

SUSTAINABLE DEVELOPMENT GOAL 16 AND ACCESS TO JUSTICE: THE CASE OF LAY MAGISTRATES IN MALAWI

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Introduction

52 years after independence, Malawi continues to struggle in many areas of society, including the justice system. Although access to justice has been highlighted as one of the pillars of the Malawian justice system, ordinary Malawians are rarely empowered to access it.²

Although the Malawi Judiciary has tried to ensure it meets the demands exerted on it by the citizenry, Malawi's rapid population growth have made it difficult to keep pace. In 2014, the government estimated the population had surpassed 15 million people.³ The judiciary is further plagued with inadequate judicial officers,⁴ inadequate court infrastructure, limited financial resources,⁵ and substantial distances between the courts and the population.

In 2015, the world adopted the Sustainable Development Goals (SDGs).⁶ This paper reflects on SDG 16 which looks at peace, justice and strong institutions. Goal 16 has ten targets to be accomplished by 2030. This paper will focus on the targets that charge States to “[p]romote the rule of law at the national and international levels and ensure equal access to justice for all” and to “[d]evelop effective, accountable and transparent institutions at all levels”.⁷

The majority of Malawi's population lives in rural areas with only 16.3% living in urban centers.⁸ This paper explores whether rural Malawians have equal access to justice as those living in cities. It also interrogates how the current use of lay magistrates impacts on the achievement of the targets outlined under Goal 16.

Importantly, this paper does not assess the work of the lay magistracy in terms of its effectiveness or efficiency. It does, however, analyse the system and assess of the work of the magistrates through case analysis. This paper recognises that “access to justice” encompasses many concepts including access to courts,⁹ access to legal aid, and redress for violations. This paper focuses on access to the courts.

1 Judge of the High Court of Malawi; LL.B (Hons.) (University of Malawi), LL.M (Advanced legislative drafting) (University of London).

2 Constitution of Malawi, 1994, section 41.

3 “Malawi in Figures” Malawi National Statistics Office (2015) available at http://www.nsomalawi.mw/images/stories/data_on_line/general/malawi_in_figures/Malawi%20in%20Figures%202015.pdf (last accessed: 20 November 2016).

4 This includes both professional officers and lay officers.

5 This impacts on the operation of the courts, as well as procurement of necessary equipment.

6 A/RES/70/1 (21 October 2015).

7 *Id* para. 59, targets 16.3 and 16.6.

8 *The World Fact Book* US Central Intelligence Agency (2016) available at <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/mi.html> (last accessed: 20 November 2016).

9 Constitution of Malawi, section 41(2).

In order to contextualise this paper, it is necessary to look at the history of the court system and its current impact on access to justice.

Malawi's Judicial System

Malawi's court system was inherited from British colonialism. The Supreme Court of Appeal is the highest court in Malawi.¹⁰ The Supreme Court of Appeal, along with the High Court,¹¹ comprise the courts of record. The High Court has both civil and criminal law jurisdiction and also handles all appeals from all the subordinate courts including the magistrates' courts. The magistrates' courts are present in each district and city in Malawi and have jurisdiction over both criminal and civil cases.¹² The Courts Act divides them into Resident Magistrates, First, Second Third and Fourth (a remnant of the traditional courts) Grade courts.¹³

Currently, Malawi has only 41 professional magistrates, which means the majority of the cases in the magistrates' courts are handled by the approximately 183 lay magistrates. Lay magistrates handle civil matters limited to the value of the subject matter of a dispute being not more than MWK2,000,000 for a Resident Magistrate whilst a Fourth Grade Magistrate handles suits up to MWK500,000.¹⁴ Whilst for criminal matters, the maximum sentence that can be imposed by a magistrate court is 21 years' imprisonment.¹⁵ Resident Magistrates' ability to impose fines has not

10 Constitution of Malawi, section 104.

11 Constitution of Malawi, section 108.

12 Courts Act (Cap. 03:02 of the Laws of Malawi) section 33; see also Constitution of Malawi, section 110.

13 Courts Act (Cap. 03:02 of the Laws of Malawi) sections 34 and 35.

14 Courts Act, 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 a Resident Magistrate, K2,000,000;
- b) in the case of a court of a magistrate of the first grade, K1,500,000;
- c) in the case of a court of a magistrate of the second grade, K1,000,000;
- e) in the case of a court of a magistrate of the third grade, K750,000; and
- f) in the case of a court of a magistrate of the fourth grade, K500,000.

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

- a) whenever the title to or ownership of land which is not customary land is in question save as is provided by section 156 of the Registered Land Act; Cap. 58:01;
- b) for an injunction;
- c) for 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;
- e) except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question; Cap. 25:01;
- f) relating to the title to any right, duty or office; and
- g) seeking any declaratory decree."

15 Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi) section 13:

"(1) A Resident Magistrate court and any court of a magistrate of the first or second grade may try any offence under the Penal Code or any other law other than:

- a) offences under sections 38, 39, 63, 208, 209 and 217 of the Penal Code; and
- b) attempts to commit or aiding, abetting, counselling or procuring the commission of any of the offences specified in paragraph (a)."

(2) Notwithstanding subsection (1), offences under sections 133, 134 and 138 of the Penal Code shall not be tried by any court of the second grade magistrate."

(3) A court of the third grade magistrate may try any offence specified in the Second Schedule in respect of which the maximum sentence does not exceed the jurisdiction conferred on such court under section 14(3). Second Schedule

(4) A court of a magistrate of the fourth grade may try any offence specified in the Third Schedule in respect of which the

been limited, while Fourth Grade Magistrates have been limited to handling offences which will result in imprisonment for twelve months or less, a fine not exceeding MWK100,000, or both.¹⁶

The Issues

Section 41 of the Constitution stipulates:

- “(1) Every person shall have a right to recognition as a person before the law.
- (2) Every person shall have 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 by this Constitution or any other law.”

This section is loaded with provisions that can be used to protect Malawians.

Section 41(1) works in tandem with section 20 of the Constitution, ensuring that every person is recognised equally before a court of law. Malawi may be on a good course, if there wasn't a deeper underlying problem of physical access to the courts. There is an old adage that rings true in this situation: *justice should not just be seen but must be seen to be done*. In Malawi, even the availability is problematic. A 2002 report observed that, “there is limited access to courts in the rural areas and the courts which are closest to the poor are poorly resourced, poorly managed and offer a limited range of services.”¹⁷ Malawi has 195 magistrates' courts, located mainly in urban areas and community centers.¹⁸ As outlined in a report by Gloppen and Kanyongolo, “[t]he nearest court might be forty kilometers or an eight hours' walk away, and public transport, where available, is prohibitively expensive.”¹⁹ This situation has not improved; there have been signs of worsening access and availability in rural areas. This situation has been an ongoing issue for the judiciary and as far back as 2002 a study revealed that the general state of access to justice in Malawi was poor. The field data then indicated, “that there is limited access to quality justice for the rural poor and that the range of services that are delivered in remote areas is severely limited.”²⁰

Access to justice, however, does not only mean access in terms of ability to go before the person dispensing justice, it also goes to the quality of dispensed justice. For justice to be meaningful, access referring only to availability is not sufficient. The availability of lay magistrates in the rural areas raises a critical issue of dispensing quality justice for the rural masses. In terms of qualifications, most of lay magistrates are holders of a Malawi School Certificate of Education before graduating

maximum sentence does not exceed the jurisdiction conferred on such court under section 14(3).

(5) The Chief Justice may by notice published in the Gazette amend the Second Schedule and the Third Schedule.”

16 *Id* section 14; see also Courts Act, section 58.

17 W Schärf, C Banda, et al. “Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums” *Department of International Development* (2002) 10, available at www.gsdc.org/docs/open/ssaj99.pdf (last accessed: 20 November 2016).

18 “List of Courts in Integrated Judiciary” Sustainable Development Network Programme available at http://www.sdn.org.mw/judiciary/Courts_list.htm (last accessed: 20 November 2016).

19 S Gloppen and FE Kanyongolo “Courts and the poor in Malawi: Economic marginalisation, vulnerability, and the law” (2007) 5(2) *International Journal of Constitutional Law* 258, 274 -5.

20 W Schärf, C Banda, et al. “Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums” *Department of International Development* (2002) 9.

from the Malawi Institute of Development or Chancellor College with a diploma in law. This was faulted in the 2003 State of Judiciary Report which stated:

“The minimum academic qualification for Resident Magistrates is a university law degree, while for lay magistrates it is a secondary school certificate; in a few cases experience has been accepted in lieu of formal academic qualifications. The judiciary has acknowledged that ‘most lay magistrates are inadequately trained, resulting in poor service delivery and inconsistencies in some judicial decisions.’ One of the main reasons for the low qualifications of serving magistrates is that some of them were incorporated into the magistracy from what had been known prior to 2004 as ‘Traditional Courts.’ Personnel in these courts had not been required to have much formal education, and their integration into the judiciary resulted in an increase in under-qualified and inexperienced magistrates. The judiciary offers a 9-month basic course in selected legal subjects mainly to school leavers, serving court clerks and former traditional court officers. Those who pass the course are appointed as lay magistrates. At least one stakeholder interviewed for this report expressed reservations about the adequacy of the course to prepare those who undergo it to handle the demands of judicial office.”²¹

This unsatisfactory level of education has contributed to a number of the challenges facing the justice system. As indicated, various Acts have stipulated the civil and criminal jurisdictions of these courts, however, many of these courts continually overstep their jurisdiction or do not apply the law correctly. Not only do the magistrates’ courts take cases which they lack jurisdiction to handle, but they also dole out punishments that exceed the limits placed on them by the law. In *Republic v Nalumo and Dickson*²² Mwaungulu J stated:

“In the last few years the review system in our criminal justice system has strained. It is necessary, therefore, to rationalise, and restate the law and practice and duties arising from the statutory provisions. The lay magistracy in Malawi handles close to 90% of the criminal load at first instances. The lay magistracy undergoes a basic training equipping them with some aspects of substantive and procedural law and the law of evidence. The clerk to the court, unlike in the United Kingdom, is not a solicitor, in our context, a legal practitioner. In the United Kingdom, lay magistrates, who sit in numbers more than one, are advised by the clerk to the court, who is a solicitor. The difficulties we have in recruiting professional magistrates mean that we cannot afford to have our lay magistrates advised by a legal practitioner. The review mechanisms under the Courts Act and the Criminal Procedure and Evidence Code becomes important.”²³

It should be noted that the High Court observed an interesting issue in terms of the concept of review in such cases dealing with magistrates’ courts:

“The courts interpret the words ‘otherwise comes to its knowledge’ generously. The words cover where this Court calls for the file under section 360 and confirms sentences under section 15. Under this generous interpretation this Court has accepted requests on letters from defendants or anyone raising a matter concerning the justice of the case, such as a newspaper report. Where there has been some injustice, this Court has allowed, under this magnanimous interpretation, the State’s representations on the sentence and, albeit rarely, conviction.”²⁴

21 E Kanyongolo “State of Judiciary Report: Malawi 2003” *IFES* (2004) 29 (citations omitted).

22 Conf. Case No. 489 of 2000 (PR) (2000) MWHC 25.

23 *Id.* See also *Republic v Genti* [2000-2001] 383.

24 *Id.*

Additionally, Kachale J upheld an appeal on the basis that the First Grade Magistrate had no jurisdiction under section 39(2) of the Courts Act to settle a dispute as to who was the rightful holder of the Muso Village Headmanship in Ntcheu. He noted a trend of overstepping jurisdiction:

“In fact, it is remarkable that in Civil Appeal No 83B of 2009 between *Kachingwe Magalasi v Sky Ngwenya* decided on 19th June 2012 before my court, a similar situation arose involving the same magistrate. Thus my court takes the position that it would be unfair to attribute all the responsibility to the respondent for the manifest incompetence with which the present action was handled in the lower court.”²⁵

A recent case where Kachale J consolidated, reviewed and quashed 42 convictions from one magistrate in *Republic v Mpokeyi and Others*²⁶ and censured the Third Grade Magistrate for overstepping their jurisdiction stated:

“Leafing through the list of files submitted shows that a considerable number of trials resulted in sentences way beyond the maximum 3 years limit. It has also become apparent from a careful study of the available materials that some of the custodial limits reflect cumulative terms of imprisonment for a combined set of convictions; the legality of such sentences is gravely in doubt. Besides, in the absence of any evidence to the contrary one is inclined to assume that the offenders were all first time offenders; no attempt has been made to comply with section 340(1) of the CP&EC which requires justification for incarceration of such offenders.... [t]his would further impugn the legality of those purported terms of imprisonment. As if that were not enough, it is quite strange to note that for a number of cases the trial court imposed maximum penalties available under the law – which begs the question whether those charges represented the worst case scenarios of such crimes. Other charges are even bad for duplicity.”²⁷

The above situations are just a minute sample of the actual problem. It is obvious that there are deep rooted problems with the continued use of lay magistrates. It should be noted that professional magistrates and judges also face issues. The reason why the problem is magnified in terms of the lay magistracy is because they deal with cases involving close to 84 percent of the population.

The issue of substantive justice is fundamental. For example, in a recent rape case, the magistrate found the defendant not guilty, yet deemed him to have married the victim and gave her the status of first wife and ordered maintenance.²⁸ The case went to the High Court for review, but shows the type of injustices which face Malawians in rural areas. Citizens in rural areas deserve the equal protection of the law and the enforcement of all of their rights as promised in the Constitution.²⁹

Furthermore, in terms of criminal justice, the continuous failure to utilise the minimum sentences stipulated in the Magistrate’s Courts Sentencing Guidelines results in the serious miscarriage of justice, which often cannot be rectified by the High Court.³⁰ In the case of theft, where the values are small, like theft of a goat, five year sentences have been passed despite a

25 *Benson v Dausi* Civ. Appeal No. 84 of 2011 (HC)(LL)(Unreported).

26 Crim. Rev. No. 25-66 of 2015 (LL) (Unreported).

27 *Id* 8.

28 *Republic v Phiri*, Crim. Review Case No. 69 of 2016 (LL) (not decided). See also *Republic v Simon Majimba*, Criminal Review No 47 of 2016 where a First Grade Magistrate found the accused guilty of defilement contrary to section 138 which carries a sentence of life imprisonment, yet handed down a non-custodial sentence and ordered the accused to compensate the girl.

29 Constitution of Malawi, sections 15, 20, and 41.

30 Criminal Procedure and Evidence Code, section 5: “Finding...not to be reversed...on account of errors not occasioning failure of justice”.

sentence of six months stipulated in the Guidelines. This contributes to overcrowding in the prison system, which is already being called out by multiple organisations as a human rights violation.³¹

Rural magistrates continue to disregard the principles provided for in the Constitution as well as the Criminal Procedure and Evidence Code.³² This results in discrimination before the law for rural Malawians who are subjected to inferior justice whilst their urban counterparts are subject to justice handed out by professional magistrates. Where justice is meted out by lay magistrates in the urban areas, the closer supervision ensures that miscarriages of justice are noticed and rectified before they have impact.

Notably, Malawi thought it could improve access to justice by enacting the Local Courts Act. These were established under section 110 of the Constitution by Parliament through the enactment of the Local Courts Act in 2011. The Constitution stipulates that these courts shall be presided over by lay persons or chiefs and their jurisdiction is “limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.”³³ Regrettably, the courts have yet to begin operating because the executive has never appropriated funds for them. The arrangement for the Local Courts is that they will be under the judiciary with supervision by the High Court. It should be emphasised that there continue to be problems with supervision of the lay magistrates and it is uncertain whether this would have improved by the time the local courts are operational.

Conclusion

We must demand that duty bearers uphold their constitutional responsibility to provide access to justice and equal recognition before the law for all Malawians. If nothing changes, the poor and marginalised will continue to face injustice. In conclusion, these words highlight the need for a strategic decision to be made on the matter:

“The lesson is clear. When democratic rules are ignored and there is no law capable of providing shelter, the people who suffer most are those who can least afford to lose. Creating an infrastructure of laws, rights, enforcement, and adjudication is not an academic project, of interest to political scientists and social engineers. The establishment of such institutions can spell the difference between vulnerability and security, desperation and dignity for hundreds of millions of our fellow human beings.”³⁴

Borrowing from the words of Kanyongolo:

“In order for the constitutional right to have access to justice and legal remedies to have practical meaning, the judiciary, the Malawi Law Society, the Ministry of Justice and relevant non-governmental organisations should develop a plan aimed at removing the major obstacles which

31 “SALC and four Malawi organisations call for urgent interventions to address food shortages in Malawi prisons” Southern Africa Litigation Centre (10 June 2016) available at <http://www.southernafricalitigationcentre.org/2016/06/10/salc-and-four-malawi-organisations-call-for-urgent-interventions-to-address-food-shortages-in-malawi-prisons/> (last accessed: 20 November 2016).

32 Criminal Procedure and Evidence Code, section 339.

33 Constitution of Malawi, section 110.

34 MK Albright and HD Soto “Making the Law Work for Everyone: Volume I - Preface” *Commission on Legal Empowerment of the Poor* (2008) ii.

impede access to formal justice, particularly by the poor and other marginalised social groups. Such a plan should include measures aimed at expediting the establishment of courts located close to the people in rural areas; improving the physical infrastructure of justice institutions so that they can be accessed by all, including people with physical disabilities; reducing court fees; expanding the availability of pro bono legal services; and introducing flexibility in the language policy of the courts to allow more use of local languages in official proceedings.³⁵

Further, if the current situation continues for another four or five years, it is obvious that the courts will have a crisis of credibility at play.

A justice system with fully trained personnel, adequately equipped and geographically accessible by the people, will significantly contribute to improved access to justice. Education for the lay magistrates cannot be overemphasised. Evidence has shown that lay magistrates who are properly trained in the fundamental principles of law and have access to legislation and case precedents have meted out justice in the rural areas. The issue is to find the right balance between quality and quantity. Therefore, as long as the judiciary in Malawi does not make a proper assessment of its lay magistracy and follow through with proper reforms, access to justice will continue to be an elusive dream for Malawians in the rural areas and so will the attainment of Goal 16.

35 FE Kanyongolo "Malawi: Justice Sector and Rule of Law, A discussion paper" *AfriMAP and Open Society Initiative for Southern Africa* (2006) 26.