongolo, *Democracy Report of Malawi* :10.

<sup>54</sup> Republic of Malawi (Constitution Act) no 20 of 1994, Section 23 (2).

<sup>55</sup> Republic of Malawi (Constitution Act) no 20 of 1994, Section 24 (1)(iv).

### 3.5 The 2019 Amendments to the Citizenship Act

Act 11 of 2019 made critical changes to Malawi's citizenship laws by amending section 6 of the existing Act and stating that a citizen of Malawi 'may hold the citizenship of one other country in addition to Malawi'.<sup>56</sup> This had a two-fold effect. Firstly, before the amendment, section 9 of the Act required Malawian women who acquired another citizenship by marriage to either renounce the other citizenship or cease to be a Malawian citizen. The new amendment nullifies this blatant gender discrimination. Secondly, the recognition of dual citizenship means Malawian citizens can not lose their citizenship from birth by voluntarily acquiring another citizenship or retaining a second citizenship after reaching majority.<sup>57</sup> Additionally, citizens will no longer have to renounce Malawian citizenship if they want to become citizens of another country as per the requirement before the 2019 amendment.<sup>58</sup> Applicants for citizenship by naturalisation can retain their foreign citizenship without fear that naturalisation will mean losing their other citizenship.<sup>59</sup> Nonetheless, the amendment requires that adults inform the Department of Immigration and Citizenship Services (DICS) of their dual citizenship status.

## 4. Migration, Trade and Belonging

Formal categorisations of citizenship in a legalistic sense relate to access to the franchise, residency rights, and to hold a passport.<sup>60</sup> However, Groves notes that "beyond formal categorisation, citizenship can also be considered in terms of the emotive and historic ties that bind people to specific and multiple places".<sup>61</sup> She argues that belonging needs to be understood not just in terms of participatory politics but at "different analytical levels that take into account social locations and emotional attachments and identifications".<sup>62</sup> Malawian society was subsequently shaped by the interaction of different internal and external ethnic groups connected to the country socially and emotionally, regardless of their origin. Emigration and immigration created complex situations where people's temporary or permanent movement resulted in uncertain citizenship status for those born from first-generation migrants and immigrants.

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<sup>56</sup> Malawi Citizenship (Amendment Act) No 11. of 2019, section 2.

<sup>57</sup> As per sections 6, 7 and 8 of the Citizenship Act.

<sup>58</sup> Section 23(1) of the Malawi Citizenship Act stated that a person could renounce their citizenship if "the person either is a citizen of another country or if the person "satisfies the board/minister that he will become a citizen of another country".

<sup>59</sup> As per section 22(2) of the Citizenship Act.

<sup>60</sup> Zoë Groves, "Zimbabwe Is My Home": Citizenship and Belonging for "Malawians" in Post-Independence Urban Zimbabwe", *South African Historical Journal* 72, no.2 (2020): 306.

<sup>61</sup> Ibid.

<sup>62</sup> Groves, "Zimbabwe Is My Home": Citizenship and Belonging for "Malawians":306.

#### 4.1 The Indian Minority in Malawi

Between 1910-1945, the Shire Highland's Railway Company recruited a modest number of Indians from Bombay, initially to work in the Shire Highlands.<sup>63</sup> These workers were paid as much as five times more than their African co-workers, who also worked alongside them in skilled employment on the railways and worked as drivers, fitters, and machinists.<sup>64</sup> This disparity in wages caused considerable tensions between Indian and African employees, manifesting themselves in numerous disputes. However, Nyasaland offered a haven for Indians barred from the two Rhodesias and South Africa, which led to a more varied Indian population.<sup>65</sup> As time went by, most Indian settlers in Central Africa were traders, and retail trade underlined Indian life in Northern and Southern Rhodesia and Nyasaland.<sup>66</sup> Many of these traders arrived by way of South Africa, and most who came to Nyasaland were Gujaratis. They voluntarily left India to be traders at their own cost, and they were the often successful ones.<sup>67</sup> This fact, more than any other, shaped the 'Indian' stereotype. From the perspective of non-Indians, 'the Indian' exhibited all the exploitative characteristics of merchant capital.<sup>68</sup> African businesspeople urged the Government to support them as they "would not" take money earned outside the country as the Indian population could.<sup>69</sup>

Antipathy toward Indian traders stemmed from economic grievances but found expression in contempt for Indian social and cultural practices.<sup>70</sup> Post-independence, the Indian community continued to thrive in business, and successive descendants stayed in what was now known as Malawi and made it their home. In 1978, the Business Licensing Act was amended by introducing provisions that prohibited all Asians, including those with Malawian citizenship, from carrying out trading activities in places other than a few urban centres designated as 'business districts' in terms of the Business Licensing Order.<sup>71</sup> Parliament's justification for this discriminatory law was that black Malawians would no longer have to face competition from Asian traders in areas outside the so-called business districts.<sup>72</sup> Thus the racial discrimination clause in the Citizenship Act could have been an attempt to limit the growth of Asian traders.

#### 4.2 Migrant Labour Amongst Malawians

The black Malawians referred to above are people speaking Bantu languages and comprise many different ethnic groups. These include Chewa, Nyanja, Yao, Tumbuka, Lomwe, Sena,

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<sup>63</sup> Joey Power, "Race , Class , Ethnicity , and Anglo-Indian Trade Rivalry in Colonial Malawi , 1910-1945", *The International Journal of African Historical Studies*, 26 no.3 (2017): 577.

<sup>64</sup> Ibid at 578.

<sup>65</sup> Ibid.

<sup>66</sup> Floyd Dotson and Lillian.O Dotson, "The Indian Minority of Zambia, Rhodesia, and Malawi", *Comparative Studies in Society and History*, 12 no. 2 (2020): 235.

<sup>67</sup> Ibid at 236.

<sup>68</sup> Ibid.

<sup>69</sup> Power, "Race , Class , Ethnicity , and Anglo-Indian Trade Rivalry in Colonial Malawi: 587.

<sup>70</sup> One of the most common criticisms levelled by Africans and Europeans against Indians was the congested and unsanitary conditions in which they lived.

<sup>71</sup> Declaration of Business Districts Order (Government Notice No.52 of 20 May 1978).

<sup>72</sup> Chirwa, Patel, and Kanyongolo *Democracy Report of Malawi*:10.

Tonga, Ngoni, Ngonde, Asian and European.<sup>73</sup> The Chewa people form the largest part of the population group and are primarily in Malawi's central and southern regions. The Yao people are predominately found around the southern area of Lake Malawi, and the Tumbuka are found mainly in the north of the country.

In the same year Malawi gained independence, the country became an essential source of migrant labour for the South African mining industry.<sup>74</sup> Malawians were needed for their skills, experience, work discipline, and lack of militancy and some mine managers claimed that they could not be easily replaced.<sup>75</sup> At its height in 1974, the mining industry employed 108,431 Malawian miners.<sup>76</sup> A subsequent ban on labour recruiting revealed that at least 12 000 other Malawians worked in manufacturing, farming, and some primary industries.<sup>77</sup> Even though the ban was later lifted before new rifts arose,<sup>78</sup> these movements resulted in the redefinition of the lives of those who had spent decades working in South African mines. Some had borne children in South Africa and had no family per se to return to in Malawi.

Similarly, thousands of Malawians had moved to then Southern Rhodesia (Zimbabwe) in the 1960s.<sup>79</sup> When Zimbabwe gained independence in 1980, between a quarter and a half of farmworkers were of foreign origin (though the majority had been born in Zimbabwe); there were also substantial numbers of workers of foreign descent in the mining and commercial sectors.<sup>80</sup> After decades of acceptance and assimilation into Zimbabwean society, amendments were made to the constitution in 1996, with more significant implications for people of foreign origin and descent from around the region.<sup>81</sup> Amendment 14, clause 2 removed the right of citizenship for children of parents who normally resided in the country as permanent residents rather than citizens.<sup>82</sup> Further changes after the 2002 Zimbabwean elections brought more dismay to thousands of former migrants and their descendants.<sup>83</sup> The Citizenship of Zimbabwe Act strengthened the demand for renunciation of foreign citizenship, allowing six months for individuals to comply with the new regulations or else forfeit their Zimbabwean nationality.<sup>84</sup>

Groves posits that this Act was potentially the most devastating for second-and third-generation Zimbabweans more than the previous citizenship laws changes. Their parents or grandparents had come to the country as migrant workers, from elsewhere around the region, before independence. Those affected were required to prove their eligibility for Zimbabwean citizenship by showing their birth certificates and evidence of their parents' arrival in the

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<sup>73</sup> Owen J M Kalinga, "The Production of History In Malawi in The 1960s : The Legacy of Sir Harry Johnston , The Influence of The Society of Malawi and The Role of Dr Kamuzu Banda and His Malawi Congress Party", *African Affairs* 97 (1998): 533.

<sup>74</sup> This was labour was initially organised through the Witwatersrand Native Labour Association (WNLA), also known as Wenela but in 1977 a new labour agreement was signed with the Employment Bureau of Africa (TEBA), which had replaced Wenela as the official recruiting agent of the South African Chamber of Mines, .

<sup>75</sup> Wiseman Chijere Chirwa, "The Malawi Government and South African Labour Recruiters , 1974-92", *The Journal of Modern African Studies* 34, no.4 (1996): 640.

<sup>76</sup> *Ibid* at p. 627.

<sup>77</sup> *Ibid*.

<sup>78</sup> In the late 1980's South Africa established strategies to prohibit Malawian miners for fear that they were mostly HIV positive.

<sup>79</sup> Zoë Groves, "'Zimbabwe Is My Home': Citizenship and Belonging for 'Malawians' in Post-Independence Urban Zimbabwe", *South African Historical Journal* 72, no.2 (2020): 306.

<sup>80</sup> Manby, *Citizenship in Africa: The Law of Belonging*, p.551.

<sup>81</sup> Groves, "'Zimbabwe Is My Home': Citizenship and Belonging for 'Malawians' in Post-Independence Urban Zimbabwe": 307.

<sup>82</sup> Constitution of Zimbabwe Amendment Act, No. 14 of 1996.

<sup>83</sup> President Robert Mugabe was returned to power in March 2002 in an election many observers categorized as neither free nor fair. Among other problems, they cited widespread violence, intimidation, and vote-rigging.

<sup>84</sup> Act no. 12 of 2001.

country.<sup>85</sup> Thus thousands of Malawians were now aliens and foreigners in Zimbabwe but had no connections to Malawi because of generational migration.<sup>86</sup> Following mounting pressure from the Southern African Development Community (SADC), the Act was eventually amended in 2003.<sup>87</sup> A new clause effectively safeguarded nationality for anyone born in Zimbabwe to parents from a SADC country who had migrated to the country for work, acknowledging the extent of labour migration in the region's colonial history.<sup>88</sup> However, the damage was done as uncertainty and confusion continued to exist. The label of “foreigners” hung heavy on many, yet for some, Zimbabwe was the only home they had ever known.

### 4.3 Seeking Refuge in Malawi

As in other parts of Africa, the refugee phenomenon in Malawi was mainly a result of wars of liberation from colonial and racial regimes and civil wars. Individuals sought refuge in Malawi from several source countries, including South Africa, Zambia, and Zimbabwe.<sup>89</sup> Prompted by the refugee phenomenon, the Malawian Government acceded and ratified some international frameworks.<sup>90</sup> In the 1980s, the advent of civil war in Mozambique between the Government (FRELIMO) and the Mozambican National Resistance (RENAMO) resulted in Malawi hosting over a million Mozambican refugees.<sup>91</sup> The Refugee Act was enacted in 1989, creating a legal framework for protecting refugees in the country.<sup>92</sup> Most of the arrivals between 1989-1990 fleeing the war in the northwestern Mozambican province of Niassa settled in Mangochi in the southern part of and Nkhata Bay on the western shores of Lake Malawi.<sup>93</sup> After the Peace accord in 1992, a majority of the refugees opted for repatriation. It is estimated that during 1994 some 620,000 Mozambican refugees repatriated from Malawi, leaving about 90,000 still in Malawi at the end of 1994.<sup>94</sup>

Malawi continued to experience an influx of refugees. By as early as 1990, refugees from Somalia had already started arriving in the country, fleeing from indiscriminate violence from the Hawiye/Darod ethnic strife, lawlessness, and banditry.<sup>95</sup> The 1994 genocide in Rwanda triggered a mass exodus of refugees who had initially fled to Burundi or Tanzania and Burundi nationals who had been kept out of Tanzania because the latter could not cope with the influx of refugees.<sup>96</sup> Most of these refugees found their way to other countries, including

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<sup>85</sup> Groves, “Zimbabwe Is My Home”: Citizenship and Belonging for “Malawians” in Post-Independence Urban Zimbabwe:308.

<sup>86</sup> For more details on the history of Zimbabwe’s Citizenship laws see Manby, *Citizenship in Africa: The Law of Belonging*, pp. 149-163.

<sup>87</sup> Citizenship of Zimbabwe Amendment Bill, 2003, Zimbabwe Government Gazette, 14 February 2003.

<sup>88</sup> Groves, “Zimbabwe Is My Home”: Citizenship and Belonging for “Malawians” in Post-Independence Urban Zimbabwe”: 308.

<sup>89</sup> Tapiwa Shana Nkhoma, "The Institution of Asylum in Malawi and International Refugee Law: A Review of the 1989 Refugee Act", *Malawi Law Journal* 4, no.1 (2010): 98.

<sup>90</sup> The 1951 United Nations (UN) Convention and the 1967 Refugees Protocol acceded to on 10 December 1989 and the 1969 Organization of African Unity (OAU) Convention on refugees acceded to on 4 December 1987.

<sup>91</sup> Nkhoma, "The Institution of Asylum in Malawi and International Refugee Law: 98.

<sup>92</sup> The Refugee Act no.3 entered into force on 8 May 1989.

<sup>93</sup> Khalid Koser, "Information and Repatriation: The Case of Mozambican Refugees in Malawi", *Journal of Refugee Studies* 10, no.1 (1994): 5.

<sup>94</sup> See UNHCR (1995) Populations of Concern to UNHCR. A Statistical Overview 1994. Geneva.

<sup>95</sup> Nkhoma, "The Institution of Asylum in Malawi and International Refugee Law: 99.

<sup>96</sup> See UN General Assembly, “UNHCR Revised appeal for assistance to Burundi and Rwandan refugees and returnees” (1995) Part 1/22.

Malawi. Simultaneously, new Congolese and Burundian refugees fled civil wars and, hearing of Tanzania's "closed-door policy" at that time, proceeded straight to Malawi.<sup>97</sup> Many refugees also moved to Malawi from camps in Tanzania, where officials pressurised them to go back home. Nkhoma opines that as of 2010, this had continued creating "a phenomenon that presents Malawi with its long-standing challenge of irregular movers".<sup>98</sup>

As of March 2018, the number of refugees in Malawi amounted to 37 000.<sup>99</sup> Asylum seekers from both the Great Lakes Region and the Horn of Africa pass through Kenya and Tanzania before seeking asylum in Malawi.<sup>100</sup> The Malawian Government has been increasingly wary of those who travelled long distances to seek asylum in Malawi. In December 1996, the Government initially decided that no further applications for asylum from Rwandans and Congolese would be considered.<sup>101</sup> However, this decision proved too time-consuming, expensive, and impractical to manage. So currently, the fact that a person passed through a third safe country is not used to bar an asylum application in Malawi.<sup>102</sup>

## 5. Current Citizenship Laws in Malawi

### 5.1 Acquisition of Citizenship

Manby has advanced that the main ways in which the legal status of nationality is acquired can lead to misunderstandings.<sup>103</sup> She argues that in particular, "the distinction between *ius sanguinis* and *ius soli* systems for acquiring nationality encourages the sense that *ius sanguinis* – the law of blood' means membership of an ethnically defined nation. This meaning is emphasised by the formerly almost universal rule that only a father could pass nationality to his child.<sup>104</sup> A *ius sanguinis* principle needs not have any ethnic or racial basis – the requirement is only that the parent be a citizen (including by naturalisation).<sup>105</sup> Malawi's Independence Constitution previously provided for the acquisition of nationality by *ius soli* (literally, law or right of the soil), whereby an individual obtains citizenship because they were born in a particular country. This was amended by the Citizenship Act of 1966, which now emphasises *ius sanguinis* right to citizenship.<sup>106</sup>

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<sup>97</sup> Nkhoma, "The Institution of Asylum in Malawi and International Refugee Law : 99.

<sup>98</sup> Ibid.

<sup>99</sup> UNHCR, Malawi country profile available at <https://www.unhcr.org/uk/malawi.html>.

<sup>100</sup> Nkhoma, "The Institution of Asylum in Malawi and International Refugee Law: 120.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Manby, *Citizenship in Africa: The Law of Belonging*: 9.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (New York: Open Society Foundations, 2016).

### 5.1.1 Automatic Attribution of Citizenship at Birth

Section 4 of the Citizenship Act grants citizenship by birth to every person born in Malawi after the 5th day of July 1966 if one of his parents is a Malawian citizen. This, however, does not “apply to a person whose father is a citizen of a country with which Malawi is at war, and the birth occurs at a place then under occupation by the enemy”.<sup>107</sup> The Act also grants citizenship by descent to every person born outside Malawi after the 5th day of July 1966, if their mother or father is a citizen of Malawi “by birth” (that is, there a restriction on transmission of citizenship for more than one generation born outside the country).<sup>108</sup>

### 5.1.2 Acquisition of Citizenship by Registration and Naturalisation

The Citizenship Act allows for various forms of registration of citizenship. The specific procedure for naturalisation is contained in section 28.<sup>109</sup> The Act provides for an unusually complicated categorisation of types of person who can naturalise. Section 13 of the Act read with section 12 provides for a Commonwealth citizen to be registered as a citizen of Malawi if they prove that they are ordinarily resident in Malawi and have resided there for five years.<sup>110</sup> The Commonwealth countries that are considered for these purposes are also listed in the Act. Persons from certain African states are also allowed to register for citizenship (section 14), provided that they meet requirements in section 13, which relate to the length of residency, language proficiency, and good character. Section 15 permits people with a close connection to Malawi to be registered as citizens if they meet specific criteria. Section 15 (1) states that:

Subject to subsections (2) and (3), any person who satisfies the Minister that he has a close connexion with Malawi (as defined in subsection (2)) and who is not otherwise qualified under this Act to be registered as a citizen of Malawi may be so registered on making application therefore to the Minister in the manner prescribed by section 28.

A close connection to Malawi is evidenced by being born in Malawi or having resided in Malawi for no less than 20 years.<sup>111</sup> A third consideration is a person who is permanently residing in Malawi, having been born in Malawi or Mozambique, and both parents were either born in Mozambique or Malawi.<sup>112</sup> A woman who has been married to a citizen of Malawi or to a person who would but for his death would have become a Malawian citizen can also apply for registration of citizenship.<sup>113</sup> This application requires an oath of allegiance and a declaration of an intention to reside in Malawi permanently.<sup>114</sup> Sections 17 and 18 relate to the registration of certain children and stateless persons, respectively, as citizens. Section 17 contains the requirements for the registration of minor children, which includes, amongst others, that the child is resident in Malawi and their parent or guardian continues to intend to reside in Malawi.

Section 18 allows for a stateless person to register as a citizen if they can meet specific requirements. One must prove that they have always been stateless and were born in Malawi,

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<sup>107</sup> Malawi Citizenship Act 1966 section 4.

<sup>108</sup> Section 5 of the Act.

<sup>109</sup> All applications must be made to the Minister with the prescribed fee, supported by all required evidence and a sworn oath before a magistrate or Commissioner of Oaths.

<sup>110</sup> Other requirements include adequate knowledge of a vernacular language, suitability to be a Malawian Citizen and good character.

<sup>111</sup> Section 15 (2) (a) i and ii.

<sup>112</sup> The conditions in section 13 also apply to applicants under section 15.

<sup>113</sup> Malawi Citizenship Act 1966, section 16.

<sup>114</sup> Section 16 (2) (a).



or one of their parents was a citizen of Malawi at the time they were born. They also have to prove that they have ordinarily been residing in Malawi for the last three years and have not been convicted of any criminal offence, served five years imprisonment or more on a criminal charge, or conducted themselves in a manner prejudicial to public security.<sup>115</sup> The article in respect of statelessness is very progressive. It recognises Malawi's migration and history and the reality that many people could find themselves stateless due to changes in various nationality laws in different countries post-independence.<sup>116</sup> So even though the Act does not establish a right to a nationality as such for children born in the country, it does safeguard them in instances where migration has affected their status.

However, in 2017, the Committee on the Rights of the Child<sup>117</sup> stated its concern in respect of Malawi, noting that "despite enacting in its Citizenship Act a provision that guarantees that children born on its territory who would otherwise be stateless, have the right to nationality, there are still cases where children born outside of Malawi or born to a non-Malawian father are at risk of being stateless".<sup>118</sup> Notably, this concern was also expressed by the CEDAW committee in respect of specifically the children of Malawians who migrated to Zimbabwe and children born to Mozambicans who live in Malawi.<sup>119</sup> Hence, the Committee on the Rights of the Child recommended that Malawi scale-up its efforts on birth registration. It also advised that Malawi consider ratifying the 1961 Convention on the Reduction of Statelessness and bringing "its national legislation in line with these international instruments".<sup>120</sup> Manby notes that as of 2011, Malawi had restored citizenship to 85 persons during the period 2008 to 2011, but the process is expensive and difficult to access.<sup>121</sup>

In October 2019, at the "High-Level Segment on Statelessness" hosted by UNHCR in Geneva, Comoros, Malawi, amongst others committed to the introduction of legal reforms to provide protections against statelessness for children of unknown parents found in the territory and for children born in the territory who would otherwise be stateless.<sup>122</sup> Malawi's Law Commission is also conducting a review of the Citizenship Act to bring the provisions into line with Malawi's international obligations.<sup>123</sup>

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<sup>115</sup> Section 18 (1) (a)-(d).

<sup>116</sup> Though there are a few concerns which will be discussed in the section on children below.

<sup>117</sup> Malawi is a signatory to the Convention on the Rights of the Child which it acceded to on 2 January 1991.

<sup>118</sup> CRC, "Concluding observations on the combined third, fourth and fifth reports of Malawi" (2017), CRC/C/MWI/CO/3-5.

<sup>119</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), "Concluding Observations : Malawi," (2015): section 28.

<sup>120</sup> Ibid.

<sup>121</sup> Bronwen Manby, *Statelessness in Southern Africa, Regional Conference on Statelessness in Southern Africa* (2011) Mbombela: 11.

<sup>122</sup> Bronwen Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community* (UNHCR:2020) p 32.

<sup>123</sup> Ibid.

## 5.2 Renunciation and Deprivation of Citizenship

### 5.2.1 Provisions in the Citizenship Act

Section 23 of the Act permits a Malawian citizen to renounce their citizenship if they were a citizen of another country or would become a citizen of another country.<sup>124</sup> Since the 2019 amendments to Citizenship Act, however, dual citizenship is permitted.

Nonetheless, Malawi has extensive grounds for deprivation of citizenship, and the decision is highly discretionary. It has been noted that common law countries have inherited a tradition of excessive executive discretion concerning nationality rules<sup>125</sup>. One's citizenship can be revoked where the minister "is satisfied" that the person "has shown himself by act or speech to be disloyal or disaffected towards the Government of Malawi"; when he has traded or associated with or assisted an enemy during the war<sup>126</sup> or when within five years of receiving citizenship he is sentenced to a prison term exceeding 12 months.<sup>127</sup> One can be deprived of citizenship if resident outside Malawi for a continuous period of seven years without being in the service of Malawi or an international organisation or without registering annually at a Malawian consulate their intention to retain his/her citizenship<sup>128</sup>; or when Malawian citizenship was obtained through fraud, misrepresentation, or concealment of any material fact.<sup>129</sup> However, on a positive note in accordance with the UN Convention on the Reduction of Statelessness, Malawi specifies that nationality cannot be taken away from a person who would thereby become stateless.<sup>130</sup>

### 5.2.2 Challenging Decisions in respect of Citizenship Laws

The Government initiates procedures regarding deprivation of citizenship. Once a decision is made, it can not be judicially reviewed. Malawi is one amongst several former British colonies with this prohibition on applying for judicial review of a minister's decision on any matter under nationality law.<sup>131</sup> The Citizenship Act states that "The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on any such application shall not be subject to appeal or review in any court".<sup>132</sup> The Minister's decision on all matters is final, which can be problematic because sometimes political expediency may trump human rights.<sup>133</sup> Manby has noted that while other Commonwealth states have changed this rule as new constitutions have been adopted and

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<sup>124</sup> However, the Minister may refuse to register any such declaration of renunciation of citizenship of Malawi if it is made during any war in which Malawi is engaged or if, in his opinion, it is otherwise contrary to public policy to register the declaration.

<sup>125</sup> Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community*, p.10.

<sup>126</sup> Malawi Citizenship Act 1966, 25 2(b).

<sup>127</sup> Section 25 2 (c).

<sup>128</sup> Section 25 (2)

<sup>129</sup> Section 25 (1).

<sup>130</sup> Manby, *Citizenship Law in Africa :The Law of Belonging*; 78.

<sup>131</sup> Rainer. Bauböck, *Debating Transformations of National Citizenship*, (New York: Springer Nature , 2018): 191.

<sup>132</sup> Malawi Citizenship Act 1966, Section 29.

<sup>133</sup> Different African governments have revoked the nationality of a troublesome critic or of someone who is running for high office and shows signs of winning.

provide a right of access to the courts, the judicial review procedure is challenging to access.<sup>134</sup> The process for appealing a decision to refuse to recognise nationality is more straightforward in the Civil law states. The process for the contestation of nationality decisions is often set out in the nationality code itself.<sup>135</sup> To prevent the abuse of power, countries can establish explicit due-process protections in case of citizenship deprivation by requiring reasons to be given and granting a right to challenge the court's decision.<sup>136</sup> In the best cases, countries can also provide for the decision to be made in the first place by the courts and not the Executive.<sup>137</sup>

### 5.3 Court Challenges to Nationality Law and Administration

#### 5.3.1 Gender Inequality

As mentioned in the introduction, Malawi still maintains gender-discriminatory nationality laws concerning women's right to transmit citizenship to their husbands. Yet, section 24 of the Constitution of Malawi mandates equal rights for women and explicitly highlights equality as it applies to citizenship and nationality. "Women have the right to full and equal protection by the law and have the right not to be discriminated against on the basis of their gender or marital status which includes the right...to acquire, retain citizenship and nationality".<sup>138</sup> A thorough understanding of the intersection of gender and citizenship must acknowledge both conceptual and legal aspects of citizenship and how each dimension informs the other.<sup>139</sup> Seely and others describe citizenship itself as gendered because it reflects certain traditional gender norms that are deeply rooted in many societies and continue to exercise influence in today's modern societies.<sup>140</sup> Consequently, women are trapped in a two-dimensional space with the contemporary notions of marriage and citizenship on one side and the traditional notions of a family on the other.<sup>141</sup> The first example of this entrapment is that only Malawian men can pass on their citizenship to their foreign spouses—the Act does not make this provision for women in article 12 and 16.

This gender discrimination was referred to in the case *Thandiwe Okeke v Minister of Home Affairs and The Controller of Immigration*.<sup>142</sup> The applicant Mrs Okeke was contesting the Immigration Official's decision to refuse her Nigerian husband entry into Malawi after he had visited Nigeria. The couple had been married for a year, and the applicant sought relief on six grounds— one of which concerned citizenship. She argued that the decision to deport her husband resulted from the discrimination present in sections 9 and 16 of the Citizenship Act. These sections discriminated against women by requiring women married to foreign men who want to have foreign citizenship to denounce their Malawian citizenship. Foreign men married to Malawian women were prevented from applying for citizenship based on marriage. However, the judge decided that the discrimination issue did not arise in the facts before him.

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<sup>134</sup> Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community* :13.

<sup>135</sup> Ibid.

<sup>136</sup> Bronwen Manby, *Citizenship Law in Africa :The Law of Belonging*: 9.

<sup>137</sup> Ibid.

<sup>138</sup> Republic of Malawi (Constitution Act) no 20 of 1994.

<sup>139</sup> Jennifer C. Seely and others. "Second-Class Citizens? Gender in African Citizenship Law" *Citizenship Studies* 17, no. 3–4 (2013): 430.

<sup>140</sup> Ibid.

<sup>141</sup> Seely and others. "Second-Class Citizens? Gender in African Citizenship Law": 430.

<sup>142</sup> Civil Cause No. 73 of (1997) [2001] MWHC 36 Decided 08 July 2001.

Hence, it was unnecessary to delve into the constitutionality of these provisions.<sup>143</sup> The requirement for Malawian women to renounce their citizenship if they gain their spouse's citizenship has fallen away due to a 2019 amendment.<sup>144</sup> Nevertheless, women still cannot pass on citizenship to their spouses.

Some Malawians seem to favour restricting the acquisition of citizenship by foreign men who marry Malawian women, partly because Malawian women are often economically vulnerable and may be exploited by such men seeking to acquire property in Malawi.<sup>145</sup> There is, however, no evidence to indicate a prevalent practice of foreign men marrying Malawian women to acquire property.<sup>146</sup> Restricting the transmission of citizenship to only one gender (whether for children or spouses) would likely limit the number of people who can claim citizenship, and therefore be consistent with other citizenship restriction measures, such as *ius sanguinis* provision or long waiting periods for adult naturalisation.<sup>147</sup> Thus the gender discrimination in nationality laws has the ironic effect of implying that Malawian women are second class citizens. Yet, it is also insinuated that these very women are in need of protection from foreign men.

Regardless of prevailing perceptions, Malawi has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>148</sup> In 2015, after Malawi submitted its report, the CEDAW Committee stated that it "remains concerned about discriminatory provisions in the Citizenship Act, including with regard to the ability of Malawian women to confer their nationality on foreign spouses".<sup>149</sup> Malawi has also ratified the Maputo Protocol to the African Charter on Human and Peoples' Rights, which calls on States Parties to "combat all forms of discrimination against women through appropriate legislative, institutional and other measures and to take corrective and positive action in those areas where discrimination against women in law and fact continues to exist."<sup>150</sup> Hence the continued discrimination against women regarding citizenship laws is an infringement of Malawi's obligations under the CEDAW and the Maputo Protocol.

It would seem that the current clause in the Citizenship Act that prevents women from passing citizenship on to their foreign spouses is unconstitutional. Malawi is still waiting for its seminal case on gender equality and nationality laws similar to *Dow v Attorney General* from Botswana<sup>151</sup> or *Rattigan and Others v. Chief Immigration Officer* of Zimbabwe.<sup>152</sup> In these cases, the Court of Appeal and Supreme Court respectively struck down citizenship laws that discriminated against women married to foreign spouses.<sup>153</sup>

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<sup>143</sup> The crux of the case was the judicial review of the exercise of an administrative discretion –in this case the Immigration department's decision to deport Mr Okeke.

<sup>144</sup> This will be discussed further in a succeeding section.

<sup>145</sup> Opinions expressed to the Special Law commission on Land related Laws, 2004 and at the Reen Kachere, association for Progressive women, AfriMap advocacy workshop in May 2006.

<sup>146</sup> Chirwa, *Malawi : Democracy and Political Participation* : 54.

<sup>147</sup> *Ibid.*

<sup>148</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>149</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), "Concluding Observations : Malawi," (2015): section 28.

<sup>150</sup> Article 2 (1) of The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as Maputo Protocol) was ratified by Malawi on 20<sup>th</sup> May 2005.

<sup>151</sup> 1991 BLR 233 (HC) and 1992 BLR 119 (CA).

<sup>152</sup> Cases No 45/94; 92/94, Zimbabwe: Supreme Court, 13 June 1994.

<sup>153</sup> The *Dow* case related to a probation on Tswana women from passing on citizenship to their children if married to a foreigner. The *Rattigan and Others* case was concerned with the denial of family based permits to foreign men married to Zimbabwean women.

In principle, constitutional provisions prevail over the nationality law in each state, so the constitutional provisions should prevail over the Citizenship Act. However, the United Nations High Commissioner for Refugees (UNHCR) has noted that nationality laws tend to be more specific and practice-oriented.<sup>154</sup> Therefore administrative authorities may be more likely to apply the older provisions of these laws rather than look to constitutional guarantees of gender equality. Nevertheless, this does not prevent a constitutional challenge of the Citizenship Act based on section 24 of the Constitution. The Constitution clearly states that all Acts of Parliament are subject to the Constitution.<sup>155</sup>

### 5.3.2 *Deprivation of nationality*

A second concern is that the Citizenship Act violates the right not to be arbitrarily deprived of citizenship.<sup>156</sup> This is because there is no recourse to a legal challenge of the Minister's administrative decision regarding acquisition or loss of citizenship. Chirwa opines that despite the constitutional prohibition on arbitrary deprivation or denial of citizenship, the Minister's discretionary power's subjective nature is problematic.<sup>157</sup> Discretionary power can create room for the victimisation of members of opposition political parties or some individuals or groups of people perceived to be political threats through spurious accusations of disloyalty and disaffection.<sup>158</sup> Chirwa provides the example of a University of Malawi female lecturer of Indian origin, married to a Malawian of the same origin, denied naturalisation because of her critical comments on the Government in 2001/2002.<sup>159</sup> A deportation order was issued against her but was not effected.<sup>160</sup> When she reapplied in 2005, she was assured that she would get her citizenship, but because the deportation order was still on file, she was denied again, and by 2013 she had yet not been granted citizenship.<sup>161</sup>

### 5.3.3 *Fraudulent Granting of Nationality*

The nature of the Minister's discretionary power also creates room for corruption and maladministration, as was laid bare in *R v Mussa, Kwanjana, Kubwimana, Katasya & Rwsa*, a case decided in 2020.<sup>162</sup> The accused had to answer various charges arising from the wrongful grant of naturalisation certificates to different foreign nationals. The first accused was the Minister of Home Affairs at the time. He was convicted of wilful neglect to perform his official duty to verify that the beneficiaries of the application satisfied legal requirements for the grant of Malawian citizenship. He was also convicted of using public office to the advantage of another person and was sentenced to five years in prison. The court pointed out that “the minister's responsibilities as final decision maker were not clerical in nature. The minister's

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<sup>154</sup>The United Nations High Commissioner for Refugees, *Law Reform to Date*, 2014.

<sup>155</sup> Republic of Malawi (Constitution Act) no 20 of 1994, section 48 (2).

<sup>156</sup> Republic of Malawi (Constitution Act) no 20 of 1994, section 47 (2).

<sup>157</sup> Chirwa, *Malawi : Democracy and Political Participation*: 55

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> The details of this case, involving Dr Nandini Patel of the Department of Political and administrative Studies at chancellor College, University of Malawi, are regarded as highly confidential as some of the issues were still being contested by 2014 when the article was written. See Chirwa *Malawi: Democracy and Political Participation* :55.

<sup>162</sup> Criminal Case no.2 of 2017.

decision is the final seal of authority and hence must be discharged with the seriousness it deserved".<sup>163</sup>

#### 5.4 Institutional Arrangements for Citizenship

The Department of Immigration and Citizenship Services (DICS) is one of the departments under the Ministry of Home Affairs and Internal Security.<sup>164</sup> The DICS is guided by section 47 of the Republic of Malawi Constitution and is governed by the Citizenship Act and the Immigration Act of Malawi.<sup>165</sup> The DICS's primary functions are to process and issue Malawi Citizenship, Residence and Work Permits following the existing policies.<sup>166</sup>

The National Registration Bureau also falls under the Ministry of Home Affairs and Internal Security. Its mandate is to "implement, coordinate, manage and maintain the National Registration and Identification System".<sup>167</sup> National Registration in Malawi includes birth registration, which establishes in legal terms one's place of birth and parental affiliation. This, in turn, serves as documentary proof underpinning acquisition of the parents' nationality or the nationality of the state where the child is born".<sup>168</sup> Birth registration (while not itself conferring citizenship) is usually fundamental to the recognition of nationality, yet the Act making birth registration compulsory in Malawi was only made possible by the Malawi National Registration Act in 2010.<sup>169</sup> In March 2012, compulsory birth registration commenced.<sup>170</sup>

As per the National Registration Act, the National Registration Regulations require that anybody who has attained the age of 16 must apply for registration into the National register in terms of the Act.<sup>171</sup> Such registration is meant to contribute to the Government's efforts to guarantee the fundamental right to identity, entitlement, and enjoyment of full citizenship in Malawi.<sup>172</sup> As of 2017, more than 8.5 million Malawians had acquired a national identity card<sup>173</sup>, although there was some confusion regarding how one could prove their citizenship to acquire the national identity card.<sup>174</sup> The roll-out of a new national identity card has also raised concerns and challenges for the community of South Asian descent, most of whom are descendants of people who came to Malawi during the colonial era, who have complained of discrimination in the requirements to prove their Malawian citizenship.<sup>175</sup> Thus, we see how an initiative for national registration, which is meant to guarantee the enjoyment of one's full citizenship, can itself be negated by the requirement of proof of citizenship.

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<sup>163</sup> Ibid at p.27-28.

<sup>164</sup> See <https://www.immigration.gov.mw/about-us/current-institutional-arrangements/>.

<sup>165</sup> Act no.20 of 1964.

<sup>166</sup> Ibid under section "Main Functions".

<sup>167</sup> See their website available at <https://www.nrb.gov.mw/index.php/about-us/mandate-vision>.

<sup>168</sup> Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community* :70.

<sup>169</sup> Act No 13 of 2010.

<sup>170</sup> Chirwa, *Malawi : Democracy and Political Participation*: 124.

<sup>171</sup> Section 6(a) of the Regulations.

<sup>172</sup> UNDP, *National Registration, and Identification System (Nris) Project*,p.5 available at <https://info.undp.org/docs/pdc/Documents/MWI/2018%20Q2%20PROGRESS%20REPORT.NRIS%20PROJE%20CT.Final.pdf>.

<sup>173</sup> Ibid,p.13.

<sup>174</sup> For more details, see Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community*,p.84.

<sup>175</sup> Ibid, p109.

## 6. Civil society engagement with citizenship rights

Over the years, many measures have been taken to remedy problems in the area of citizenship rights. Human rights and non-governmental organisations have sought to encourage attitudinal and behavioural change through civic education programmes.<sup>176</sup> Such programmes have typically involved public meetings, radio and television programmes, posters and leaflets through which activists have addressed various aspects of gender inequality, including the legal responses to it.<sup>177</sup> Civil society organisations such as the Civil Liberties Committee, the Association of Progressive Women, the Women's Lobby Group, the Citizenship Rights in Africa Initiative, and others have also sought to improve women and children's condition in respect of citizenship laws by lobbying for changes. The amendment to the Citizenship Act concerning dual citizenship gave credence to the work performed by these organisations. The Malawi Human Rights Resource Centre and others have advanced that progress so far contributes to an environment where there are both openings for eliminating gender discrimination in the nationality law and barriers, including lack of transparency around ongoing processes.<sup>178</sup> It appears that civil society plays an important role not just in safeguarding women's rights but in ensuring that the Citizenship Act is as close as possible to international norms and standards.

## 7. Conclusion

In many ways, Malawi's nationality laws are encouraging. The dual citizenship clause, the protection against statelessness and the removal of racial grounds for citizenship acquisition indicate its progress. However, the prohibition on women passing on citizenship to their spouses and the absence of judicial review in respect of the Minister's decisions are areas of concern. One possible way to tackle the remaining gender inequality in the Citizenship Act would be a constitutional challenge of section 16 of the Citizenship Act. The Constitution states clearly that "an Act of Parliament shall have primacy over other forms of law but shall be subject to this Constitution".<sup>179</sup> It would seem that a constitutional challenge would be the only method of seeking relief, considering that other opportunities to amend this particular section of the Citizenship Act have been missed. Second, the absence of general rights on birth based on birth in Malawi, lack of rights for foundlings, and inadequate protection for stateless children mean that Malawi still has areas of improvement. Third, the Minister's discretionary powers pose a significant challenge because an amendment to the respective clause would require a parliamentary majority. It is hard to imagine that the ruling party would want to lose such a powerful aspect of its governance.

Finally, there is an absence of readily available statistics concerning the specific modes of acquisition and citizenship loss. Further research on Malawi could focus on interrogating

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<sup>176</sup> Chirwa, Patel, and Kanyongolo *Democracy Report of Malawi*: 16.

<sup>177</sup> Ibid.

<sup>178</sup> The Malawi Human Rights Resource Centre, Institute on Statelessness and Inclusion, and Global Campaign for Equal Nationality Rights, 'Joint Submission to the Human Rights Council at the 36th Session of the Universal Periodic Review', 2020, pp. 1–5. "Joint Submission to the Human Rights Council at the 36th Session of the Universal Periodic Review" (2020) :5

<sup>179</sup> Republic of Malawi (Constitution Act), no. 20 of 1994, section 48 (1).

the Department of Immigration and Citizenship Services' data in two ways. Firstly, it would be worthwhile to analyse which naturalisations are based on residence or family relations with a citizen or naturalising foreign national. Secondly, considering Malawi's history as a refugee haven, statistical information about how many refugees have been naturalised, especially those in danger of becoming stateless, would also be beneficial.



