

JURISDICTIONAL LIMITS FOR MAGISTRATES ARE HINDERING ACCESS TO JUSTICE IN MALAWI

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Introduction

The Republic of Malawi transitioned from an autocratic one-party State on 18th May 1994 with the adoption of an interim Constitution. This was after Malawians had overwhelmingly voted in a national referendum, held on 14th June 1993, for the adoption of a multi-party system of government.² On 18 May 1994, the interim Constitution became substantive after the first multi-party elections. This Constitution entrenched the three branches of government namely: the executive,³ the legislature,⁴ and the judiciary.⁵ Each branch has its own distinct functions. The judiciary has the responsibility of interpreting, protecting and enforcing the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.⁶

The Malawi judiciary discharges its functions through the following different courts with different jurisdictions:

- a) The Supreme Court of Appeal, the highest appellate court which hears appeals from the High court and other courts and tribunals as an Act of Parliament may prescribe;⁷
- b) The High Court with “unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law”;⁸
- c) Subordinate Courts:
 - (i) Magistrate Courts presided over by both professional and lay magistrates;⁹ and
 - (ii) Industrial Relations Court with original jurisdiction over labour disputes and such other issues relating to employment.¹⁰

There are five different categories or grades of magistrates’ courts as provided by the Courts Act, namely:

- i) Courts of the Resident Magistrate;
- ii) Courts of Magistrates of the First Grade;

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 2 64.69 percent voted for a multi-party State. Results are available at http://africanelections.tripod.com/mw.html#1993_Referendum (last accessed: 9 December 2016).
 3 Constitution of Malawi, 1994, section 7.
 4 Constitution of Malawi, 1994, section 8.
 5 Constitution of Malawi, 1994, section 9.
 6 *Id.*
 7 Constitution of Malawi, 1994, section 104.
 8 Constitution of Malawi, 1994, section 108(1).
 9 Constitution of Malawi, 1994, section 110(1).
 10 Constitution of Malawi, 1994, section 110(2).

- iii) Courts of Magistrates of the Second Grade;
- iv) Courts of Magistrates of the Third Grade;
- v) Courts of Magistrates of the Fourth Grade.

The jurisdiction of the magistrates' courts vary and is principally provided for under the Courts Act.¹¹

Jurisdiction of Magistrates' Courts

A court's jurisdiction is defined via two parameters: the power of a court to adjudicate cases and issue orders, and the territory within which a court may properly exercise its power. Any court possesses jurisdiction over matters granted to it by the Constitution, legislation (an Act of Parliament) or any written law. Courts can only act within their legally defined jurisdiction. The magistrates' courts in Malawi, which are subordinate to the High Court,¹² handle both civil and criminal matters. In fact most of the cases are handled in the magistrates' courts. The jurisdiction or power to handle these matters emanates from the Courts Act and various Acts of Parliament. In Malawi, subject to any written law for the time being in force, the court of a magistrate shall exercise its jurisdiction throughout Malawi.¹³ Although a magistrate's court can hear any criminal or civil case regardless of where the crime was committed, in practice, magistrates defer jurisdiction to the magistrate's court in the vicinity within which the crime was committed. Where a court acts outside its jurisdiction or power, it is said to be acting *ultra vires* (outside the power) which makes the court's decision invalid on that matter.

As outlined, there are different categories of magistrates and these categories of magistrates have different civil and criminal jurisdiction. There are matters that one grade of magistrate can handle, but other magistrates cannot handle. In criminal matters, this depends on the sentence to be imposed and the seriousness of the offence. For example, a magistrate's court is not allowed to preside over a murder case; these can only be heard by the High Court. Likewise, a magistrate's court cannot impose a sentence beyond its jurisdiction, such as a sentence beyond 21 years in the case of a Resident Magistrate. The Penal Code and the Criminal Procedure and Evidence Code provide some guidance on jurisdiction in criminal matters.

Criminal Jurisdiction

The power or jurisdiction of a magistrate, whether in criminal matters or civil matters derives from statute. The law must always regulate the conduct of the magistrate in exercising his/her powers. In the case of *Mpinganjira v Lemani and Another*¹⁴ Kapanda J (as he then was) had this to say:

“In the absence of any other statutory power and/or jurisdiction conferred on the learned Magistrate, I find that he had no power and/or jurisdiction to make the order he made which, had the consequence of regulating the conduct of people not within the confines or vicinity of the court. If we allow the subordinate courts to make orders which they are not empowered to make it would mean that every magistrate court in the land would be given a new power, by

11 Courts Act, Cap. 3:02 of the Laws of Malawi, sections 39 to 57.

12 Constitution of Malawi, 1994, section 110(1).

13 Courts Act, section 35.

14 [2000-2001] MLR 295, [2001] MWHC 9.

its own order, to postpone discussion of a case before it or another court. Such an order could be made, and would be made, against the public at large, and the press without any notice of it or any opportunity of being heard on it. That would create a bad precedent. The people of this country rejected dictatorship by the executive and I believe they would not want dictatorship by the magistrate's court, in the form of *ultra vires* orders that have the effect of muzzling the freedoms enshrined in our Constitution."¹⁵

Thus, every magistrate must strive to exercise his/her jurisdiction within the stipulations of the law. As regards criminal jurisdiction, section 58 of the Courts Act¹⁶ provides as follows:

"In exercise of their criminal jurisdiction the powers of courts of magistrates shall be as provided for in this Act, in the Criminal Procedure and Evidence Code and in any other written law."

Section 13 of the Criminal Procedure and Evidence Code¹⁷ provides that a Resident Magistrate Court and any court of a Magistrate of the First or Second Grade may try any offence under any law, including all sections of the Penal Code except for offences under sections 38, 39, 63, 208, and 209.¹⁸ The offences which cannot be tried by magistrates' courts are:

- Treason (death sentence);¹⁹
- Concealment of treason (life imprisonment);²⁰
- Piracy (to be tried according to the law for the time being in force in England);²¹
- Manslaughter (life imprisonment);²²
- Murder (death sentence/life imprisonment);²³ or
- Attempts to commit or aiding, abetting, counseling or procuring the commission of any of these offences.²⁴

In addition, a court of the Second Grade Magistrate, cannot try the following Penal Code offences:

- Rape (death sentence or life imprisonment);²⁵
- Attempted rape (maximum sentence is life imprisonment);²⁶
- Defilement (maximum sentence is life imprisonment);²⁷
- Attempted defilement (maximum sentence is 14 years imprisonment with hard labour).²⁸

Section 14 of the Criminal Procedure and Evidence Code²⁹ provides maximum sentences which magistrates can impose. A Resident Magistrate may pass any sentence, other than a sentence of

15 *Id.*

16 Cap. 3:02 of the Laws of Malawi.

17 Cap. 8:01 of the Laws of Malawi.

18 Penal Code, Cap. 7:01 of the Laws of Malawi.

19 *Id* section 38.

20 *Id* section 39.

21 *Id* section 63.

22 *Id* section 208.

23 *Id* section 209.

24 Criminal Procedure and Evidence Code, section 13(1)(b); see also Penal Code, chapters V, XXI and XLIII.

25 Penal Code, section 133.

26 *Id* section 134.

27 *Id* section 138(1).

28 *Id* section 138(2).

29 *Id.*

death or a sentence of imprisonment for a term not exceeding 21 years, authorised by the Penal Code or any other written law.³⁰ Where the Resident Magistrate, after presiding over a criminal matter within his jurisdiction, forms an opinion that a sentence beyond his jurisdiction is required, he may refer the matter to the High Court for sentence only with his recommendations.³¹ A First Grade Magistrate can impose any sentence not exceeding 14 years.³² Whereas Second Grade Magistrate can impose any sentence not exceeding 10 years or a fine not exceeding MWK200,000³³ or both.³⁴ A Third Grade Magistrate may impose any sentence not exceeding 3 years or a fine not exceeding MWK150,000³⁵ or both,³⁶ and a Fourth Grade Magistrate (which is being phased out) can impose any sentence not exceeding 12 months or a fine not exceeding MWK100,000³⁷ or both.³⁸ In addition, a Second Grade Magistrate, a Third Grade Magistrate and a Fourth Grade Magistrate may also pass other sentences, including security to keep the peace, payment of compensation, liability to police supervision, forfeiture and community service.³⁹ Again these courts may commit any matter to a magistrate of higher jurisdiction or a judge for purposes of sentencing.⁴⁰

Most of the magistrates' courts, especially in the rural areas of Malawi, are presided over by Third Grade Magistrates. As outlined, a Third Grade Magistrate has jurisdiction to try any offence specified in the Second Schedule as long as the maximum sentence of that offence does not exceed three years.⁴¹ This limitation on the jurisdiction of Third Grade Magistrates hinders access to justice and the rule of law. Although the magistrates can try crimes such as fighting in public, which carries a maximum one-year sentence,⁴² they are prevented from dealing with other serious local crimes. Notably, the Chief Justice has the authority to amend the Second Schedule and Third Schedule.⁴³

Hindering access to justice

The limitations on the jurisdictions of magistrates are hampering access to justice. Malawi's population currently exceeds 17,000,000 people.⁴⁴ There are 22 High Court judges; 204 magistrates of which 4 are Chief Resident Magistrates (Regional Magistrates), 22 are Senior Resident Magistrates, 56 are First Grade Magistrates, 34 are Second Grade Magistrates, and 88 are Third Grade Magistrates. Resident Magistrates are those with a recognised law degree, whereas the rest are lay magistrates (without a law degree). Third Grade Magistrates are in a majority and based

30 *Id* section 14(1).

31 *Id* section 14(6).

32 *Id* section 14(2).

33 MWK200,000 is equivalent to \$278 (12 October 2016).

34 Criminal Procedure and Evidence Code, section 14(3).

35 MWK150,000 is equivalent to \$208 (12 October 2016).

36 Criminal Procedure and Evidence Code, section 14(4)(a).

37 MWK100,000 is equivalent to \$139 (12 October 2016).

38 Criminal Procedure and Evidence Code, section 14(4)(b).

39 Penal Code, section 25.

40 Penal Code, section 14(2).

41 Criminal Procedure and Evidence Code, section 14(4)(a).

42 Penal Code, section 84.

43 Criminal Procedure and Evidence Code, section 13(5).

44 The projected 2016 population of Malawi is 17,750,000. United Nations Department of Economic and Social Affairs *World Statistics Pocketbook* (2016) 124.

mostly in the rural areas. There are many areas where the only magistrate is the Third Grade Magistrate, and yet his/her jurisdiction in criminal matters is limited to sentences of not more than 3 years or a fine not exceeding MWK150,000.⁴⁵ In addition, their civil jurisdiction is limited as well. Accessing justice in rural areas is accordingly limited.

Although their jurisdiction is limited, Third Grade Magistrates continue presiding over matters when they have no jurisdiction and imposing sentences above their jurisdictional limits. This happens for various reasons including necessity, sheer disregard of jurisdictional constraints and mere incompetence. For example, in the case of *Republic v Mpokeyi and Others*,⁴⁶ the High Court reviewed 41 cases from Thindi Magistrate Court, a court in a rural area of Malawi's Central Region. Kachale J, the reviewing judge, quoted the views of the referral Chief Resident Magistrate as follows:

“As you can appreciate from the files I have sent, the court is of a third grade magistrate but it has passed sentences of up to 10 years imprisonment with hard labour, against the provisions of sections 13 and 14 of the CP&EC.”⁴⁷

And Kachale J went on to observe as follows:

“Furthermore under section 13 of the CP&EC limits the jurisdiction of TGM (Third Grade Magistrate) courts to offences under the Second Schedule of the CP&EC; section 14 further limits the sentencing range of TGM courts to three years imprisonment and a fine of up to K150,000. The crucial nature of the issue of jurisdiction was highlighted in the Malawi Supreme Court of Appeal (MSCA) decision of *DPP v Mtegha* 7 MLR 135 when it observed that an appellate court is bound to consider whether the trial court assumed jurisdiction properly even if such question has not been specifically argued by the appellant. It was wholly irregular for the magistrate to presume to sit over cases over which he lacks the legal authority to do so; even with respect to those matters over which the law grants him a mandate he totally disregarded his prescribed sentencing limits.”⁴⁸

The reviewing court quashed the convictions in all the 42 cases, set aside the sentences, ordered retrials within 90 days before a different magistrate, and proposed additional remedial measures.⁴⁹

These mistakes by magistrates lead to delayed justice. This is contrary to the constitutional right to a fair and speedy trial.⁵⁰ In most other instances, the Third Grade Magistrates would recuse themselves due to lack of jurisdiction. A magistrate with the required jurisdiction would then be required to take over the matter. This leads to further delays because in most instances the magistrate taking over will have to travel from a distance to come and take over the case, and this has cost implications which often delays the matter further. In such cases, the accused cannot speedily access justice and the victims too, are kept in abeyance. Hence, jurisdictional limits hamper access to justice.

45 MWK150,000 is equivalent to \$208 (12 October 2016).

46 Criminal Review Cases Nos. 25-66 of 2015.

47 *Id* 5.

48 *Id* 8.

49 *Id* 10. (“As a matter of prudence the CRM is further advised to seriously consider subjecting the responsible magistrate to closer supervision and even disciplinary action given the extensive nature of the judicial failures emanating from one court. In any event, it is further directed that the concerned officer is exposed to remedial lessons to reduce the potential harm he or she might continue to inflict upon the community which he/she has been assigned to serve. In closing the supervising court is to be commended for taking remedial steps to arrest this grave situation which, if unchecked, threatens to undermine the legitimacy of the judicial process by reason of such unlawful and irregular court orders.”)

50 Constitution of Malawi, 1994, section 42(2)(f)(i).

Civil Jurisdiction

The civil jurisdiction of the magistrates' courts is mainly set out in the Courts Act. Other Acts of Parliament also set out civil jurisdiction for magistrates. For example, the Child Care, Protection and Justice Act;⁵¹ Deceased Estates (Wills, Inheritance and Protection) Act;⁵² Customs and Excise Act;⁵³ Taxation Act (Special Arbitrator);⁵⁴ and Land Act⁵⁵ all contain provisions conferring civil jurisdiction on the magistrates' courts.

Courts Act

As earlier stated, the main statute conferring civil jurisdiction to the magistrates' courts is the Courts Act and it stipulates as follows:

Section 39(1) "Subject to this or any other written law, in exercise of their civil jurisdiction the courts of magistrates shall have jurisdiction to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed:

- a) In the case of a court of the Resident Magistrate, K2,000,000;⁵⁶
- b) In the case of a court of a magistrate of the first grade, K1,500,00;⁵⁷
- c) In the case of a court of a magistrate of the second grade, K1,000,000;⁵⁸
- d) In the case of a court of a magistrate of the third grade, K750,000.⁵⁹

Section 39(2) "Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter:

- a) Whenever title or ownership of land which is not customary land is in question save as is provided by section 156 of the Registered Land Act;⁶⁰
- b) For an injunction;
- c) the cancellation or rectification of instruments;
- d) Wherein the guardianship or custody of infants, other than under customary law, is in question, unless jurisdiction is specifically provided under any written law;
- d) Except as specifically provided in any written law for the time being in force, wherein the validity of or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question;
- f) Relating to the title to any right, duty or office; and
- g) Seeking any declaratory decrees."

51 No. 22 of 2010, section 133.

52 No. 14 of 2011, section 60.

53 Cap. 42:01 of the Laws of Malawi, section 120-122 (Special Referee).

54 Cap. 41:01 of the Laws of Malawi, sections 88, 98, and 107.

55 Cap. 57:01 of the Laws of Malawi, section 36(1).

56 MWK2,000,000 is equivalent to \$2778 (12 October 2016).

57 MWK1,500,000 is equivalent to \$2084 (12 October 2016).

58 MWK1,000,000 is equivalent to \$1389 (12 October 2016).

59 MWK750,000 is equivalent to \$1042 (12 October 2016).

60 Section 156 of the Registration of Land Act (Cap. 57:01 of the Laws of Malawi) states: "Civil suits and proceedings relating to the ownership or the possession of land, or to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being an interest which is registered or registrable under this Act, or being an interest which is referred to in section 27, shall, notwithstanding the Courts Act, be tried by the High Court, or, where the value of the subject matter in dispute does not exceed 200 pounds, by the High Court or a subordinate court held by a Resident Magistrate."

As seen in the statutes above, the jurisdiction of magistrates is limited. In the rural areas, where the Third Grade Magistrates mostly operate, the villagers are limited in the civil claims they can bring to court. If they have larger claims, they must travel long distances to where a magistrate of the required jurisdiction is based, or to the High Court where most land disputes are heard. This is an economic impossibility for the majority of rural Malawians. Thus, jurisdictional limitations hamper access to civil justice as well.

Argument

Goal 16 of the UN Sustainable Development Goals aims at promoting just, peaceful and inclusive societies. This entails upholding of the rule of law, access to justice and enforcing and upholding fundamental rights for all. For a country to achieve this Goal, the people must be able to access justice through the legal processes and institutions, fundamental rights must be enforced and defended and the rule of law must be upheld. The issue of jurisdictional limits of the magistrates' courts in Malawi goes to the core of access to justice. Though this paper has addressed both criminal and civil justice, the main focus of the paper is access to criminal justice and enforcement of the fundamental human rights of those in conflict with the law.

The jurisdiction of magistrates is limited. The highest grade of magistrate, the Resident Magistrates, cannot impose a sentence exceeding 21 years. Furthermore, no magistrate can preside over homicides and other serious offences. All those charged with homicide offences can only be tried before the High Court. There are only 22 High Court judges in Malawi, and as of August 2016, there are 1065 homicide inmates in our prisons awaiting trial.⁶¹ It must further be noted that several others are on bail awaiting homicide trials as well. The unacceptable wait times on the list outline the gravity of the situation: Aubrey Senti has been on remand since 24 June 2003, Patrick Mwangomba since 13 February 2006, Vincent Tumba since 17 October 2006 and Thomas Fololiano since 30 August 2007. This is indicative of how long homicide remandees are incarcerated awaiting trial in the High Court. This is obviously unconstitutional. The Constitution requires that "every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –as an accused person, to a fair trial which shall include the right to public trial before an independent and impartial court of law within a reasonable time after having been charged."⁶² No conception of "reasonable time" comports with someone being kept on remand for thirteen years, ten years, or nine years. In addition, the right of access to justice is being hampered for both the accused and the victim as they wait unreasonable amounts of time for a trial before the High Court.⁶³

Despite other issues hindering access to criminal justice for homicide remandees, if the jurisdiction of Resident Magistrates was extended to include presiding over homicide cases, it might go a long way towards improving access to justice for those awaiting murder trials. Section 14(1) of the Criminal Procedure and Evidence Code should therefore be amended to expand the jurisdiction of Resident Magistrates by removing the 21 years limitation. Similarly, section 13(1)(a) of the

61 Acting Chief Commissioner of Prisons, 'List of Remand Prisoners on Homicide Cases Held in Malawi Prisons as of August, 2016'.

62 Constitution of Malawi, 1994, section 42(2)(f)(i).

63 Constitution of Malawi, 1994, section 41.

same Code can be amended, in so far as it refers to a Resident Magistrate, so that the Resident Magistrate should be given jurisdiction to handle the offences of manslaughter and murder in the Penal Code.⁶⁴ This reorganisation would lead to two stages of appeal. Following a ruling at the magistrate's court, the defendant could appeal to the High Court and later appeal to the Malawi Supreme Court of Appeal. As it stands, convicts can only appeal to the Malawi Supreme Court of Appeal since homicide trials are only conducted in the High Court. Twenty-two High Court judges cannot handle the large backlog of murder cases. It will take time, unless Resident Magistrates are also allowed to try these cases.

Other players are also involved in the remand crisis, such as the Director of Public Prosecutions and the Legal Aid Bureau.⁶⁵ Most of these remandees are indigent and rely on the Legal Aid Bureau for legal representations in these trials. Recently, the Bureau informed the High Court that due to underfunding they had suspended legal representation for those undergoing homicide trials.⁶⁶ These trials were subsequently suspended. To achieve Goal 16 of Sustainable Development Goals, institutions aimed at upholding and enforcing peoples' human rights must be empowered. The Legal Aid Bureau needs to be adequately supported. Until it receives enough funding, only those with private legal representation can have their trials conducted. With the low percentage of non-indigent defendants, most remandees are being denied access to criminal justice.

In the same vein, the criminal jurisdiction of Third Grade Magistrates must be enhanced from 3 years to 5 years. In that way, they would be able to handle most of the cases which occur within the rural areas where they are based without overstepping their jurisdictional limits. This will enhance access to criminal justice in the rural areas and do away with situations where Third Grade Magistrates recuse themselves for want of jurisdiction, thereby denying accused persons' and victims' access to criminal justice. This will also reduce the number of situations where the High Court quashes convictions and sets aside sentences imposed by Third Grade Magistrates for having acted outside their powers. Concerns around the length of sentences imposed by Third Grade Magistrates can still be addressed through adequate supervision and the normal process of confirmation by the High Court.

Conclusion

Acting within jurisdiction is paramount. It is paramount that magistrates and all judicial officers must act within the powers conferred upon them by law. This will bring order in the delivery of justice and public confidence in the Judiciary. However, where jurisdictional limits bring hardship to societies, the same must be dealt with, among other interventions, through amendments of the law. There are many homicide remandees awaiting trials before the High Court for agonisingly long periods. The number of judges is very few, and due to other factors as well, these remandees are denied speedy access to criminal justice, thereby denying them their fundamental human rights as guaranteed by the constitution. Increasing the jurisdiction of Resident Magistrates to include handling of homicide cases will go a long way in easing the burden on the judges, and at

64 Penal Code, sections 208 and 209.

65 There is currently an inequality of funding between the Director of Public Prosecution and the Legal Aid Bureau, with the latter facing serious budget shortfalls.

66 O Khamula "Malawi Legal Aid Bureau puts hold on murder cases: No funds" *Nyasa Times* (30 March 2016).

the same time ensuring speedy access to justice for those homicide remandees. Enhancing the criminal jurisdiction of Third Grade Magistrates will also improve access to criminal justice for the rural masses. Courts must always enhance peoples' access to the courts in order for there to be access to justice. Justice delayed is always justice denied.