JUDICIAL ACTIVISM AND THE PROTECTION OF THE RIGHTS OF VULNERABLE GROUPS IN MALAWI[1]

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Introduction

The mere mention of activism and the judiciary in the same sentence might be enough to send shivers down the spine of many a judicial officer or indeed the ordinary citizen – and for good reason, in my view. Activism at times conjures up images of persons demanding (not with a lot of civility) their perceived share of the national cake. It is not an image that one wants to associate with judicial officers and the judiciary. So what exactly is judicial activism? Views vary from the not so complimentary to the outright derogatory.

On one United States legal website,[3] judicial activism is defined as the view that:

> Judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. Judicial activism believes that judges assume a role as independent policy makers or independent 'trustees' on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws.

Black's Law Dictionary[4] refers to judicial activism as a philosophy of judicial decision-making whereby judges allow their personal views about public policy to guide their decisions.

Kennedy J of the United States Supreme Court, on the other hand, took a spectacularly pragmatic view of judicial activism. He thought an activist court is no more than a court that makes a decision you do not agree with.[5]

Other online dictionaries refer to judicial activism as:

- "A usually pejorative phrase implying that a judge is applying his or her own political views, rather than basing decisions on law or prior precedent";[6]
- "The act of replacing an impartial interpretation of existing law with the judge's personal feelings about what the law should be";[7] or

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 6 and 7 March 2014.

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3 See http://www.definition.uslegal.com.

4 *Black's Law Dictionary* Sixth Edition (1990) 847. The dictionary defines judicial activism as a "judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges".

5 M Sedensky "Justice Questions Way Court Nominees are Grilled" *The Associated Press* (14 May 2010).

6 See http://www.yourdictionary.com.

7 See http://www.definitions.net.

- "Judicial rulings suspected of being based on personal or political considerations rather than on existing law".[8]

Criticism of judicial activism has been many and varied. Most think it subverts the doctrine of separation of powers. Judges should restrict themselves to interpreting the law as it is, as opposed to as it ought to be. Critics follow up the foregoing with the view that judicial activism usurps the power of the elected branches of government and damages the rule of law. Supporters of judicial activism, on the other hand, tend to regard it as a legitimate form of judicial review, which is intended to keep executive power in check.

It is fair to say that judicial activism is still treated with a considerable amount of suspicion. Speaking for myself, I remember being wary of deciding on matters of policy in *Ex Parte Mhango and Others; In Re State v Minister of Finance and Another.*[9] I thought this was best left to the people's elected representatives, namely members of parliament. In *Chiume & Others v AFORD, Chihana & Another*,[10] I considered that matters purely political were best left to politicians. In *State v Registrar of Political Parties & Another, Ex Parte Mulungu*,[11] I reiterated the widely-held view that judges should not substitute their own view in judicial review proceedings for that of those democratically elected. This is clearly a departure from the widely-held view of judicial activism.

So what exactly is judicial activism? It varies from jurisdiction to jurisdiction in my view. In Malawi, it is, in my judgment, based on the Malawi Supreme Court of Appeal's views on constitutional interpretation, as expressed in *Nseula v Attorney General & Malawi Congress Party*.[12] Adopting the Indian Supreme Court's sentiments in *Gopalan v State of Madras*,[13] the Malawi Supreme Court of Appeal said that the Constitution should be interpreted in a generous and broad fashion, as opposed to a strict, legalistic, and pedantic one – a manner that gives life to the words used by the legislature and avoids at all times interpretations that produce absurdities.

Whether or not a court indulges in judicial activism depends, in my view, on how generous, broad-minded, non-legalistic, and non-pedantic it is prepared to be in dealing with the cases before it. The more generous, broad-minded, non-legalistic, and non-pedantic the court is, the higher the possibility that such a court is an activist court. That is the understanding of judicial activism that I am adopting in this paper.

The object of the paper is to show how – in the context of decided cases – a court can, having adopted the above understanding of judicial activism, protect the rights of vulnerable groups in Malawi.

8 *Id.*

9 [2009] MWHC 2 (HC). The applicants were members of parliament who sought the implementation of the Appropriation Act of 2008, in so far as it concerned the payment of a fuel allowance to members of parliament. The respondents had refused to disburse funds for the fuel allowance.

10 Civil Cause No. 108 of 2005 (HC) [unreported].

11 [2010] MWHC 6 (HC). The applicants sought judicial review of the respondent's decision not to register the People's Development Movement as a political party.

12 MSCA Civil Appeal No. 32 of 1997.

13 [1950] SCR 88.

What are vulnerable groups?

Vulnerable groups have been defined as groups that experience a higher than normal risk of poverty and social exclusion, than does the general population.[14]

My understanding of vulnerable groups (and therefore persons) would therefore be those who are most disadvantaged in society; those most likely to be taken advantage of; and those who are least able to look after themselves and those closest to them.

For the purposes of this discussion, I will examine women and children in the context of the institution of marriage, distribution of matrimonial property, child custody, maintenance, rules of procedure, and sexual offences.

The institution of marriage

There are hard and fast rules regarding marriage in Malawi. If one is married under the Marriage Act,[15] there are usually no problems regarding whether or not one is married, and a certificate from the Registrar of Marriages suffices. In terms of customary law, in the patrilineal system of marriages practiced in northern Malawi and the lower Shire, someone was considered unmarried unless *lobola* was paid; while in the matrilineal system of southern and central Malawi, someone was considered unmarried unless there were *ankhoswe* (marriage advocates) in relation to the marriage. In the absence of *lobola* and *ankhoswe*, it mattered not how long a man and woman lived together: they were not husband and wife. In addition, on going their separate ways, the woman would not be entitled to any rights associated with a marriage – including a share of what might otherwise be deemed to be matrimonial property and custody of children of the union, as there was no matrimony. The question of distribution of matrimonial property and custody of children therefore simply never arose. Examples are *Ali v Mhango*[16] and *Elliasi v Magaisa*.[17] In both cases the parties had cohabited for periods of between six and eight years, but no *lobola* had been paid and there were no *ankhoswe*. When the parties went their separate ways, the women asked for a share of the matrimonial property and custody of the children, but the courts thought these issues did not even arise: there being no marriage, there was no matrimonial property to distribute. Furthermore, there was no community of children to talk about: children born of such unions were regarded as children born out of wedlock and they were therefore illegitimate.

This resulted in an obvious injustice to the women and children involved, who are, incidentally, two of Malawi's most vulnerable groups. The women would have spent years in a union believing that they had acquired rights accruing to all women similarly positioned. They would have had children believing that they had some legal communion in them – only to discover, often after their most productive years, that such was not in fact the case. Children born out of such unions were equally disadvantaged. They were considered illegitimate and not capable of sharing in any of their father's property.

14 See http://www.eqavet.eu/qa/gns/glossary/v/vulnerable-group.aspx.

15 Cap 25:01 of the Laws of Malawi.

16 MWHC Civil Appeal [TC] No. 15 of 1970.

17 MWHC Civil Appeal [TC] No. 7 of 1970.

Then came section 22 of the Constitution, which provides for various aspects of marriage and family. Section 22(5) specifically provides that section 22(3) and (4) of the Constitution "shall apply to all marriages at law, at custom and marriages by repute or by permanent cohabitation". In *Mbewe v Nyirenda*,[18] I agreed that this meant that in Malawi there were and could be marriages at law, e.g., under the Marriage Act; at custom, as described above; and others *by repute or permanent cohabitation*.[19] So, if a man and woman lived as husband and wife and held themselves out to society as such, they were held to have been lawfully married during the subsistence of such cohabitation – notwithstanding there was no *lobola* or *ankhoswe* in relation to such a union.[20] This allowed parties, especially women, to be regarded as married women and to enjoy all rights accruing to married women (including the right to an equitable share in matrimonial property and the companionship of any children of the union) – notwithstanding that there was (strictly speaking) no legal marriage in the customary legal sense. The children were equally considered as being born in wedlock.

Distribution of matrimonial property

Section 24(1)(b) of the Constitution provides that women shall, on the dissolution of a marriage, be entitled to fair disposition of property held jointly with a husband; and fair maintenance taking into consideration all circumstances and in particular the means of the former husband and the needs of any children.[21]

The question then is – what exactly is jointly-held property? The courts have, over the years, been preoccupied with defining "fair disposition" as opposed to "jointly-held".[22] Where they have, they were content to regard such to be property formally registered in the names of the husband and wife, property in whose acquisition the wife had a monetary input, or property being neither of the immediately above which the couple somehow made known was jointly held. If therefore, the property in issue did not fall into any of the above three categories, the wife would have no share. There are practical problems with this. Firstly, it is obvious that the wife has to prove joint registration, input or joint holding before she can benefit. It is not always easy to do this. Furthermore, it appears to be a discriminatory requirement. The husband is not required to prove that the property in issue was never jointly held or that the wife never contributed to its acquisition. Secondly – and considering the economic status of most women – it is somewhat unreasonable to expect women to contribute monetarily towards the acquisition of matrimonial property. Thirdly, and because invariably the woman is the weaker party in the marriage contract,

18 MWHC Civil Appeal Case No. 49 of 2003 [unreported].

19 In that case the Court found that a marriage by repute did not exist.

20 This would depend on the facts of the case. For example, in *Gondwe v Gondwe* MWHC Appeal Cause No. 26 of 2002 the Court did not allow a property claim after co-habitation. Compare with *Phiri v Masompha* MWHC Civil Appeal No. 24 of 2006 where the Court held that property acquired during co-habitation or repute suffice as matrimonial property.

21 Section 24(1)(b)(ii) was examined by the High Court in *Kamphoni v Kamphoni*, Matrimonial Cause No. 7 of 2012, where Mwaungulu J held that "[f]airness is much wider than equality. In the specific case, achieving equality between the spouses would result in unfairness to a wife. For example, if the wife has custody of infant children, equal allocation of matrimonial property will not be fair. Consequently, provisions under international law that want to achieve equality cannot limit section 24(1)(b)(ii) of the Constitution that requires fairness … At customary law, disposal of matrimonial property on dissolution of marriage, like upon death, bases on fairness, justice, dignity, reasonableness, proportionality, comity and solidarity ".

22 See *Ulaya v Ulaya* [2000-2001] MLR 409 (HC).

it is virtually impossible to expect her to insist on formal registration of her interest in matrimonial property – the fact that she contributed towards its acquisition notwithstanding. Experience shows that matrimonial property is invariably registered in the name of the husband. The net result is that any interpretation of "property jointly held", which borders on the literal, excludes women from an equitable disposition of matrimonial property.[23]

A more generous, non-legalistic, non-pedantic interpretation of section 24(2)(b)(i) better protects the wife. In *Kayira v Kayira*,[24] *Zola v Kumwenda*,[25] and *Mtegha v Mtegha*,[26] the High Court interpreted "property jointly held" not to always mean property formally registered in the names of the husband and wife, or necessarily property towards whose acquisition the wife contributed monetarily, but to include any property that, though not necessarily formally registered in their names, the husband and wife regarded during the subsistence of the marriage as belonging to the family and in respect of which there was community of use. It enhanced not only the pool of property from which the wife could benefit, but also the chances of equitable disposition of matrimonial property.

Custody of children

In common and statutory law, custody is dependent on the best interests of the child.[27] Custody of children is therefore awarded to the parent who offers them the best quality of life.

As per custom, custody of children was given to the father in the patrilineal system. In the matrilineal system, custody was invariably awarded to the mother. This was, however, subject to the fact that a parent would lose custody of the children if he or she was at fault for the dissolution of the marriage. The foregoing was applied irrespective of the child's best interests. In practice, there have therefore been instances of child custody being awarded to one parent, rather than the other – in accordance with customary law and in disregard of the child's best interests. In addition, even where the child's best interest is taken into account, there is a tendency to view a child's best interests in the light of a parent's financial capacity. The more affluent a parent is, the higher the chances of them being granted child custody. Because women are more financially disadvantaged in society, they lose out in custody battles – even when they are otherwise qualified. It works to the detriment of both the child and the divorcing woman: the child, because its best interests are not taken into account; the mother, because she unjustifiably loses custody of her child.

Similarly, there are instances of child custody being awarded to one parent, rather than the other – presumably in accordance with the child's best interests – but in disregard of applicable customary law. This has its own downsides. That it is undesirable to award child custody in disregard of a child's best interests is obvious enough. It may, however, not be so obviously undesirable to award

23 This concern was also raised in *Kamphoni v Kamphoni*, Matrimonial Cause No. 7 of 2012, where the High Court held that, in the interest of fairness, the word "held" refers to both ownership and possession and that "property need not be jointly acquired in order for it to be jointly held".

24 MWHC Civil Appeal Case No. 44 of 2008 [unreported].

25 MWHC Civil Appeal No. 21 of 2008.

26 MWHC Civil Appeal Case No. 92 of 2008 [unreported].

27 See *Kamangira v Kamangira* [2004] MLR 135 (HC).

child custody in disregard of applicable customary law. I fail to see, for example, how it can be in a child's best interests to take it away from, let us say its mother, and give it to its father, in disregard of customary law. It cannot, in my judgment, be in the best interests of a child if a custody order pits paternal and maternal family against each other from the word 'go'. The above occurs because most courts believe that customary law and received law are mutually exclusive. They are not; they actually complement each other. There is also the perception that received law has a higher status than customary law, so that the courts should always do as the received law says – irrespective of the tenets of customary law. That should not be the case. When dealing with child custody in a customary law context, courts would do well to understand the concepts.

In the patrilineal system of northern Malawi, where I spent much time as a judicial officer, it is clear that custody of children goes beyond the mere physical custody of children. It also determines who will receive *lobola* in respect of female children. If, therefore, upon divorce, a father is not at fault, customary law grants him custody of the children and with it the right to receive *lobola* in respect of the daughters when they get married. It is most likely that the same *lobola* will be used to pay for the *lobola* of any sons. If you therefore deny him custody, because it is not in the children's interests, you are depriving him not just of child custody, but also of the opportunity to receive *lobola* for his daughters. This, in turn, would have reduced, if not wiped out, his obligations in respect of his sons' *lobola*. In my view, the right to receive *lobola* is one the man got by himself paying *lobola* for his wife and ensuring that he was not at fault in relation to the divorce. The same is true with respect to women. In custom, they will have earned the right to custody simply by not being at fault for the breakdown of the marriage.

To ensure the continued co-existence of customary and received law, and to avoid injustice, I believe there is a distinction between physical custody and legal custody (what might also be loosely termed guardianship). Legal custody is what a parent should have following the application of customary law tenets. Physical custody is what a parent should have if the child's best interests so dictate. So, if a divorcing woman is not at fault, she should have legal child custody. She will also have physical custody – if the child's interests so dictate. But, if the best-interest principle means child custody should go to the husband, then the wife will retain legal custody while physical custody goes to the husband. That will, however, reserve for her the right to receive *lobola*, at an appropriate time, in relation to the child, if it is a daughter. The same applies with respect to the husband. The advantages of the above are varied in my judgment. Firstly, it does away with the perception that received law is superior to customary law. Secondly, at a practical level, it allows for customary and received law to co-exist. Thirdly, both of the child's parents have a share of the child, which would not otherwise have been possible if customary or received law had been applied to the exclusion of the other. More importantly, the child's interests are not compromised – which might not have been possible if customary law was applied to the exclusion of received law or *vice versa*. In this regard, in *Zolo v Kumwenda*,[28] the High Court gave immediate physical custody to the mother, while reserving legal custody for the father. In *Mtegha v Mtegha*,[29] physical custody was granted to the father, while legal custody was granted to the mother with appropriate visitation rights.

28 MWHC Civil Appeal Case No. 21 of 2008 [unreported].

29 MWHC Civil Appeal Case No. 92 of 2008 [unreported].

Maintenance

On divorce, a woman is entitled to fair compensation. The question is always – what amounts to fair compensation? Section 24(1)(b)(ii) of the Constitution of Malawi states clearly that what amounts to fair compensation should take into account "all circumstances and, in particular, the means of the former husband and the needs of any children".

The above words should – in my judgment – be interpreted liberally. It is important that circumstances should include whether the divorcing husband or wife has remarried, or who was at fault for the marriage breakdown. If the husband has remarried, it is crucial that whatever maintenance he has to pay does not adversely affect his ability to look after his new family. If the wife has remarried, surely her financial position in the new family should impact on what she gets as maintenance from her previous husband? Children should, I believe, include children of subsequent liaisons. If it did not, we run the risk of, for instance, interfering with a man's right to found and maintain a family – simply because he cannot afford to support them, and it would also lead to discrimination. You would have a class of women and children who would enjoy support from their ex-husbands and fathers respectively – while at the same time have another class of women and children who would not have similar support from their husbands and fathers. It is an injustice that the courts should be wary of, and they should deal with it proactively.

Procedure

Courts are always asked to make orders relating to child custody and maintenance consequent to a divorce. There have been instances where such orders have not been made ostensibly, because they were not specifically requested. This is in keeping with normal procedure in civil litigation.[30] Many people are not conversant with the rules of court procedure. They also cannot afford a lawyer. Unduly sticking to procedure means such persons cannot bring their cases before court in the best possible way. The result is inevitable: they will not be able to get the best possible relief from the courts, which in the end is injustice. In my judgment, unless the other party's case is clearly or manifestly prejudiced, a court should be able to entertain claims for maintenance, child custody, *inter alia*, even if the same have not been specifically pleaded. In *Phiri v Phiri*,[31] I endorsed the view in *Juma v Juma*[32] that courts should take a relaxed view of procedural dictates. As much as possible, they should be able to make orders relating to child custody, maintenance, and distribution of property – even when it is not specifically requested.

Sexual offences

The prosecution of sexual offences is a sensitive matter which is sometimes as traumatising to victims as the actual offences. There are instances of accused persons – sometimes with the help of their counsel – dealing with issues of penetration in a manner that seeks more to embarrass, than to prove the particulars of alleged offences. It is time, in my view, for courts to play their

30 See *Phiri v Phiri* [2007] MWHC 8.

31 [2007] MWHC 8.

32 MWHC Civil Appeal Case No. 42 of 2002 [unreported].

rightful part in protecting the rights of victims, while also not compromising those of accused persons. For instance, particulars not in dispute need not be brought up – more so when it has no probative value and is only raised to embarrass. As for consent, I feel it is time we ended demands for corroboration of their testimony. Corroboration serves no useful purpose, save to perpetuate the misconception that women are prone to lying. It is also time we discarded the clearly untenable position that women must show evidence of resistance before they can be considered not to have consented to a sexual act. In *Phiri & Mwayi v Republic*,[33] the High Court said:

It is wrong in law to proceed on the basis that the female should scream for help and struggle against the male to show that she is not consenting. It is not for the female, in our further view, to show that she is not consenting. It is for the male to obtain the female's consent before embarking on the sexual act. The male must not assume consent just because the female has not said no. He must actually obtain consent. If he proceeds on the assumption that she has consented, and it turns out that the female did not in fact consent, it will not be of any use for him to claim that the female never shouted her denial or screamed for help or that she never protested against the sexual act. Or indeed that she never said no to the sexual advances.

The above approach preserves the dignity of victims. It treats them like all witnesses, and certainly like male witnesses are treated. At the same time, it does not lower or reverse the standard or burden of proof.

Conclusion

Judicial activism in its various manifestations is of course not without challenges. One that immediately comes to mind is a lack of uniformity of approach. Judicial officers may therefore be tempted to deal with issues before them in their own way. There is also the danger of judicial officers behaving much like the biblical John the Baptist and his lone voice in the wilderness – and the judiciary becoming no more than a collection of such voices. It would wreak havoc with the doctrine of precedent and perhaps the predictability which all judiciaries crave.

It is my view that judicial officers should never shy away from going the extra mile in trying to achieve justice – even when they might, in effect, be going on some kind of voyage of discovery. Like the late Lord Denning said, we should not be scared to go into areas unknown, merely because no one has been there before.[34] It is only when we do more that our communities will sit up and take notice, will be moved to debate the concerns thoroughly and openly, and will deal with them in a manner that takes out the need for activism.

33 MWHC Criminal Appeal Case No. 84 of 2005 [unreported].

34 *Packer v Packer* [1953] 2 All ER 127, 129. "If we never do anything which has not been done before, we shall never get anywhere. The law will stand whilst the rest of the world goes on; and that will be bad for both."