

OVERCROWDING AND ITS EFFECTS ON THE HEALTH OF PRISONERS IN MALAWI: A ROLE FOR THE MALAWIAN COURTS?

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Introduction

Malawi continues to be one of the least developed countries in the world.² It has an estimated population of over sixteen million people,³ with a growth rate of 2.8 percent.⁴ With such statistics, it is inevitable that there will also be an increase in the incidence of crime. While no official crime-rate figures are publicised, all indicators suggest there has been an increase in crime in Malawi.⁵

Prisons in Malawi are heavily congested, with the current population being more than double the estimated capacity. One of the consequences is that there are some serious health issues in prisons and these are leading to the death of inmates. In 2007, the Constitutional Court ruled in *Masangano v Attorney General and Others*⁶ that the current prison conditions in Malawi amounted to torture and degrading treatment. The Court went on to order that the Malawi Prison Service should reduce the prison population by half within eighteen months. However, seven years later, nothing has been done to address this. Meanwhile, prison conditions in Malawi keep worsening, as the spread of diseases such as tuberculosis is on the increase – causing inmates to die unnecessarily.

Deteriorating health conditions in prison and continuing prison congestion violate the fundamental human rights of prisoners. This paper provides some background to these concerns and argues that the courts have an important role to play in protecting the rights of prisoners.

The situation in Malawi prisons

Most of the prisons in Malawi are old. It is estimated that the prisons should be housing a prison population of around 5 000 inmates; however, current figures indicate that the prison population stands at 12 566 with 10 470 being convicted prisoners, and the rest on remand.⁷

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2 Malawi is ranked 174th out of 187 countries and territories on the Human Development Index of 2014. United Nations Development Programme *Human Development Report 2014* (2014).

3 *Id.*

4 *Key Indicators for Malawi* available at <http://www.countrystats.org>.

5 AfriMAP & OSISA “Malawi: Justice Sector and the Rule of Law” (2006) 99 available at <http://www.afriMAP.org/english/images/report/Malawi%20Report%20justice.pdf>; “Malawi President Vows to Wage War on Crime” *Voice of America* (04 September 2014) available at www.voanews.com/content/malawi-president-vows-to-wage-war-on-crime/2438283.html.

6 MWHC Constitutional Case No. 15 of 2007. This case is also discussed in P Patel “Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries” in this publication.

7 There is no set capacity for the prisons in Malawi since the law does not regulate the space which a prisoner can occupy, but the Prison Inspectorate has always estimated the capacity of the prisons in Malawi to be around 5 000. The current prison population figures were obtained from the figures supplied by the Malawi Prison Service on 11 July 2014. See also *Malawi*

In most of the prisons, people are spending their entire sentences sleeping in a sitting position, in what are now commonly known as *shambas*.⁸ *Shamba* is a word used to describe the space in the centre of a prison cell which the prisoners would normally use as a passage to go to the lavatories during lockup time. However, because of the limited space and congestion, this space is used by prisoners as a sleeping area. When we talk of congestion in a Malawi prison it means, for example, that a cell that would normally house 60 inmates is housing 200.⁹ Ironically, the Swahili meaning of the word *shamba* is a small plot used for farming. Indeed, it is the view of most prisoners in Malawi that they are meant to ‘work’ in the *shambas*, because they can hardly sleep and if anybody needs to go the toilet during the night, they cannot do so and usually are forced to wet or soil themselves. Furthermore, when prisoners in the *shamba* are released from their cells every morning, they do not have the energy to do anything else and spend the entire day trying to catch up on sleep. Clearly these prisoners cannot effectively participate in any reformation or rehabilitation programmes. Rather, it could well be that these harsh prison conditions will make such prisoners grow bitter, which might increase the rate of recidivism.¹⁰

The result of inmates spending considerable time in the *shambas* is that they often develop boils or calluses that frequently become septic. This in turn leads to the spread of skin diseases. At the same time, due to overcrowding in the prisons, there are increasing cases of tuberculosis, measles, meningitis, and other communicable diseases, especially during the hot months.¹¹ The spread of such diseases is exacerbated by the fact that prisons in Malawi face serious challenges when it comes to accessing prescription medication, and because there are no fully-fledged medical clinics in most prisons. Such challenges, coupled with the fact that there is laxity in taking medicines, has recently led to an outbreak of a multi-drug resistant strain of tuberculosis in prisons. The risk of transmission to the general population is heightened because a policy decision has been made that such individuals should be released from prison for fear of spreading the disease to other inmates.¹²

There is an increasing incidence of HIV/AIDS in Malawi’s prisons, and indicators seem to suggest that most new cases are within the prisons.¹³ This is because consensual and non-consensual sex between men occur in prison.¹⁴ This is again a cause for concern, especially as most of the inmates who are HIV positive or those who are contracting tuberculosis are not serving life sentences

2012 Human Rights Report available at <http://www.state.gov/documents/organization/204351.pdf>.

8 Malawi Inspectorate of Prisons *Prisoners’ Health and Staff Welfare* Report to Parliament (2014) 4.

9 *Id.*

10 MK Chen & JM Shapiro “Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach” (2007) 9(1) *Am L & Econ Rev* 1.

11 See O Simooya “Infections in Prison in Low and Middle Income Countries: Prevalence and Prevention Strategies” (2010) 4 *Open Infectious Diseases J* 33, 35; KW Tudrys & JJ Amon “Criminal Justice Reform as HIV and TB Prevention in African Prisons” (2012) 9(5) *PLOS Med.*

12 A case of multi-drug resistant tuberculosis was discovered at Thyolo Prison, which is located within the southern part of Malawi. Due to congestion in prisons, it was decided that it was better for the inmate to be released back into the community, since current studies by Médecins sans Frontières (MSF) seem to show that the risk of spreading tuberculosis may be higher within the confined and congested space of prisons walls than outside in the community. Interviews conducted with doctors working for MSF, Chichiri Prison, as part of preparation of Prison Inspectorate Report (2014).

13 R Zachariah *et al* “Sexually Transmitted Infections among Prison Inmates in a Rural District of Malawi” (2002) 96 *Transactions of the Royal Society of Tropical Medicine and Hygiene* 617, 618.

14 R Jurgens, M Nowak & M Day “HIV and Incarceration: Prisons and Detention” (2011) 14(1) *J of the Int’l AIDS Soc’y* 29. See GD Kangaude “A Sexual Rights Approach to Addressing Gender-Based Violence among Male Prisoners in Malawi” (2014) 14 *Afr Hum Rts LJ* 1.

and that, at some point, they have to be released back into their communities.¹⁵ It is feared that if such inmates are released they may resume sexual relations or interactions with their partners or families outside prison – and that this will in turn increase incidences of such diseases in the community at large.

It can thus be concluded that *shambas* are a source of disease in prisons and that their continued existence in prisons is a threat to prisoners' health, as well as that of the wider community.

Prisons are also conducive to severe mental hardship and stress. The death-row phenomenon is one such instance.¹⁶ Although the Malawi High Court ruled in *Kafantayeni and Others v Attorney General*¹⁷ that the death sentence should no longer be mandatory for the offence of murder, there are still 29 inmates who are currently on death row, and the death penalty is still being imposed by the courts for the offence of murder.¹⁸ During the visits undertaken by the Prison Inspectorate, the inmates on death row indicated that they are under considerable mental distress, as they are not sure of their fate since their sentences have not been commuted to life terms.¹⁹

The situation in Malawi prisons, as described above, is dire, and something must be done as a matter of urgency. Indeed, considering that most of the population currently in Malawi's prisons consists of convicted offenders, it is suggested that the courts need to take a role in reducing prison populations by articulating and safeguarding prisoners' right to life.

The role of the courts

The majority of the adjudicating work in criminal law is undertaken by the courts in Malawi.²⁰ It is thus safe to conclude that most of the inmates in Malawi's prisons are there because they were convicted or remanded into prison by the courts. Of course there are instances when people are remanded into prison without proper court remand warrants, which normally happens when the police conduct 'sweeps'.²¹ It is normal that during such sweeps the police will round up hundreds

15 O Simooya "Infections in Prison in Low and Middle Income Countries: Prevalence and Prevention Strategies" (2010) 4 *Open Infectious Diseases J* 33, 33; R Zachariah *et al* "Sexually Transmitted Infections among Prison Inmates in a Rural District of Malawi" (2002) 96 *Transactions of the Royal Society of Tropical Medicine and Hygiene* 617, 618.

16 See P Hudson "Does the Death Row Phenomenon Violate a Prisoner's Rights under International Law?" (2000) 11(4) *Eur J Int'l L* 833.

17 [2007] MWHC 1. This case is also discussed in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

18 As per Condemned Prisoners statistics submitted to the Prison Inspectorate, June 2014.

19 In this regard, it must be pointed out that most of the inmates who are now on death row have had their sentences confirmed by the Malawi Supreme Court, which is the final Court of Appeal in Malawi; and thus their only hope is that their sentences will be commuted to life imprisonment, which can only be done by the Head of State. When such commutations are not forthcoming, the inmates believe that it is the intention of the government that they should be executed one day. This is what is now being described as the "Death Row Phenomenon". See P Hudson "Does the Death Row Phenomenon Violate a Prisoner's Rights under International Law?" (2000) 11(4) *Eur J Int'l L* 833.

20 Another institution that has criminal jurisdiction in Malawi is the Immigration Department, which has powers to detain illegal immigrants for up to three months, under section 33 of the Immigration Act, Cap 15:03 of the Laws of Malawi.

21 Police 'sweeps' are operations conducted by the Malawi police during the festive season or on major public holidays. The aim of the sweeps is apparently to remove people from the streets, whom the police deem to be criminals. However, most of the people targeted in these sweeps are people from poor backgrounds, who are found moving about at night in major cities, towns, or trading centres. These people are arrested for being rogues and vagabonds. This offence is a hangover from the colonial era and should really be decriminalised, as it is often abused by the police to limit people's freedom of movement. The offence also violates the right to freedom from arbitrary arrest. Further, the offence is also all about social profiling and

of people who end up being taken to prisons due to limited place for detention in police cells. The problem this causes is that because the sweeps are not done properly in terms of taking down the details of those arrested or charging them correctly, a good number of people arrested during these sweeps end up being lost in the prison system. They are thus detained for longer periods of time because of the absence of proper remand warrants. It should be pointed out that, due to improved record-keeping and deliberate efforts within the Malawi Prison Service, the remand population has been greatly reduced – from around 40 percent of the prison population to around 15 percent.²² I consider, however, that there could be a further reduction in the remand population if offences like being ‘rogue and vagabond’ and ‘idle and disorderly’, and petty nuisances were decriminalised. In this regard, the role of the courts in Malawi would be to look into the constitutionality of such offences and declare them unconstitutional as part of the process of decriminalisation.²³

Besides the police sweeps, most people currently in prison are there because the courts have sent them there. Much as it is appreciated that courts have a duty to uphold a country’s security, imprisonment may not always be the best solution for criminal behavior. In this regard, it should be stated that most criminal cases in Malawi are tried in the Magistrates Courts. Almost all of the magistrates staffing these courts are lay magistrates, who would have completed only a one-year basic law course. Whilst this is not a criticism of the course or the lay magistrates, the sentencing practices of a good number of the lay magistrates are problematic. This may be because of the training that the magistrates undergo on sentencing. When it comes to sentencing, much focus is placed on the traditional sentencing theories of deterrence and retribution. The end result is that most offenders in Malawi are sentenced to prison as a way of punishment and deterrence, as opposed to providing a means for the offender to reform. It is thus recommended that judicial training on sentencing should start focusing on reforming and rehabilitating the offender. This is especially important considering that most people currently incarcerated in Malawi’s prisons are still in their prime and could still contribute to the country’s development if given the opportunity.

The sentencing patterns of the lower courts indicate a favouring of longer sentences – especially in the case of felonies. This might be due to training as well as precedents from the higher courts, which do in fact state that custodial sentences are ideal for felonies. In this regard, when it comes to sentencing most of the lower courts just consider the type of offence, that is, whether it is a felony or a misdemeanour. If the offence is a felony, the first and perhaps the only consideration a lower court would make is imposing a custodial sentence. It does not matter if the item stolen does not have that much value. In this regard, there are people serving sentences for stealing chickens, goats, and bicycles. These offences are felonies, but could be deemed to be minor felonies not deserving of custodial sentences. There is currently a debate about whether such offences should be declassified as felonies – as they are considered to be ‘minor’ offences because of the low value of the items stolen. However, opposing views are that since Malawi has a predominantly rural

nothing to do with crime detection, since, if the police know that someone is a known thief, there is really no point for them to wait until a public holiday and the festive season to effect an arrest. See Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*.

22 International Centre for Prison Studies, available at <http://www.prisonstudies.org/country/malawi>.

23 For a more detailed discussion, see C Banda & A Meerkotter “Examining the Constitutionality of Rogue and Vagabond Offences in Malawi” in this publication.

population, chickens, goats, and bicycles do have considerable value to the rural population, who are deemed to be poor. It may be seen as being arrogant for the 'elite' to conclude that these offences are minor. Indeed, the jury is still out on this.

It should, however, be stated that it is about time that the courts started addressing such issues and that this can only be done by answering the 'difficult questions'. In the meantime, if the item stolen has little value and the offender is willing to make restitution, then this should be favourably considered by the courts. The same should also apply in situations where the stolen items have been recovered. All this is to ensure that people are not being needlessly sent to prison. In this regard, it is hoped that the current exercise being undertaken by the Malawi Law Commission – of coming up with sentencing guidelines – will be concluded as soon as possible. This is because the guidelines will not only provide uniformity for sentencing, but will also ensure that only deserving cases are sent to prison for reformation and rehabilitation, and not punishment and deterrence.

A call is also made to the High Court to continuously exercise their supervisory powers over the lower courts in Malawi. It should be stated in this regard that, under section 15 of the Malawi Criminal Procedure and Evidence Code,²⁴ the High Court is required to exercise supervisory powers over the lower courts by reviewing and confirming custodial sentences imposed by the lower courts.²⁵ This rarely happens, however, with the result that most inmates in Malawi are serving sentences that have not been confirmed by the High Court. This is a worrying development – especially since a good number of the sentences imposed by the lower courts turn out to be unjustified, beyond the jurisdiction of the courts, and excessive. Under section 15(3) of the Criminal Procedure and Evidence Code, it is provided that an Officer-in-Charge of a prison may be obligated to release prisoners whose sentences have not been confirmed within a set period of time. However, should this happen, it would lead to a public outcry as almost all inmates in Malawi's prisons would be released. It is thus imperative that the sentences passed by the lower courts should be reviewed and confirmed by the High Court.

Courts and the right to health of prisoners

Ramcharan²⁶ once stated that the way in which society treats its vulnerable members is a reflection of its social health and conscience: prisoners are under the control of their jailers and therefore at their mercy. In view of this, Ramcharan stressed that it is important that national, regional, and international norms and policies that safeguard the human rights of prisoners be promoted and fully protected. It is indeed imperative for the courts in Malawi to realise that prisoners are actually a vulnerable group, as they do not have a say about their situation while in prison. In this regard, it was encouraging to note that the Constitutional Court decided that prisoners in Malawi have the right not to be subjected to torture and cruel, inhuman, and degrading treatment or punishment.²⁷

24 Cap 8:01 of the Laws of Malawi.

25 See OD Kamanga "Management of Review Cases by the Judiciary: The Impact and Implications on Overcrowding in Malawi Prisons" LLM Thesis, University of Cape Town (2013) available at http://uctscholar.uct.ac.za/PDF/98722_Kamanga_OD.pdf.

26 Ramcharan quoted in A Dissel "Prison Conditions and Human Rights" in *Prison Conditions in Africa* Report of a Pan-Africa Seminar held in Kampala, Uganda on 19-21 September 1996, available at <http://www.csvr.org.za/index.php/publications/1663-prison-conditions-and-human-rights.html>.

27 *Masangano v Attorney General and Others* Constitutional Case No. 15 of 2007 (HC).

As previously stated, the Malawi Constitutional Court ruled that prison authorities had to reduce congestion in prisons within eighteen months of the date of the judgment, but this has not happened. This part of the decision has been criticised, especially given that the Malawi Prison Service can only release inmates after they have completed serving their sentences, as imposed by the courts. Indeed, besides a presidential pardon, the only other way inmates are entitled to an early release is if the High Court or Supreme Court of Appeal reduce their sentence. In this regard, I would thus posit that the directive to reduce the prison population should really have been made to the higher courts, as they have the power to review the decisions of the lower courts and the power to reduce sentences. Furthermore, I also suggest that the Constitutional Court should have given direction to the lower courts to use alternative sentencing methods as a way of reducing the prison population.²⁸

Overcrowding in Malawi's prisons is a major contributor to almost all problems in the prisons, including health issues. It is the duty of the courts to address the issue of congestion by not always considering imprisonment as the appropriate punishment. Furthermore, since it is unlikely that the courts will stop sending people to prison, it is recommended that they should also not abrogate their duties as visiting justices.²⁹ It is hoped that when the courts do visit the prisons they will experience first-hand the plight of prisoners, especially those who are terminally ill. Most terminally ill prisoners are being sent back to prison and placed on 'home based care' – which means they die in prison, even though they were not sentenced to life terms. In most cases, such prisoners die without dignity, as they lack appropriate care (fellow inmates, do not feel obligated to offer care and are not trained for the purpose). At the same time, if there are inmates who are willing to take care of such inmates, they are not being provided with protective gear, which also makes them susceptible to contracting diseases.³⁰ It is my view that when a prisoner has been certified as being terminally ill, a recommendation should be made to the courts that the sentence be either reduced or commuted. At the same time, magistrates and judges should review such terminal cases and take immediate action when visiting the prisons, as is required by law. In addition, the courts should also take note when they come across inmates with mental health problems and other conditions that do not justify their continued imprisonment.

Conclusion

The late Nelson Mandela once said that “what counts ... is the difference we have made in the lives of others”.³¹ In Malawi, courts could make a difference in the lives of prisoners by realising that there is limited space available in the prisons. Furthermore, the courts should also appreciate that, despite their incarceration, inmates are human beings entitled to rights and freedoms. Indeed, a prisoner's right to movement and other rights may be taken away, but it does not mean that prisons

28 There are available alternatives to custodial sentences, including suspended sentences, probation and community service; but these are rarely being used by the lower courts. It has been suggested that a good number of magistrates only feel that justice has been served if they send the offender to prison.

29 Both magistrates and judges are visiting justices under sections 33 and 35 of the Prison Act, Cap 9:02 of the Laws of Malawi.

30 See J Clark & K Boudin “Community of Women Organise Themselves to Cope with the AIDS Crisis: A Case Study from Bedford Hills Correctional Facility” (1990) 17(2) *Social Justice* 90.

31 Address during the 90th birthday celebration of Mr Walter Sisulu (18 May 2002) available at <http://www.anc.org.za/nelson/show.php?id=2879>.

should become ‘killing fields.’ This is in fact what is happening when prisoners are subjected to the harsh conditions in the Malawi prison system. Furthermore, the courts in Malawi ought to realise that prisoners in Malawi still remain part of the community and do in fact have interaction with communities, as they are a source of cheap labour. So if the courts do not protect a prisoner’s right to health while he is in prison – but would rather ignore that congestion is leading to the outbreak of diseases – then they may be putting the community at large at risk as well. Indeed, it is now becoming increasingly clear that diseases that originate in prison can easily spread to the community at large in Malawi. It may of course be argued that the right to health is a socio-economic right and that the same is not within the ambit of the court, since it requires policy considerations.³² However, it should be stressed that the matter of the right to health of prisoners is a question of life and death, and thus at issue is the right to life.

The Malawi Prison Service does not have the mandate to reduce the prison population in Malawi, as the law only provides that it should keep inmates until completion of their sentences. Thus, besides presidential pardon, it is argued that the only other way of reducing the prison population is if the courts in Malawi take an active role in addressing the issue of congestion. Courts cannot conduct business as usual by continuing to send people to prison, when it is obvious that a prison term will not be appropriate. All judicial officers take an oath to uphold and defend the Constitution. Courts are also supposed to follow their own case law as precedents. It is about time the courts in Malawi consider the *Masangano* decision and start addressing the issue of seriously reducing congestion in Malawi’s prisons. It should be remembered that the way the courts treat prisoners could be a reflection of their conscience and that a truly just and fair criminal justice system should be tempered by mercy.

32 For a discussion on using civil and political rights to ensure the health of prisoners, see P Patel “Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries” in this publication.