

# THE ROLE OF THE JUDICIARY IN PROTECTING THE RIGHTS OF VULNERABLE GROUPS IN MALAWI<sup>1</sup>

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## Introduction

The Republic of Malawi is bestowed with a particularly comprehensive legal framework for the protection of human rights. Complemented by a permissive Constitution that embraces most major international and regional human rights instruments, the Malawi human rights chapter promises utopia. After so many years under the Constitution, though, we have to ask whether we are anywhere close to realising *de facto* and *de jure* protection of rights for the majority of our society.

Since the advent of human rights law in Malawi following the 1994 Constitution and the turn-around in the political order, many Malawians take pride in, and might proclaim knowledge of, their rights. The truth, though, is that most remain largely unaware of the extent of their rights, and especially the means by which these rights can be enforced. As for those with some idea of the means by which to enforce their rights, they soon realise that access to any such means is barred in many respects – and virtually beyond their reach.

It can thus be said that it is one thing to have a comprehensive legal framework, and quite another to achieve an effective legal order. We must accept that while we have made strides towards achieving formal equality and non-discrimination, we have yet to achieve substantive equality.

One of the key objectives of human rights law is to provide a life of dignity for every individual, without any kind of discrimination. The rights to equality and non-discrimination are at the fore of the human rights agenda. Inequality and discrimination of any kind, based on gender, race, and such other considerations should be frowned upon and challenged.

Due to so many factors, gross inequality and discrimination remain in large sectors of our society. The brunt of inequality and discrimination has unfortunately largely been borne by the sectors of our society who were intended to be the primary beneficiaries of human rights law. The principle aim of human rights instruments is the protection of those considered to be ‘vulnerable’ to the powers of state, and generally the society in which they live. It is to vulnerable individuals and vulnerable groups that human rights instruments dedicate most of their attention.

This paper briefly reviews the definition of vulnerable persons and groups, assesses the legal framework for the protection of vulnerable groups in Malawi, reviews the role of the courts in

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protecting the rights of vulnerable groups, documents relevant case law in Malawi, and, finally, offers an assessment of the overall progress made.

## Vulnerable persons and vulnerable groups

We live in a world in which poverty is pervasive, the gap between rich and poor continues to grow, political authorities continue to wield more power and wars continue to displace large sections of society, and derogatory customary and cultural practices continue to classify certain groups of people as inferior. As the second-class and under-privileged categories continue to grow in size, we continue to create groups of persons in our societies who are deprived of humanity.

It is difficult to define in clear and succinct terms what vulnerable persons or vulnerable groups are. It is generally agreed, though, that this is the part of the population that often encounters discriminatory treatment or is in need of special attention and protection by the state, in order to avoid exploitation. Such discrimination or exploitation could be based on sex, race, religion, disability, health, or other such criteria. Vulnerability is often linked to, or associated with, poverty. Potentially vulnerable persons or groups include women, children, the elderly, persons with disabilities, and persons with a serious illness or health condition. The list can never be closed.

Vulnerability is a challenge in itself, but it leads to more complex challenges. Vulnerable persons might have little education or knowledge of the law. They will not be able to surmount the practical hurdles of state institutions, including tribunals, and they will not be able to bribe their way through. They will likely not be able to afford quality justice. What adds to their plight is that legal-aid services are limited in most jurisdictions – as is the case in Malawi.

## The legal framework for the protection of vulnerable groups in Malawi

In Malawi, the Fundamental Principles of the Constitution provide – in section 13 – for gender equality, support for the disabled, full development of children, and support for the elderly. The plight of women, children, the elderly, and persons with disabilities is therefore recognised and clearly prioritised as an area of concern. Beyond the Fundamental Principles, the Constitution also attends to inequality in section 20, and provides:

- (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.
- (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

The Constitution then provides for access to justice and legal remedies for all, ideally for the vindication of their rights. It states in section 41:

- (1) Every person shall have a right to recognition as a person before the law.

(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

Pursuant to section 20(2) of the Constitution, legislation has been passed in Malawi providing for the legal needs of specific groups in society, and further articulating their respective rights. Apart from providing for women's rights in section 24 of the Constitution, a comprehensive law has been enacted for the prevention of domestic violence, the Prevention of Domestic Violence Act,<sup>3</sup> the victims of which are mostly women. While the Constitution provides for the rights of children in section 23, alongside it is a comprehensive law on children in conflict with the law, the Child Care, Protection and Justice Act.<sup>4</sup>

Beyond the Constitution itself and related domestic legislation, Malawi is party to most major international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). These international conventions have long been part of the law that is enforceable in Malawi, by virtue of section 211 of the Constitution and relevant pronouncements from courts at different levels, including judicial dicta from *In Re David Banda*<sup>5</sup> and *In Re Chifundo James*,<sup>6</sup> which are discussed later.<sup>7</sup>

As stated earlier, Malawi can take pride in the extensive laws relating to the protection of rights, including the rights of some vulnerable groups. Obviously the remaining question is whether we can also achieve the vindication, protection, and enforcement of the rights of vulnerable groups. This question is much more about the role of law enforcement; in that regard, courts must play a pivotal and lead role.

## The role of courts in protecting the rights of vulnerable groups

Storme<sup>8</sup> conceptualised the role of the judiciary as a state power, with three essential functions:

(1) To take an active part in the process of developing the law, whilst at all times doing so with the necessary degree of restraint.

(2) To have as its supreme function the safeguarding and protection of human rights, especially in terms of the relationship between citizens and the authorities.

3 Act No. 5 of 2006.

4 Act No. 22 of 2010.

5 [2008] MLR 1.

6 MSCA Adoption Appeal No. 28 of 2009.

7 For further discussion on these cases, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

8 M Storme "Law in Motion" *General Reports and Conference Papers*, Part 1, First World Law Conference International Encyclopaedia of Laws (1996) 133. These functions are also contained in the Revised International Standards of Judicial Independence, International Association of Judicial Independence and World Peace (2008) at para. 1.2.

(3) To be the ultimate bulwark in maintaining the rule of law.

The basic role of courts is to interpret and uphold national law, and international law where the latter is applicable. Courts must preserve their independence and impartiality in the administration of justice for all manner of litigants who approach the corridors of justice. In determining cases before them, courts must have reference only to relevant facts – as far as they can be established – and the merits of the facts in relation to the law. Justice, however, calls for much more. Judges must understand all the facts and also the attendant circumstances of the parties appearing before them. They must have the faculty and skill of immediately assessing the ability and capacity of those appearing before them, and must be ready to control the proceedings accordingly. It is the singular duty of the court to ensure equality as different sectors of our society try to fathom the thicket of intricate procedures and evidential burdens.

Beyond procedural and evidential complexities are the decisions we make. Obviously courts must make decisions that conform to the law. While they do so, it is inevitable that the decisions must find justification in the facts and the circumstances of the case. However, Aldisert<sup>9</sup> contends that judges may occasionally make decisions for extra-legal reasons – sometimes for personal reasons and even based on petty motivations. Sometimes judges make decisions based on overriding motivations that cannot be publicly stated. But he considers that whatever the motivation, decisions must have justification; there must be a public explanation for the decision; there must be a statement of the norms that contain the exposition of stated rules and appropriate principles of law; there must be a statement that originates with the judge's choice of the legal precept, through the interpretation of that choice; and finally the decision must have application to the cause at hand. It is critical, however, that the private reasons for the decision be the same as those publicly stated in justifying them. Finally, he asserts that the decisions judges make will survive and endure only when they reflect desirable current public opinion or are congruent with contemporary community moral standards.

Returning to the subject at hand, contemporary community moral standards uphold human rights for all, irrespective of the individual's station in life. We must acknowledge that people, be they vulnerable or not, would rather not spend their time litigating in courtrooms, which are already intimidating, boring, and tiresome. Citizens would rather get on with their lives than spend valuable time in courts waiting to be patronised by intricate institutional designs, complex procedures, and gruelling examinations and cross-examinations, and in the end be subjected to the anxiety of waiting for the unknown, as judges take their time to come up with loquacious and legalistic decisions.

Vulnerable persons are already disadvantaged, and their lives are already concerned with the more pressing needs of survival. The last thing they think of is being in court. In the event that they are forced to go to court, it would be adding injury to misery. The first thing for them is to find the court, then how to approach the court, and finally there is the difficulty of explaining why they have come to court – if given proper notice by the system.

9 See RJ Aldisert *The Judicial Process, Text, Materials and Cases* Second Edition (1996) 604-676.

It is here that the role of courts becomes critical. It is suggested that as a starting point, courts must adapt to the institutional needs of vulnerable groups. It would include assessing the following: the location and proximity of the courts to vulnerable groups; the physical structure of the courts themselves; the reception arrangements at the courts; the procedures for complaint; and the procedures for trials themselves. More importantly, it is about the redress that vulnerable groups will get.

The trend of decisions taken by courts in Malawi – decisions relating to or having a bearing on some sections of vulnerable groups – are now briefly analysed.

## The trend of court decisions

Public opinion, in the media and public discourse generally, is that our courts have not accorded particular attention to the plight of vulnerable groups. It is felt that there is undue adherence to procedural technicalities and high evidential burdens. It is further felt that decisions by courts in Malawi lack adequate recognition of the circumstances of the vulnerable generally, but in particular women and girls. Is there truth in this perception?

Sathe,<sup>10</sup> a leading commentator on judicial activism, commended the court's proactiveness in India thus:

The court developed a new paradigm of judicial process consistent with the rights discourse it has generated through judicial activism. The new paradigm envisions an affirmative, proactive role of the court for facilitating access to justice for those who do not possess either the know-how or the resources for invoking the judicial process on their behalf and for ensuring greater public participation ... The new paradigm was for a court that has to protect the rights of the poor and illiterate people of India and to ensure that the rule of law was observed by citizens as well as rulers.<sup>11</sup>

Sathe's comments are specifically about public interest litigation, but also generally about a proactive court system. This is an area where courts in Malawi seem to be unprepared.

As mentioned elsewhere,<sup>12</sup> the nature of public interest litigation is the intention to uphold the public interest by providing socio-economic and political justice to a large number of people who are poor, lacking in knowledge of the law, socially and economically deprived, and who would not normally approach the court. It is based on the notion that individuals are equal and should enjoy their fundamental rights equally, irrespective of their poverty, illiteracy, and lack of knowledge.

In *Malawi Human Rights Commission v Attorney General*,<sup>13</sup> the High Court of Malawi stated:

I think it is important to press home certain realities. In constitutional and human rights matters, individual human beings may be claimants both in their own right and as representatives of groups.

10 SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* First Edition (2002).

11 *Id* 201.

12 A Nyirenda "Public Interest Litigation: Procedure and Available Remedies" Paper presented at Chancellor College workshop on Public Interest Litigation.

13 [2000-2001] MLR 246.

While individuals are of course, always the ultimate deprivées, they do not necessarily become active, or effective claimants in seeking remedy against deprivation or non-fulfilment. In many communities, many people who suffer deprivations or non-fulfilments are conditioned or forced to endure them in silence. They may be too intimidated, uninformed, powerless or resourceless to make claims. They become too used to being pushed around and accepting without questioning that which “they”, in authority, have decided or done. In these circumstances, the relevance of public interest litigation cannot be over-emphasised ... [I]n such cases, if there should spring up a public-spirited individual or body and seek the court’s intervention against legislation, decisions or actions that pervert the Constitution, the court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise to the occasion and grant him standing.<sup>14</sup>

In *Registered Trustees of the Public Affairs Committee v Attorney General and Another*,<sup>15</sup> the High Court supported the above approach, and explained:

The answer on *locus standi* on the issues raised in the current Originating Summons will not come from how Judges in America, in England, in South Africa or elsewhere in the world construe it depending on their peculiar traditions and/or special wording in their Constitutions or Statutes, although that might still provide us a guide on the trend generally applicable. I do believe that the answer we need on this issue and in this case will come directly from our own Constitution, which after all is the document that contains the wishes and aspirations of our people. The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.

...

I find, accordingly, that limiting “sufficient interest” under section 15(2) of the Constitution to only a person or only a group of persons that have a personal grievance does not take full account of the full breadth of the provision in question, in that it omits the fact that the provision also gives this right of access to the Courts to persons merely interested in protecting the rights (not necessarily their personal rights) and that apart from seeking remedies for grievance, the provision is open enough to allow promotion of rights well apart from protection of those rights.<sup>16</sup>

These two decisions did not have an opportunity to have any real impact. Soon thereafter there was a decision by the Supreme Court of Appeal of Malawi in *Civil Liberties Committee v Minister of Justice and Another*.<sup>17</sup> The Court opined:

We wish to make it very clear that there is no reason to make apology for affirming the standard of *sufficient interest* for determining *locus standi*, in the field of public law. It is the standard which the eminent Lord Justices in England use: see *Regina v Secretary for Foreign and Commonwealth Affairs ex-parte World Development Movement*. It is true that the concept has undergone some reform and what constitutes sufficient interest is liberally interpreted. Nevertheless, according to the *World Development Movement* case a plaintiff is still required to establish *locus standi* by meeting the criteria laid down in that case; that criteria includes the absence of another responsible challenger

14 *Id* 255.

15 [2002-3] MLR 333.

16 *Id*.

17 [2004] MLR 55.

and the role of the plaintiff in relation to the subject matter of the action. We take the view that that is fundamentally different from the total abandonment of the concept of *locus standi*, a result which has been achieved by Chipeta J's literal interpretation of the words *any person* contained in section 46(2).

The concept of *locus standi*, expressed in terms of *sufficient interest*, *special or substantial interest* or existence of a *legal right or interest* in the outcome of a suit should not be misunderstood as failure to promote or respect human rights. Respectable democracies renowned for their respect of human rights such as United States of America, some Commonwealth countries including Australia and a number of countries which are parties to the European Convention on Human Rights and Fundamental Freedoms require *locus standi* expressed in the standard as earlier discussed. Would it be sensible to suggest as Chipeta, J does that the judiciaries in these countries cling hard to a *narrow, legalistic and pedantic* version of *locus standi*? The Americans are so proud of their version of *locus standi* that they entrenched it in their Constitution. There is no justification for us to be too shy to express frankly the idea of *sufficient interest* as a standard for *locus standi* which our Constitution provides.<sup>18</sup>

This being the approach and attitude of the highest court of the land, we have obviously left behind the poor, women, the young, the elderly, persons with disabilities, and many in other vulnerable groups. These are voiceless people in our society whom our courts must deliberately and positively accommodate. Unless we, in appropriate cases, allow for well-meaning persons or institutions to champion a cause on their behalf, the plight of these groups will continue to elude us.

There are further signs in jurisprudence that suggest that courts in Malawi are not sufficiently responsive to the situation of the vulnerable. In *Nwangwu v Republic*,<sup>19</sup> the appellant was tried and convicted of incest. He had carnal knowledge of his daughter, aged four. In approaching sentence, the High Court observed:

The events of this case will leave [the victim] maimed, dejected and crestfallen for the rest of her life to say the least.<sup>20</sup>

The High Court proceeded to uphold the sentence of 13 years imprisonment with hard labour. On appeal, the Supreme Court of Appeal, in considering the appeal against sentence, said:<sup>21</sup>

We need not consider the severity of sentence ... It has been submitted, however, that the High Court erred in law in sustaining the sentence by attaching undue weight to its finding that the events of the case will leave the victim maimed, dejected and crestfallen for the rest of her life. Learned counsel said that this finding is shocking because it cannot be supported by the evidence whatsoever. We have ourselves read the record of the proceedings. We are unable to find evidence on which the finding was based. It was, therefore, misdirection on the part of the High Court which would have constituted an error on a matter of law appealable to this Court.<sup>22</sup>

The Supreme Court of Appeal upheld the sentence, however, because, in principle, it did not find

18 *Id* [original emphasis retained].

19 [2008] MLR 103.

20 *Id*.

21 *Nwangwu v Republic* MSCA Criminal Appeal No. 11 of 2008.

22 *Id*.

it appropriate to alter the sentence as a court of appeal.<sup>23</sup> There could be no doubting that the little girl child would grow to fear and be apprehensive of any guardian. There was evidence that her physical being had been violated. She would have to live with the memory that the violation was at the instance of her own parent. It is submitted that to refuse to see the consequences and implications of a gross violation of the rights of the vulnerable in this manner, is serious cause for concern regarding the role of courts in Malawi in protecting the rights of the vulnerable.

While there are these glaring instances of unsupportive decisions, it is not that courts in Malawi have abdicated their responsibility regarding the plight of vulnerable groups. There are a number of instances where courts have clearly recognised that vulnerable groups require special attention and protection. A few cases should demonstrate that commitment.

In *In Re David Banda*,<sup>24</sup> the High Court granted an application for adoption. This was a case of inter-country adoption. The Court interpreted the rather restrictive laws in the Adoption of Children Act<sup>25</sup> as to allow for inter-country adoption. At stake was the best interest of the child, whose mother died seven days after his birth. The other members of the immediate family, including his father, were materially deprived and were forced to leave the boy at an orphanage. In *Re Chifundo James*<sup>26</sup> and *In the Matter of the Adoption of Children Act and In the Matter of Teleza Misomali*<sup>27</sup> were also about inter-country adoption. The decisions rested on the paramount consideration of the rights of the children concerned and what was in their best interest.<sup>28</sup>

A few earlier decisions should also demonstrate that courts in Malawi have been conscious of the plight of vulnerable sections of society. The High Court case of *Kaseka and Others v Republic*<sup>29</sup> is a solitary voice and yet a very important breakthrough in our Court's jurisprudence on the rights of vulnerable women. In the case, police on night patrol in a certain township decided they would search rest houses. In a number of them they found women – and in some instances they were with male partners. Police arrested only the women and prosecuted them for idle and disorderly conduct, and they were convicted. On review of the matter, the High Court quashed the convictions. The Court warned against discrimination and stressed that there was no justification for thinking it was only the women who erred and not their male partners. The message was simple but resounding. We must never victimise women for who they are and, in the words of the fundamental principles of the Constitution of Malawi, all persons have equal status.

23 *Id.*

24 [2008] MLR 1.

25 Cap 26:01 of the Laws of Malawi.

26 MSCA Adoption Appeal No. 28 of 2009.

27 [2009] MLR 247 (HC).

28 For further discussion on these cases, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

29 [1999] MLR 116. For further discussion on this case, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

In sentencing the convict in *Republic v Cidreck*,<sup>30</sup> a case of rape, the High Court observed:

The offence which the accused committed is very serious. Society requires protection of the law through a meaningful penal process in our courts ...<sup>31</sup>

Similar sentiments will be found in several cases involving sexual offences, which suggests that our courts are conscious of the predicament of women and girls.

*Republic v Balala*<sup>32</sup> is yet another important decision. Balala was a juvenile who was convicted of being a rogue and vagabond by a Magistrates Court. On review, the High Court affirmed:

I have examined the facts which were presented before the magistrate's court. It is not very clear to me for what purpose the juvenile was found wandering about within the trading centre. When he was questioned by the police he said that he came to the northern region to look for employment. It is possible that the juvenile is a person who needs care and protection. He is a needy person. I am concerned that the charge of being a rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison.<sup>33</sup>

It is only fair to say from the few cases considered, that while there is still cause for concern, the courts in Malawi are making an effort to rescue vulnerable groups from hazardous circumstances and from situations of inequality and discrimination, and to place them in circumstances where their rights can be realised.

## Conclusion

Courts will continue to be centre stage in the protection of the rights of vulnerable groups. While courts in Malawi are still grappling with and trying to come to terms with philosophy and jurisprudence on the protection of rights of vulnerable groups, it is significant that demonstrable strides are being made to uphold these rights. We live in a nation in which most of our citizens lack access to even basic necessities, live in abject poverty, and lack basic education. It is imperative that our courts continue to renew their transformative role and pay particular attention to the full realisation of rights of such citizens. The protection of rights of vulnerable groups is the solemn duty of our courts, lest we leave behind the greater part of our community.

30 [1995] MLR 695.

31 *Id.*

32 [1997] MLR 67. This case is also discussed in C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

33 *Id.* 68.