Goal 16 of the Sustainable Development Goals:

Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice

SOUTHERN AFRICA LITIGATION CENTRE

NATIONAL ASSOCIATION OF WOMEN JUDGES AND MAGISTRATES (Botswana)

REPUBLIC OF MALAWI JUDICIARY

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December 2016

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About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public-interest initiatives undertaken by domestic lawyers in Southern Africa. SALC supports these lawyers in a variety of ways, as appropriate, including providing legal research and drafting, training and mentoring, and monetary support. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe.

Acknowledgements

This collection of papers is a culmination of discussions held at the Judicial Colloquia on Goal 16 of the Sustainable Developments Goals which were held in Botswana, Malawi and Zambia in January and April 2016. As such, this publication is a joint initiative by the Judiciary of Malawi, the National Association of Women Judges and Magistrates of Botswana, and SALC. The purpose of the colloquia and this publication is to encourage discussion and honest reflection on the myriad ways in which the judiciary and legal profession can work towards achieving the objectives of Goal 16 of the Sustainable Development Goals. Accordingly, the views expressed in this publication are those of the individual authors and should not be attributed to their individual workplaces, the Judiciary of Malawi, the National Association of Women Judges and Magistrates of Botswana, or SALC.

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Introduction

Goal 16 of the Sustainable Development Goals (SDGs) seeks to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[1]

During 2016, the Southern Africa Litigation Centre, in conjunction with the National Association of Women Judges and Magistrates, the Malawi judiciary and the International Commission of Jurists, convened colloquia in Botswana, Malawi, Zambia and Zimbabwe to encourage discussion on the role of the judiciary in achieving Goal 16. This publication seeks to further broaden these discussions so that the achievement of Goal 16 moves from the conceptual to impactful initiatives.

Target 16.3 of Goal 16 strives to **promote the rule of law** at national and international levels. The papers of Justice Masuku from the Namibia High Court, and Kaajal Ramjathan-Keogh and Angela Mudukuti from SALC reflect on the necessity of judicial independence to ensure the maintenance of rule of law.

Target 16.3 further seeks to **ensure equal access to justice for all**. Several authors contribute to this discussion:

Justice Sikwese from the Malawi High Court highlights the necessity to reform the composition of the bench itself and to develop mechanisms to address limitations to women's access to the courts.

Chipo Nkhata, Johnson Jasson and Annabel Raw deal with the barriers to access to courts faced by persons with disability. Brigadier Siachitema from SALC focuses on the challenges faced by rural women to access justice in a context of rampant land dispossession in Zambia.

Annabel Raw from SALC looks specifically at the barriers faced by vulnerable groups in obtaining redress for healthcare discrimination. She makes the point that the issue of access to justice extends beyond the courts and includes a range of complaints mechanisms.

A number of authors focus on the specific problems around **access to criminal justice**. Dr Elizabeth Macharia-Mokobi from the University of Botswana considers the arguments in favour and against the death penalty. Anderson Ngulube, Director of Legal Aid in Zambia and Justice Kamanga from the Malawi High Court look at the limitations in access to justice for accused persons in Zambia and Malawi respectively. Justice Ntaba and Justice Kalembera follow with a critical examination of the jurisdictional limits of magistrates' courts in Malawi and the consequent limitations on access to justice, especially in rural areas. Finally, Chikondi Ngwira and Nyasha Chingore consider the imperative for courts to take into account the best interests

1 "Transforming our world: the 2030 Agenda for Sustainable Development" Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

of the child when sentencing care-givers in Malawi.

Target 16.5 of Goal 16 aims to substantially **reduce corruption and bribery**. In this respect, Justice Mzikamanda from the Malawi Supreme Court of Appeal considers strategies to reduce corruption within the judiciary, whilst Caroline James from SALC evaluates the role played by the courts in discouraging corruption in State institutions.

Target 16.9 of Goal 16 aims to **provide a legal identity for everyone**, including birth registration. Liesl Muller from Lawyers for Human Rights provides an overview of recent developments in the SADC region to end statelessness for children.

Target 16.10 of Goal 16 seeks to **ensure the public's access to information**. Mariya Badeva-Bright and Dr Oluwatoyin Badejogbin from AfricanLii explore the challenges in accessing law reports and legislation in Southern Africa and the imperative to improve such access in order to further the objectives under Goal 16. Mandala Mambulasa, a legal practitioner from Malawi, looks specifically at the access to information laws in Malawi.

Target 16.10 and target 16(b) of Goal 16 respectively emphasise the need to **protect fundamental freedoms** in accordance with national legislation and international agreements and to promote and **enforce non-discriminatory laws and policies**. Tashwill Esterhuizen and Brynne Guthrie discuss the recent Botswana Court of Appeal case on the right of persons to register an organisation that advocates for the rights of lesbian, gay, bisexual and transgender persons. The case is an important milestone in showing the ability of the courts to promote peaceful and inclusive societies. Justice Baruti from the Industrial Court in Botswana discusses the ambit of the prohibited grounds of discrimination in domestic law and argues that these grounds should interpreted broadly in line with international law. Justice Nyirenda from the Malawi High Court assesses the recent Marriage, Divorce and Family Relations Act in Malawi and highlights the need for ongoing reflection to ensure that law reform processes do not perpetuate outdated ideas and values.

Target 16(a) of Goal 16 seeks to strengthen relevant national institutions to **prevent violence and combat terrorism and crime.** Professor Jeremy Sarkin cautions that law reform efforts aimed at responding to the threat of terrorism should not unjustifiably infringe on human rights including the right to freedom of expression.

The editors and authors of this timely publication hope you will enjoy reading these papers and that it will, through your actions, contribute to the achievement of Goal 16.

Anneke Meerkotter[2]

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JUDICIAL INDEPENDENCE AS AN ESSENTIAL ASPECT OF THE RULE OF LAW[1]

Thomas S. Masuku J[2]

The Importance of Judicial Gatherings to Advocate for Judicial Independence and the Rule of Law

The independent judiciary and the rule of law is a modern "gospel" that should be spread across the continent. Vast amounts of money and time is spent for the political elites across Africa to come together and discuss these issues. This practice leads to a recurring question. Why should we meet and expend money only to preach, as it were, to the converted?

Would it not be better and more beneficial for the political elites to leave the comfort and serenity of air-conditioned and beautifully adorned venues and instead go to the highways and by-ways of this region. They could look for the "heathen" so to speak, in order to preach the "gospel" or good tidings related to the independence of the judiciary and the rule of law.

This premise is based on an assumption that the judiciary acts in a way separate from the other members of the *trias politica*, namely members of the executive and legislative organs of State. These two "usual suspects" have become notorious for continuously violating the twin core principles of an independent judiciary and the rule of law. Additionally, there may be other constituencies who have joined the bandwagon in this regard, including some captains of business and other people with financial and political muscle and prowess or those who have untrammelled access to political influence in various countries.

Sadly, the most remarkable addition to this growing inglorious list, are judges. This, at times, even includes the "first among equals", Chief Justices themselves. Some Chief Justices have played a deleterious role in the nefarious battle to undermine judicial independence, thwart judicial accountability and render the rule of law nothing but a pipe dream.

Judges are not fully and irreversibly converted in this regard. There is a great need to continue preaching the "gospel" of the independence of the judiciary and the rule of law, especially to judges.

People, including members of the judicial and legal professions, tend to forget or become complacent regarding core ethical and judicial virtues. For that reason, regular "preaching" and dusting of judicial cobwebs is necessary, even if it may seem to the unwary to be a waste of time and resources. It brings revival to the spirit of core judicial virtues and places them on the correct pedestal. This is similar to the way that converts in all the religions of the world do not stop attending religious services and activities once they are converted. Dusting of religious cobwebs is

1 Paper presented at the Judicial Colloquium on Working towards a Just, Peaceful and Inclusive Botswana: 50 years of Promoting Rule of Law and Equal Access to Justice, held at Gaborone, Botswana on 11 and 12 April 2016.

2 Judge of the High Court of Namibia (Civil Division) and former High Court Judge of the High Courts of Swaziland and Botswana; B.A. (Law), LL.B (University of Swaziland).

a constant necessity for the attainment of higher spiritual goals. It is accordingly no different in the high calling of judicial officers.

Furthermore, gatherings of judges create a venue for the cross-pollination of ideas on these key issues. These are likely to spread past the boundary of our profession to those still in need of "salvation". Ruminations and decisions made by gatherings of judges may eventually reach the ears and hopefully the hearts of those we perceive to be the main culprits and impediments to the full and unadulterated acceptance and application of the key concepts of the independence of the judiciary and the rule of law.

One lesson of our time is that the debilitating cancer of undermining and interfering with the independence of the judiciary and the rule of law is pretty much constantly mutating and has in recent times found an unlikely, unexpected and unwanted home within some of the very members of the judicial fraternity. Some judges, including certain Chief Justices, have participated in the rape and molestation of the independence of the judiciary and the rule of law either for personal aggrandisement or for that of their political ensembles. There are some "politicians" dressed in judicial robes who use the judicial office to deliver on political mandates. Some judges have found themselves doing dirty, injudicious "judicial" business for those they perceive to be in authority over them. Improper orders that flow out of these situations need to be discussed within the judicial fraternity.

To draw further parallels to religion, the judiciary has sometimes been backsliding. This idea references when the converted develops withdrawal symptoms and goes back to the reprobate behaviour they were supposedly redeemed from. It is important to hold judges accountable when they backslide. Some judges have shown that they can and do fall below the bar, stray from the paths of judicial virtue and start engaging in conduct that is anathema to the virtues of judicial independence. They engage in conduct that is inconsistent with their oaths of office and deleterious to the independence of the judiciary and the rule of law and will even apply pressure on other judges to veer from the paths of judicial virtue. Preaching to the converted may help keeping the ones on the brink of backsliding on the straight and narrow, hopefully nudging them back to the paths of judicial virtue.

Issues of judicial independence need close and constant scrutiny and monitoring so as to detect new trends manifesting themselves in the areas of judicial independence and the rule of law arenas. To this end, frequent interaction and discussion are important and require the employment of resources to thwart and extinguish new threats to the independence of the judiciary as a central theme to the survival of democracies and the rule of law in the world.

Conceptions of the Rule of Law and Judicial Independence

Rule of law and the independence of the judiciary are broad categories that are helpful to unpack. The latter does not speak to "the independence of judges" but to the independence of the judiciary as a whole, this includes judicial officers on the magisterial bench. The need for judicial independence equally applies to them.

The decision by Mogoeng CJ in the South African Constitutional Court is a helpful starting point for this discussion:

> "[O]ur constitutional order hinges on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would amount 'to a licence to self help' ... The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which will be given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with authority to make them or else approach the courts of law to set them aside, so we may escape their biding force."[3]

Two cardinal principles appear from this excerpt. First, the constitution and law should bind everyone. Second, if one seeks to be exempted from the ordinary consequences of the law, there must be recourse. Clinging to these two principles prevents society from resorting to survival of the fittest. There is a necessary intercourse between the rule of law and an independent court.

The United Nations Declaration of Human Rights (UNDHR) states, "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression…human rights should be protected by the rule of law."[4] Unfortunately, the UNDHR does not define what is meant by the phrase the rule of law. There are many ways that "rule of law" could be interpreted. 600 years ago, Bracton stated the following lapidary remarks:

> "The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power, for there is no *rex* where will rules rather than *lex*.[5]

This is applicable not just to monarchies, but to every system of government including countries such as Botswana under the rule of a President. Leaders, be they kings, prime ministers or presidents, are placed in power and clothed with authority by the law. For that reason, they need to respect the law by subjecting themselves to God and the law, rather than man or woman. That, in essence, is the "rule of law". It means that those in power and authority need to demean themselves to the law first and the rest of the led will do likewise.

Other great legal philosophers have characterised the rule of law differently. Dicey said, "[n]o man is above the law; every man and woman, whatever his or her rank or condition, is subject to the jurisdiction of ordinary tribunals." Joseph Raz wrote, "[t]he rule of law means literally what it says: the rule of laws. Taken in its broadest sense, this means that people should obey the law and be ruled by it." On the other hand, Francis Neate says, "[t]he 'Rule of Law' means exactly that: the law is the ruler, the supreme authority. No one is above or beyond the law. Everyone is subject to and governed by the law."[6] Neate wrote elsewhere:

3 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) (2016) ZACC 11 (31 March 2016), paras. 74 and 75.

4 United Nations Declaration of Human Rights, General Assembly Resolution 217 A (10 December 1948), Preamble.

5 *Bracton on the Laws and Customs of England*, Volume 2, 33, Harvard Law School Library, available at http://bracton.law.harvard.edu/Unframed/English/v2/33.htm#FN6 (last accessed: 8 December 2016).

6 F Neate "The Rule of Law – A Commentary on the IBA Council's Resolution of September 2005" *International Bar Association*

> "What is the Rule of Law? Some people, even quite the intelligent people express confusion about this. It is not really difficult. The Rule of Law is the only system so far devised by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law that rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law, no one is above or beyond the law. The law is the ruler."[7]

Universal respect for the law and separation of powers

In order for the rule of law to flourish, two things are necessary. First, there must be respect for the law at all levels of society. This includes those who live in the palace or State house as well as those who are impoverished and live in shacks; those who live in the urban suburbs of Gaborone and those who live in Tsabong. In this regard, there must be no distinction in social class, caste or whatever demarcation. Neate adds, "[t]hose who wish to exercise power find it a constraint. Politicians, those in power, even in the best organised societies tend to be the first to chip away at it."[8]

Second, separation of powers among the three organs of State must be upheld; the executive, legislature and judiciary. Speaking about the separation of powers, Mogoeng CJ said the following:

> "The principle of separation of powers, on the one hand recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of the other. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation . . . Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government." [9]

The doctrine of the separation of powers enables and mandates the courts to check on the use or abuse of power by the other organs of State. The courts must ensure that the branches all act within the confines and dictates of the constitution and consistently with the observance, propagation and protection of human rights and freedoms. The courts must be independent if the judiciary is going to be able to effectively play this pivotal role. Independence of the judiciary is a necessary ingredient for the rule of law to be sustained and for society to be held together.

Chaos will manifest itself if the independence of the judiciary is absent or compromised. An independent judiciary can guarantee the proper observance of the rule of law. The judiciary

(adopted 2009).

7 F Neate "The meaning and importance of the rule of law" (2009) *The Rule of Law: Perspective from Around the Globe*.

8 F Neate "Speech to the Rule of Law Symposium" Moscow, Russia (6 July 2007).

9 *Economic Freedom Fighters v Speaker of the National Assembly and Others* (2016) ZACC 11, paras. 91 to 93.

should have the liberty and licence to address an infringement of the law by whosoever without any interference or influence from any quarter and for any reason whatsoever.

This supervisory power should include the members of all the organs of State and individuals and legal persons. In this regard, members of the judiciary are also held accountable through the appellate courts. Should the lower courts fall below the paths of judicial virtue, the higher courts are empowered to say so unequivocally and without speaking in a forked tongue. This responsibility is a critical aspect of the constitutional duty of the judiciary to be custodians of the constitution and the law and is consistent with them being the ultimate interpreters of same.

The connection between the rule of law and the independence of the judiciary

At the most basic level, the law is put in place by the legislature and the courts have a duty to interpret and declare the law. In doing so, the court sets out the parameters of the law and calls to order those found to be acting outside the solicitudes of parliament. In order to do this, courts need to be protected and assisted in carrying out this enormous task without internal and external voices unduly influencing the process.

For centuries, lawmakers have appreciated the centrality of the independence of the judiciary in upholding the rule of law. For example, a 1346 statute from King Edward bore the following inscription:

> "We have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause."[10]

This is the independence of the judiciary put in very simple terms. It is the ability of judicial officers of all ranks to carry out their judicial functions in respect of all people, regardless of status and in respect of all causes, in accordance with the law and the facts applicable thereto, without any additives, pressure or inducement from any other source, person or authority.

Dealing with judicial independence, Professor Stephen Burbank said, "[t]rue judicial independence … requires insulation from those forces, external and internal, that so constrain *human* judgment as to subvert the judicial process."[11]

Sir Guy Green, on the other hand said:

> "I thus define judicial independence as the capacity of the courts to perform their constitutional functions free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions including, in particular, the executive arm of government, over which they do not exercise direct control." [12]

10 C Robinson *History of the High Court of Chancery and Other Institutions of England, From the Time of Caius Julius Caesar Until the Ascension of William and Mary* (1882) 585; also quoted by AM Khumalo "Official Opening of the Legal Year in Swaziland" (2002) 6.

11 SB Burbank "Is it time for a national commission on judicial independence and accountability?" (1990) 73 *Judicature* 176, 177.

12 G Green "The rationale and some Aspects of Judicial Independence" (1985) 59 *Australian Law* Journal 13.

At the world conference of the Independence of Judges held in Canada, in 1983, a clarion call was made for judges to be free "to decide matters before them impartially and in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[13] This was unanimously adopted at the final plenary session.

Furthermore, Hidayatullah from the Supreme Court of India, said:

> "The courts must do their duty according to their own understanding of the laws and the obligations of the Constitution. They cannot take their cue from sentiments of politicians nor even indirectly give support to something they consider to be wrong or against the Constitution and the laws. The good faith of judges is the firm bed-rock on which any system of administration securely rests and an attempt to shake the people's confidence in the courts is to strike at the very root of our system of democracy."[14]

As outlined in the Canadian case of *Valente v The Queen*,[15] judicial independence happens at two different levels, namely personal and institutional independence. According to Lord Neuberger of Abbotsbury, personal independence refers "to each judge's ability to decide any part of a case by applying the right law to the right facts. Judges must be independent of the parties and must not be subject to any pressure or inducement from the parties. They must have no interest in the outcome and must be open-minded and impartial in their approach to issues."[16] On the other hand, Neuberger said institutional independence "goes wider than individual independence. It refers to the constitutional principle that the judiciary is independent from the other two branches of State. It is the constitutional principle that the judiciary cannot properly be influenced by the executive or the legislature in carrying out the judicial function. Influence, whether overt or covert undermines the judiciary's ability to decide cases on their merits. Justice under influence is not justice at all. It is inimical to the rule of law and the democratic system."[17] Furthermore, institutional independence also refers to the fiscal and administrative independence of the judicial institution.

Without judicial independence, the rights and interests of human beings are in serious jeopardy. It must be mentioned in this regard that judicial independence is not for the benefit of judges themselves but it is a commodity and a constitutional bequest judicial officers hold in trust for the litigating public. For that reason, the judicial and legal communities need to conduct civic education campaigns in order to make members of the public in our sub-region acutely aware that the issue of judicial independence is their business and for their good and it is not necessarily or primarily for lawyers and judges. As Shah CJ said, "[j]udicial independence is not the personal privilege or prerogative of the individual Judge. It is the responsibility imposed on each Judge".[18]

There is another subtle but dangerous source of threat to judicial independence and this is from within the individual judge. Shientag says the following about this internal parasite, so to speak:

13 Universal Declaration of the Independence of the Judiciary (Montreal Declaration) (1983), para. 2.02.

14 *Namboodiripad v Nambiar*, Supreme Court of India (1971) SCR (1) 697; see also Lord Suffian "The Role of the Judiciary in a Democracy with Special Reference to a Developing Country" (1981) 3.4 *Commonwealth Judicial Journal* 45.

15 (1985) 2 SCR 673, 679.

16 Neuberger "Where the Angels Fear to Tread" *Holdsworth Club* (12 March 2012), para. 20.

17 *Id* para. 23.

18 *The CPIO, Supreme Court of India v Agarwal and Another*, Delhi High Court W.P. (C) 288/2009, para. 73.

> "The subtlest poison to which a judge may succumb may be from pressure within. Every man craves praise, although some call it recognition. A deep instinct of human nature is the yearning to be appreciated. Within normal limits that craving is not only natural, but desirable. It becomes reprehensible when the judge woos popularity by his decisions, or by his conduct on the Bench."[19]

When the judiciary is truly independent and it actually upholds the rule of law, this is when government can rule justly for its citizens. As Shientag put it:

> "There can be no government of law without a fearless, independent judiciary. The independence of the judge is the chief of all cardinal virtues. He must be free from all external influence and subservient only to his conscience."[20]

19 BL Shientag "The Personality of the Judge" *Benjamin N. Cardozo Memorial Lectures* (1943).

20 *Id*.

THE IMPORTANCE OF PROMOTING JUDICIAL INDEPENDENCE IN THE SOUTHERN AFRICAN REGION

Kaajal Ramjathan-Keogh[1]

Introduction

Judicial independence is the concept that courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. This is important for the proper functioning of a State based on democratic values. Judicial independence is also a key component of social transformation and democratic consolidation. There are numerous studies which indicate that independence and accountability of judges is fundamental to an impartial judicial process. As a consequence, judges' protection from undue influence or interference is a key concern and various principles and standards to protect judicial independence have been introduced by different bodies. At the same time, cases where judges have used their margin of discretion to make biased decisions have demonstrated the need for more accountability and oversight.

It is fundamental to the rule of law, to the right to a fair trial, to the right to liberty and security of person, and to the right to effective remedy for violations of human rights, that individual judges and the judiciary as a whole must be independent and impartial.[2] The requirement that courts and other tribunals be effective, independent and impartial "is an absolute right that is not subject to any exception".[3]

For the judiciary as an institution, the requirement of independence refers in particular to: the procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; the conditions governing promotion, transfer, suspension and cessation of their functions; and the degree to which the executive and legislative branches of power do or do not in practice interfere with judges and judicial decision-making.[4]

1 Executive Director of the Southern Africa Litigation Centre; B.Proc, LL.B (University of Kwa Zulu Natal).

2 See International Covenant on Civil and Political Rights (ICCPR) article 14(1); Universal Declaration of Human Rights (UDHR) article 10; Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter: 'UN Basic Principles on the Independence of the Judiciary'), Principle 1 and 2; Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999, Article 1; Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 1 and Value 2; see also International Commission of Jurists International Principles on the *Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners' Guide No. 1* (2007).

3 Human Rights Committee "General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial" UN Doc. CCPR/C/GC/32 (2007), para. 19.

4 *Id.* See also UN Basic Principles on the Independence of the Judiciary.

This paper will view judicial independence through the lenses of rule of law, corruption and fair trial rights.

Protecting the Rule of Law

Rule of law standards include an obligation to ensure that States have access to a competent, independent, impartial and accountable judiciary that will not bend to political or other pressure. For example, in September 2016 the Zimbabwean police banned protests in Harare. The decision went on review before the Harare High Court. The courageous Justice Priscilla Chigumba found that the police banning order was "invalid" and curtailed citizens' rights.[5] This brave judgment asserted the independence of the judiciary at a time when there was an intense crackdown on protest and social media activism in Zimbabwe.[6] The President tried to intimidate the judiciary when he said that judges when allowing these protests to continue showed a reckless disregard for peace and accused them of being negligent.[7] Subsequent developments saw another High Court judge dismiss a legal challenge to the police order and uphold the police ban on anti-government street protests after weeks of demonstrations calling for President Robert Mugabe to step down.[8]

The Influence of Corruption on the Administration of Justice

Corruption in the judicial system has a detrimental impact on citizens and can seriously compromise the legitimacy and stability of democratic institutions. A fair and impartial judicial process is a precondition for accountable governance and for anti-corruption safeguards to take effect. Judges are as capable as any other public official of perpetrating or being complicit in violations of human rights. The State is responsible for all judicially perpetrated or judicially complicit human rights violations - this is true even if the judge's conduct is "lawful" under the State's domestic law.

Swaziland editor Bheki Makhubu and human rights lawyer Thulani Maseko were arrested in March 2014 and charged with contempt of court for writing and publishing two articles criticising the Swazi judiciary and the then-Chief Justice, Michael Ramodibedi. Initially, High Court Judge Mumsy Dlamini found their original arrest warrants to be defective and released them.[9] The men were subsequently re-arrested by Judge Mpendulo Simelane and detained for more than a year

5 "Zimbabwe court overturns ban on Harare protests" *Al Jazeera* (7 September 2016) available at http://www.aljazeera.com/news/2016/09/zimbabwe-court-overturns-ban-harare-protests-160907201438556.html (last accessed: 20 November 2016); C Zvayi "Demo case: State scores own goal" *The Herald* (8 September 2016) available at http://www.herald.co.zw/demo-case-state-scores-own-goal/ (last accessed: 20 November 2016).

6 "Zimbabwe threatens social media activists, after protests" *The Sun Daily* (17 August 2016) available at http://www.thesundaily.my/news/1939255 (last accessed: 20 November 2016).

7 A Withnall "Robert Mugabe calls Zimbabwe judges 'reckless' for permitting protests against him: 'I hope they learnt their lesson'" *The Independent* (5 September 2016) available at http://www.independent.co.uk/news/world/africa/robert-mugabe-calls-zimbabwe-judges-reckless-for-permitting-protests-against-him-i-hope-they-have-a7227036.html (last accessed: 20 November 2016); see also F Machamire "Police Ban Ruling 'Haunts" High Court Judge Priscilla Chigumba" *Nehanda Radio* (1 October 2016) available at http://nehandaradio.com/2016/10/01/police-ban-ruling-haunts-high-court-judge-priscilla-chigumba/ (last accessed: 20 November 2016).

8 "Zimbabwe court keeps police ban on protests" *Reuters Africa* (4 October 2016) available at http://af.reuters.com/article/zimbabweNews/idAFL5N1CA52T (last accessed: 20 November 2016).

9 *Maseko and Another v Chief Justice and 3 Others* (161/2014) (2014) SZHC 77, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/Dlamini-Judgment.pdf (last accessed: 21 November 2016).

before the Supreme Court acquitted them and ordered their release.[10] This Supreme Court decision came in the wake of the suspension of Judge Simelane, and the removal of Chief Justice Ramodibedi on the grounds that the two judges were being investigated by the Anti-Corruption Commission on suspicion of defeating the ends of justice.[11] Following a 2015 scandal Swaziland's King Mswati III dismissed Chief Justice Ramodibedi.[12] This situation clearly displayed the intersection between rule of law, corruption and fair trial rights and how a weakness on any of these pillars could be detrimental to the administration of justice.

The Swazi courts have been regarded with much suspicion following this situation. However, in September 2016, the High Court asserted its independence in declaring portions of the terrorism and the sedition laws unconstitutional.[13] The State has already filed an appeal but the Swazi High Court's bold position remains an encouraging demonstration of judicial independence.

Fair Trial Rights

The right of everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law in all criminal and civil legal proceedings, is recognised by article 14 of the ICCPR, article 10 of the Universal Declaration of Human Rights and several other human rights treaties.

Right to effective remedy and reparation

The International Commission of Jurists outlined the judiciary's role in ensuring access to remedy:

> "International law and standards also clearly require that States ensure the availability of effective remedies for human rights violations and reparation for harm suffered. The fact that a violation may have been perpetrated by a judicial official over other public officials, or that a judge has been complicit in the violation, does not absolve the State of its responsibility to ensure an effective remedy."[14]

10 *Maseko and Others v Rex* (18/2014) (2015) SZSC 03, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/The-Nation-Appeal-002.pdf (last accessed: 21 November 2016).

11 "Justice Locked Out: Swaziland's Rule of Law Crisis" *International Commission of Jurists* (2016) 16 and 17.

12 *Id* 17.

13 *Maseko v Prime Minister of Swaziland and Others* (2180/2009) (2016) SZHC 180, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/09/High-Court-Majority-Judgment.pdf (last accessed: 21 November 2016); see also "News Release: Swaziland High Court Strikes Down Provisions of the Sedition and Subversive Activities and Suppression of Terrorism Acts" *SALC* (2016) available at http://www.southernafricalitigationcentre.org/2016/09/16/news-release-swaziland-high-court-strikes-down-provisions-of-the-sedition-and-subversive-activities-and-suppression-of-terrorism-acts/# (last accessed: 21 November 2016).

14 "Judicial Accountability - A Practitioner's Guide No. 13" *International Commission of Jurists* (2016) 6 to 7 (citations and parentheticals omitted).

Fair and Transparent Procedures for the Appointment of Judges are Vitally Important for Accountability and Independence

The appointment of judges in Botswana

The procedures for the appointment of judges can be another cause for concern. In Botswana the President makes these appointments acting in accordance with the advice of the Judicial Services Commission. This procedure is currently being disputed before the courts. The President is arguing that he retains a discretion to decide who to appoint and that in making his decision, he takes into account "a broad range of material considerations, including matters of national security, the socio-political situation in Botswana, public perceptions of the relevant candidate and the judiciary, and questions of policy".[15] The High Court has been inclined to agree with this discretion by the President. However, the matter is on appeal and no final positon is yet available.

The appointment of judges in Swaziland

A 2015 International Commission of Jurists report found that King Mswati III, the absolute monarch in Swaziland, stands in the way of the kingdom having independent judges.[16] The judges' appointment process continues to pose a threat to judicial independence and impartiality. The Constitution of Swaziland provides that the judges are appointed by the King after consultation with the Judicial Service Commission.[17] Even though Swaziland's 2005 Constitution enshrines the guarantee of the independence of the judiciary, the executive has not respected this principle in practice.

Swaziland must effectively engage in the process of judicial reform, including by tackling underlying legal and policy factors which undermine the proper functioning of the judiciary. Only through this can it truly make progress towards ensuring protection of human rights for all. The proper functioning of the legal profession, as set out in the Basic Principles on the Role of Lawyers,[18] is also key to the protection of rights.

Judicial Independence in South Africa

One situation that clearly demonstrated the independence and integrity of the judiciary was when the South African courts ordered the arrest of Sudanese President Omar Al Bashir when he attended the 2015 AU Summit in Johannesburg. The International Criminal Court (ICC) issued a warrant for his arrest in 2009 and 2010 on charges of war crimes, crimes against humanity and genocide allegedly committed in Darfur after a 2003 insurgency. As a signatory to the Rome Statute and having domesticated the Statute, South Africa was obligated to arrest President Omar al Bashir if he was found on South African territory. A full bench of the High Court ordered that

15 *Law Society of Botswana and Another v President of Botswana and Others* MAHGB-000383-15 (5 February 2016) para. 12.1, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/02/LSB-v-JSC-HC-judgment.pdf (last accessed: 21 November 2016).

16 "Justice Locked Out: Swaziland's Rule of Law Crisis" *International Commission of Jurists* (2016), 34 to 36.

17 Constitution of Swaziland, 2005, section 153.

18 "Basic Principles on the Role of Lawyers" adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990).

he be arrested for transfer to The Hague.[19] The State subsequently facilitated his departure from the country and were on the receiving end of the full wrath of the judiciary for disrespecting the rule of law.[20]

In the assessment of these cases we find that:

- Independence and impartiality of the judiciary requires integrity of individual judges and judicial institutions. Accordingly, there must be accountability for judicial corruption and judicial involvement in human rights violations.
- Accountability mechanisms must themselves be independent, fair and transparent, in order to ensure that they do not undermine the independence of the judiciary and that victims and the broader population see them as credible.
- Fair and transparent procedures for the appointment of judges are vitally important for accountability.

Access to Justice is Linked to Judicial Independence: The SADC Tribunal

One situation which seriously impacts on the independence of the judiciary is the suspension of the Southern Africa Development Community (SADC) Tribunal which is a Southern African regional court giving access to justice at a regional level. The SADC Tribunal was suspended in 2010 following a challenge by Zimbabwe to its mandate and legitimacy.[21] The terms of office of five of the SADC Tribunal judges were not renewed, nor were these judges replaced. Although an independent commission of inquiry found in 2011, that the Tribunal was properly constituted with powers to hear human rights cases, the heads of State and governments of Southern Africa have failed to lift the suspension.[22]

In 2014 SADC amended the Protocol of the SADC Tribunal.[23] The SADC Tribunal was previously a regional human rights court which individuals could access when their governments were unable or unwilling to provide effective protection of human rights. If duly ratified, the amended Protocol will remove individual access to the Tribunal as well as the human rights jurisdiction of the Tribunal.[24]

19 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (Case No. 27740/2015) HCZAGP (23 June 2015) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf (last accessed: 21 November 2016).

20 *Id* paras. 37.2 and 39.

21 F Cowell "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" (2013) 13(1) *Human Rights Law Review* 153-54.

22 L Bartels "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" *WTI Advisors* (2011) available at http://lawyersofafrica.org/wp-content/uploads/2014/02/Annexure-6-B-Report-of-the-World-Trade-Institute-Advisors-of-6-March-2011.pdf (last accessed: 21 November 2016).

23 "Communique of the 34th Summit of SADC Heads of State and Government Victoria Falls, Zimbabwe" (August 17-18, 2014) paras. 18 and 23.

24 "Coalition for an Effective SADC Tribunal Calls on Heads of State to Reinstating the SADC Tribunal" *Southern Africa Litigation Centre* (14 August 2015) available at http://www.southernafricalitigationcentre.org/2015/08/15/coalition-for-an-effective-sadc-tribunal-calls-on-heads-of-state-to-reinstating-the-sadc-tribunal/# (last accessed: 21 November 2016).

The Law Society of South Africa has brought a case against the State challenging the signing of this revised protocol.[25] In addition, the office of the UN Special Rapporteur on the Independence of Lawyers and the Judiciary has indicated that the suspension of the SADC Tribunal negatively impacts on the independence of the judiciary[26] and runs counter to the principles of respect for the independence of the judiciary; prohibition of inappropriate or unwarranted interference with the judicial process;[27] and security of tenure of judges.[28]

Conclusion

The UN Special Rapporteur on the independence of judges and lawyers has emphasised that:

> "Judicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system."[29]

In order for States to operate optimally within a free and democratic framework, all three arms of government must also function freely and without fear. This includes the judiciary. While there have been many sightings and instances of judicial independence in Southern Africa, there is still a long way to go.

25 Court documents of LSSA litigation available at http://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter (last accessed: 21 November 2016); supporting litigation documents from SALC available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-supporting-regional-individual-access-to-justice-in-sadc/ (last accessed: 21 November 2016).

26 Mandate of the Special Rapporteur on the independence of judges and lawyers, letter to Mr. Salomão (29 December 2011) (AL G/SO 214 (3-3-16) OTH 6/2011) available at https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_(6.2011).pdf (last accessed: 21 November 2016).

27 UN Basic Principles on the Independence of the Judiciary, principle 4.

28 *Id* principles 11 and 12.

29 Special Rapporteur on the independence of judges and lawyers "Independence of judges and lawyers" A/67/305 (2012) para. 109.

JUDICIAL INTEGRITY AND INDEPENDENCE: THE SOUTH AFRICAN OMAR AL BASHIR MATTER

Angela Mudukuti[1]

Introduction

In South Africa, the Constitution is the supreme law of the land and it forms an integral part of the foundational building blocks of the constitutional democracy that exists today.[2] In terms of the Constitution, judicial independence is protected. Section 165 states in part that:

> "(2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

This provision binds all organs of State, preventing them from interfering with the independence and effectiveness of the courts. This strengthens the separation of powers which is vital for the effective protection of the rule of law. It is upon this firm foundation set by the Constitution that South African courts have operated since 1996.

Whilst it cannot be said that the South African judicial system is flawless, this paper is based on a case that it is a commendable example of judicial independence. Cited as the *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*,[3] this case and its two judgments highlight the importance of ensuring judicial independence and protecting the rule of law. This case was politically charged because it involved a head of State as well the South African government authorities. Despite the political dimension, the judges of the High Court and the Supreme Court of Appeal were able to make just and legally sound rulings.

Sudanese President Omar al Bashir is wanted by the International Criminal Court (ICC) for five counts of crimes against humanity, two counts of war crimes and three counts of genocide. He was initially charged in 2009, followed swiftly by more charges in 2010. [4]

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2 "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Constitution of South Africa (No. 108 of 1996), section 2.

3 All available court documents are located at: http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (last accessed: 26 October 2016) Cited as *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 in the Supreme Court of Appeal and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 in the North Gauteng High Court.

4 The first arrest warrant was issued 4 March 2009 for five counts of crimes against humanity and two counts of war crimes. The second arrest warrant was issued 12 July 2010 for three counts of genocide. *The Prosecutor v President Omar al Bashir* ICC-

President Bashir's alleged crimes took place in the context of a state led suppression of an insurgency carried out by the Justice and Equality Movement (JEM) and the Sudanese Liberation Army (SLA) in Darfur Sudan in 2003. The groups revolted in protest of their treatment under Bashir's rule. The rebels and the communities they represent felt marginalised and discriminated against by the Khartoum government and decided to take action igniting a conflict that continues today.[5] The United Nations estimates that at least 300,000 people have died and an additional 4.7 million have been severely affected by the conflict through internal displacement and other grave human rights violations. [6]

Seeking to bring justice to the victims, the ICC indicted suspected perpetrators from both sides of the conflict.[7]

As the ICC has no police force, it relies on signatory States to assist with its mandate by fully cooperating with the ICC. Article 86 of the Rome Statute[8] obliges all State Parties to "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". In addition, article 87(1) entitles the Court to request co-operation from State Parties. The Court may request state parties to arrest and surrender a suspect or, in urgent cases, to arrest the suspect provisionally pending further proceedings.[9] South Africa signed, ratified,[10] and domesticated the Rome Statute.[11]

South Africa had both a domestic and international law duty to arrest President Bashir when he arrived in South Africa for the 25th African Union Summit in June 2015. Previously South Africa had acted in accordance with this duty; for example in 2009, a chief magistrate domesticated the ICC arrest warrant making it a South African arrest warrant. Also in 2009, President Bashir was invited to attend President Zuma's inauguration but was informed publically that he would be arrested should he set foot on South African soil.[12]

In January 2015 it became public knowledge that South Africa would host the 25th African Union Summit. Aware of the potential of President Bashir's visit, the Southern Africa Litigation Centre (SALC) wrote to six branches of the South African government in May 2015, a month before the Summit. The purpose of the letter was to remind them of their obligations in terms of the Rome Statute and the Implementation Act.[13] SALC received one response from the government's Chief

02/05-01/09, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/pages/icc02050109.aspx (last accessed: 26 October 2016).

5 "Q and A: Sudan's Darfur Conflict" BBC (23 February 2010) available at http://news.bbc.co.uk/2/hi/africa/3496731.stm (last accessed 28 October 2016).

6 UNICEF "Darfur - overview" (2008) available at: http://www.unicef.org/infobycountry/sudan_darfuroverview.html (last accessed: 28 October 2016).

7 ICC "Situation in Darfur, Sudan" (2005) ICC-02/05 available at https://www.icc-cpi.int/darfur?ln=en (last accessed: 28 October 2016).

8 A/CONF.183/9 of 17 July 1998.

9 *Id* articles 58(5), 89(1) and 92.

10 South Africa signed the Rome Statute on 17 July 1998 and deposited its instrument of ratification of the Rome Statute on 27 November 2000. ICC Assembly of State Parties (ASP) website, available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx (last accessed: 28 October 2016).

11 Implementation of the Rome Statue of the International Criminal Court Act (27 of 2002).

12 "SA is obliged to arrest Al-Bashir, says Ntsaluba" SA News (31 July 2009) available at http://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsaluba (last accessed: 28 October 2016).

13 K Ramjathan-Keogh "SALC Reminds SA Government: President Bashir Must be Arrested" *Southern Africa Litigation Centre*

State Law Adviser who indicated:

> "I am aware that the Government is mindful of its international obligations which it takes seriously…You should not though, expect to receive a further communication on the matter, unless I am specifically instructed to engage you on the contents of your letter."[14]

SALC wrote to the government again, informing them that legal action would be taken should President Bashir be found in South Africa. Despite all the correspondence, President Bashir arrived and was not arrested. SALC was forced to approach the High Court on an urgent basis seeking the implementation of the arrest warrants.

High Court Proceedings and Judgment

Upon receiving confirmation of President Bashir's arrival, SALC approached the North Gauteng High Court on a Saturday evening seeking the implementation of the ICC arrest warrant. The matter was heard the following morning on an urgent basis.

The government of South Africa opposed the court application and requested that the matter be postponed. The matter was postponed until later that afternoon but having learnt lessons from previous experience in Kenya and Nigeria,[15] SALC requested that the Court issue an interim order mandating the government of South Africa to ensure that every port of entry and exit is aware that President Bashir should not be allowed to leave the country. It stated that, "President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so".[16]

When the matter resumed in Court the following day, the judges ruled that President Bashir should be arrested and detained for subsequent transfer to the Hague.[17] It was at that point that the State informed the Court that they believed that President Bashir had already left the country. This was despite the fact that the Court had repeatedly asked state counsel, prior to handing down

(21 May 2015) http://www.southernafricalitigationcentre.org/2015/05/21/salc-reminds-sa-governmentpresident-bashir-must-be-arrested/ (last accessed: 28 October 2016).

14 Letter received from the Chief State Law Advisor, Enver Daniels (21 May 2015) para. 2-3.

15 The Nigerian Coalition of the ICC (NCICC) litigated in Nigeria's domestic courts in an attempt to arrest Sudanese president Omar Al Bashir. On 14 July 2013 Bashir arrived unannounced in Nigeria, and the NCICC promptly filed their court documents on 15 July 2013 requesting that the courts issue a domestic arrest warrant for Bashir in the case of *NCICC and Others v Federal Republic of Nigeria*. However, during the court proceedings the news that Bashir had unexpectedly left Nigeria reached the court and the proceedings were abandoned. The NCICC quickly brought a second action to the court to secure a standing provisional arrest warrant that would be executed at any time should Bashir return to Nigeria. This case was filed as *NCICC and Others v Federal Republic of Nigeria No. 2*; see SALC *International Criminal Justice Regional Advocacy Conference Report - Civil Society in Action: Pursuing Domestic Accountability for International Crimes* (2014) 16-20; The Kenyan section of the International Commission of Jurists has also been involved in efforts to arrest Bashir. In 2011 the organisation filed an application before the High Court seeking an arrest warrant for Bashir should he be found in Kenya. The Kenyan High Court issued a provisional arrest warrant. After the arrest warrant was issued, ICJ Kenya managed to ensure that should the Kenyan Attorney General and the Minister of Internal Security hear of Bashir's travelling to Kenya, they are under a legal obligation to prepare to arrest him and surrender him to the ICC.

16 "Interim Court Order" Case No. 27740/15 (14 June 2015) para. 1, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf (last accessed: 30 October 2016).

17 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 2, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf (last accessed: 30 October 2016).

judgment, if President Bashir was still in South Africa.

During legal arguments, SALC raised the importance of adhering to domestic and international law and the importance of promoting justice and accountability in Africa. SALC relied on provisions of the Rome Statute, the Implementation Act, United Nations Security Council Resolution 1593,[18] customary international law and foreign and comparative law to indicate that there can be no immunity with respect to President Bashir. Relying on the South African Diplomatic Immunities and Privileges Act, the Host Agreement with the African Union, and customary international law, the State attempted to convince the Court that arresting President Bashir would have been in violation of head of State immunity.

The High Court found itself reviewing the legal obligations under domestic and international criminal law whilst under immense political pressure. Despite this, the High Court maintained its judicial integrity by promoting and protecting the rule of law. The Court ruled against the State in this very high profile matter, indicating that:

> "A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues."[19]

The Court also reaffirmed the need for South Africa to adhere to its domestic and international law obligations:

> "It must be stated at this juncture that the Implementation Act as mentioned earlier is such national legislation, and the State is bound to implement it. By way of its enactment, the legislature complied with its obligations as a state party to the Rome Statute to take measures at national level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute. This is clear from the long title of the [Implementation] Act and the preamble also gives good insight into its motivation. Note should also be taken of ss. 3 (a) and (b) which define the objects of the Act, which mainly are, in the present context, to ensure that anything that is done in terms of this Act conforms with the obligation of the Republic in terms of the Statute."[20]

The Court also requested that the State produce an explanatory affidavit detailing how President Bashir was allowed to leave the country despite a court order explicitly calling for such to be prevented. This call for transparency is another example of the independence of the judiciary. The Court correctly requested that the government put their explanation on record.

According to the Department of Home Affairs, "the passport of President Bashir was not part of the passports that were handed to immigration for processing of the persons that were on board the flight."[21] Although the entire Sudanese delegation was on board the flight, the State proposed

18 UNSC Resolution 1593 referred the situation in Darfur to the ICC and called for cooperation from Member States.

19 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 37.2.

20 *Id* para. 25.

21 "Respondents' Explanatory Affidavit" Case No. 27740/15 (25 June 2015) para. 7, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/State-Explanatory-Affidavit-including-Lubisi-

that President Bashir was not. At best, this is a tenuous explanation for a direct breach of a court order. The High Court agreed and invited the National Prosecuting Authority to consider whether "criminal proceedings are appropriate".[22]

Nonetheless, the State proceeded to seek leave to appeal to the Supreme Court of Appeal (SCA) from the High Court. Citing that there were no prospects of success on appeal,[23] the High Court denied leave to appeal. The state directly petitioned the SCA and the appeal was heard on 12 February 2016.

Supreme Court of Appeal Proceedings and Judgment

The arguments presented before the Supreme Court of Appeal were similar to those raised before the High Court. The State continued to insist that President Bashir was protected by head of State immunity whilst SALC indicated that in accordance with the Implementation Act, South Africa had a duty to arrest President Bashir and that any immunities that could possibly apply had been trumped.

The SCA also ruled against the State indicating that, the State:

> "in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful."[24]

The SCA addressed the State's conduct throughout the High Court proceedings and began by addressing the explanatory affidavit:

> "The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible."[25]

Wallis JA proceeded to raise the possibility that:

> "Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court or misled

supplementary.pdf (last accessed: 30 October 2016).

22 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 39.

23 "Leave to Appeal Judgment" Case No. 27740/15 (15 September 2015) para. 9, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Bashir-leave-to-appeal-judgment.pdf (last accessed: 30 October 2016).

24 *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 at "Order" available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/Bashir-SCA-judgment.pdf (last accessed: 30 October 2016).

25 *Id* para.7.

> counsel in giving instructions, or the representatives and counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct."[26]

The SCA judges did not mince their words, calling the State's conduct "disgraceful". South Africa's constitutional democracy requires its office bearers to protect and uphold the rule of law. When such office bearers fail to act in compliance with their constitutionally enshrined duties, it falls to other stakeholders to ensure accountability. In this instance, South Africa's independent judiciary acted without fear or favour and held the government accountable in terms of the law.

Conclusion

Goal 16 of the Sustainable Development Goals recognises that "[p]eace, stability, human rights and effective governance based on the rule of law are important conduits for sustainable development".[27] Independent judiciaries are key to the development and protection of the rule of law. Judicial officers are the gatekeepers who should also conduct themselves ethically, and act independently.[28] This case not only sets the correct precedent, but it also gives victims of egregious crimes hope that justice can be done.

26 *Id.*

27 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

28 As "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards." Secretary General KA Annan, S/2004/616 (23 August 2004).

WOMEN'S ECONOMIC RIGHTS: REMOVING BARRIERS TO WOMEN'S ACCESS TO JUSTICE IN MALAWI

Rachel S. Sikwese J[1]

Introduction

The Malawi Constitution provides that any law that discriminates against women on the basis of gender shall be invalid.[2] This is right closely relates to other rights including the right to freely engage in economic activity; the right to development; and the right to fair and safe labour practices without discrimination.[3] "Economic rights" in this paper refers to the right to earn a dignified living through decent work whether in the public or private sector, operate successful businesses and serve in elected positions to run public affairs.

World Bank reports have highlighted some adverse findings in relation to women's economic rights in Malawi. For example, the lack of legislation on paternity leave, no provision on access of nursing mothers to break times to nurse their babies, no mandate for flexible work times and schedules for nursing mothers, no prohibition against enquiring into a woman's marital status during job interviews.[4] In addition, there is no specific tax credits applicable to women, there is no universal provision of free child care, education and support, and although primary education is free it is not compulsory.[5] In 2015, the World Bank reported that Malawi has the lowest income levels in the world.[6] Depressed incomes are a hindrance to accessing health and wellness. By protecting women in employment and business their good health and that of their families would be guaranteed. In addition, customs that promote women's inferior status and hinder their access to economic development such as polygamy, wife inheritance, and property grabbing continue to exist.[7]

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2 Section 24 of the Constitution of Malawi, 1994, provides that:
"(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status …
(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as:
(a) sexual abuse, harassment and violence;
(b) discrimination in work, business and public affairs; and
(c) deprivation of property, including property obtained by inheritance."

3 Constitution of Malawi, sections 29, 30 and 31 respectively.

4 World Bank Group *Women, Business and the Law: Removing Restriction to Enhance Gender Equality* (2014) 121.

5 *Id.*

6 World Bank "WB Update Says 10 Countries Move Up in Income Bracket" *Press Release* (1 July 2015) available at http://www.worldbank.org/en/news/press-release/2015/07/01/new-world-bank-update-shows-bangladesh-kenya-myanmar-and-tajikistan-as-middle-income-while-south-sudan-falls-back-to-low-income (last accessed: 15 October 2016).

7 See Malawi Human Rights Commission *Cultural Practices and Human Rights: A Study into Cultural Practices and Their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi*, 2006.

The Gender Equality Act (GEA) was enacted in 2013 to "promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters."[8]

The courts have the power under the Constitution to interpret, protect and promote people's rights in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.[9] To a large extent, the success or failure of the objectives of the GEA will depend on the Malawi Human Rights Commission[10] and the courts. In assessing the courts' enforcement of the GEA, the following questions should be considered:

1. How have the courts interpreted equality of men and women in integration, influence, empowerment, dignity and opportunities?
2. How have the courts ensured that they provide redress for sex discrimination, harmful practices and sexual harassment?
3. How have the courts provided awareness on the promotion of gender equality?

It should however be noted that the role of courts in interpreting, protecting and enforcing rights and freedoms under the law cannot be separated from political will. The role of political leaders in formulating policy is critical in determining the efficiency and effectiveness of courts. For example, the decision of former President of Malawi Dr. Joyce Banda to appoint five female High Court judges brought the number of female High Court judges to seven.[11] This was a good example to other public service appointing authorities to remove the gender gap in decision-making positions. This is the kind of transformation at the highest level of policy formulation that impacts positively on the rights of women. In a country dominated by customary laws and values it is extremely important that more female judges be appointed to the higher benches to counter the negative cultural practices that filter into decision-making processes.[12]

The GEA requires that public offices must be occupied with no less than 40 percent women and the High Court can be approached to issue a compliance order where a recruiting authority does not comply with this provision during appointment.[13] However, in the Malawi judiciary itself women constitute only 28 percent of judges on the bench.[14] As the adjudicating authority of the GEA, it is imperative that the appointing authority bridges this gap to validate the spirit of the Constitution and the GEA.

8 Act No. 3 of 2013, section 23.

9 Constitution of Malawi, 1994, section 9.

10 GEA, sections 8 to 10.

11 Prior to these appointments, the High Court had two female judges while the Malawi Supreme Court of Appeal had two female justices.

12 For example, the High Court in *Demba v Demba* Civil Appeal No 161 of 2006 (unreported) accepted that customary law allowed a man to divorce his wife is she did not comply with her household duties. See DM Chirwa *Human Rights under the Malawian Constitution* (2011) 231.

13 GEA, sections 11 and 12. "…an appointing or recruiting authority in the public service shall appoint no less than forty percent (40%) and no more than sixty percent (60%) of either sex in any department in the public service."

14 As at December 2016 there were 36 judges in the Supreme Court of Appeal and High Court. Of these only 10 were women (1 in the Supreme Court of Appeal, and 9 in the High Court).

It is also important for the judiciary to put in place deliberate mechanisms that will ensure gender equality. Rather than being an overreach of the court's mandate, judicial activism to right the wrongs against traditionally disadvantaged groups is necessary and commendable. It is no good hiding behind archaic excuses that the 'law has no eyes'. If the legislature thought the law cannot see, it would not have made provisions for affirmative action.

Redress for Sex Discrimination, Harmful Practices and Sexual Harassment

In taking stock of the courts' contribution towards implementation of the GEA, we should consider the extent to which women access the courts. This should include an analysis of the barriers faced by women in accessing justice. Such as assessment can then contribute towards reform in the judiciary and increased access to the courts by women to assert their economic rights. In this respect, the Chief Justice is tasked to make rules and prescribe fees for those approaching the courts under the GEA.[15] This is a further opportunity to ensure increased access to justice for women.

Even when courts provide quick redress for women, few women currently approach the courts. For example, Court Number 3 in the Commercial Court, a division of the High Court registered 40 cases in 2013. Of these, four cases involved female litigants suing or being sued in their personal capacity. Only one case is still pending conclusion. The reason for this pending case is that the lawyers on both sides have not moved the court to prosecute the case since the last document was filed on 20 October 2014. 36 cases were filed in 2014. Of these none involved a woman suing or being sued in her personal capacity. In 2015, 68 cases were registered. Out of these cases six involved women suing or being sued in their personal capacity and they were all concluded. In 2016, as at 30 August, 74 cases were registered out of which six involved women suing or being sued in their personal capacity. One is concluded, and five are pending court appearance within the months of October, November and December 2016. There is no matter pending judgment and of the sixteen cases involving female litigants except for the one in 2013 only five registered in 2016 are awaiting court appearance within three months. Thus, from a registered 218 cases in a period of close to four years, sixteen involved women demanding or defending their economic rights in business, representing seven percent. Of the sixteen, ten cases have been concluded representing a 62 percent completion rate. Of the sixteen cases, seven involved women suing and the other nine were of women being sued.

The Industrial Relations Court and Women's Access to Justice

Courts like the Industrial Relations Court (IRC) have made tremendous inroads to help women access justice through its deliberate policies of simple and straightforward procedures, minimum registration fees, speedy disposal of cases, and an ethos of "women first". Furthermore, the Industrial Relations Court has been able to improve court access to many disadvantaged persons, including women, by considering cases from a human rights perspective and maintaining the

15 GEA, section 22.

supremacy of substance/facts over technicality. A case should not fail because of a technicality, it is the substance of the matter which is critical. Judges ought to prioritise facts and not make decisions in a vacuum when issues of human dignity are at stake.

However, whilst the IRC has issued progressive judgments on women's economic rights prior to the passing of the GEA, the new Act has not automatically resulted in an increase in the number of women seeking access to justice through the IRC. The table below illustrates how women litigants encountered the Industrial Relations Court in the period between 2012 and 2015. Notably, over the four-year period, the total number of women engaging with the court varied very little and averaged at 8.6 percent of the total number of cases registered.[16] Of significance is the increase in registered cases and in female applicants in the Principal Registry in 2014 and 2015 compared to 2012 and 2013.

Case statistics in the Industrial Relations Court, 2012 to 2015

Registry	**Year**	**Total cases registered**	**Female applicants**	**Female respondents**	**Total female litigants**
Principal	2012	576	65	13	78
Lilongwe	2012	627	9	9	18
Mzuzu	2012	110	11	5	16
Principal	2013	639	50	20	70
Lilongwe	2013	571	6	13	19
Mzuzu	2013	115	19	2	21
Principal	2014	580	88	11	99
Lilongwe	2014	613	3	7	10
Mzuzu	2014	112	7	3	10
Principal	2015	764	81	25	106
Lilongwe	2015	700	4	11	15
Mzuzu	2015	146	15	4	19
TOTAL		**5553**	**358**	**123**	**481**

Research at the IRC shows that the Court has consistently applied the law to give effect to the objectives of the Constitution on the question of non-discrimination and equal access to economic resources. The following cases are examples of situations where the Industrial Relations Court of Malawi provided redress in complaints of discrimination and sexual harassment.

16 In 2012, the total number of cases registered in all registries were 1313, with female litigants comprising 8.5 percent. In 2013, the total number of cases registered were 1325, with female litigants comprising 8.3 percent. In 2014, the total number of cases registered were 1305, with female litigants comprising 9.1 percent. In 2015, the total number of cases registered were 1610, with female litigants comprising 8.6 percent.

HIV discrimination

In *Banda v Lekha*[17] the applicant alleged that she was dismissed from her employment after testing HIV-positive. She was not ill. The Industrial Relations Court held that the reason for the dismissal was discriminatory. Section 20 of the Malawi Constitution prohibits discrimination. The Court noted that although HIV was not included in the prohibited grounds of discrimination listed in the Constitution, given Malawi's international obligations and its commitments under its National AIDS Policy, HIV should be seen as a prohibited ground of discrimination. In this respect, the Court followed the reasoning of the South African Constitutional Court in *Hoffmann v South African Airways*.[18]

Reproductive health

In *Chinkondenji v Malawi Stock Exchange Ltd*[19] the applicant alleged that in the course of her employment she fell ill and had to undergo a gynecological procedure. Upon her return from sick leave she was demoted, although her salary and benefits remained the same. The Court ordered her reinstatement in her previous position and further restrained the employer from psychologically harassing the applicant.

Pregnancy

In *Jumbo v Banja La Mtsogolo*[20] the applicant alleged that her employer admonished her for falling pregnant 'at the wrong time' and dismissed her. The Court ordered her reinstatement.

Maternity leave

In *Chisowa v Ibrahim Cash 'n Carry*[21] the applicant was dismissed immediately after returning from maternity leave. The Court held that a woman is entitled to return to work after maternity leave. She was awarded compensation.

Sexual harassment

Prior to the enactment of the GEA, there was no definition of sexual harassment. As the cases cited below illustrate, the Industrial Relations Court applied definitions used in CEDAW[22] and other jurisdictions.

The International Labour Organisation (ILO) has defined sexual harassment broadly to include instances when the "victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment or promotion," or "when it creates a hostile working environment."[23] Acts of sexual harassment would include "insults, remarks, jokes,

17 [2008] MLLR 338 (IRC).
18 [2000] 21 ILJ 2357 (CC); 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).
19 [2008] MLLR 379 (IRC).
20 [2008] MLLR 409 (IRC).
21 [2008] MLLR 385 (IRC).
22 CEDAW General Recommendation No. 12 of 1989.
23 International Labour Organisation *Labour Legislation Guidelines* (2001) Chapter VII, Sexual Harassment.

insinuations and inappropriate comments on a person's dress, physique, age, family situations", and a "condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses, pinching or assault."[24]

The applicant in *Kamkosi v Office of the Ombudsman*[25] alleged that her employer pestered her with small notes inviting her to join him for dinner and demanding her to work in the evenings. Her response to these advances were non-committal and the Ombudsman ordered that she be removed from his office to a dilapidated office. The Court had to consider whether the employer's conduct was fair and whether it amounted to a constructive dismissal. The Court found that a case of sexual harassment had been established.

In *Nazombe v Malawi Electoral Commission*[26] after a misunderstanding at a lakeshore resort with her boss, the applicant was demoted from her position. The Court found that the demotion was unfair and ordered her reinstatement.

In *Ntaba v Continental Discount House Ltd*[27] the applicant alleged that her dismissal was unfair because she had declined to accompany her boss to a lakeshore resort for a weekend. The Court found that this did not amount to sexual harassment but that in dismissing her the employer did not follow rules of procedure. The respondent was ordered to pay compensation in an amount equivalent to three months' salary. The Court's reason for rejecting the applicant's assertion of sexual harassment was that the incident was isolated and that subsequent to that incident the applicant had committed acts of misconduct.

It is important that cases of sexual harassment are not be condoned. Increasingly courts in other jurisdictions have recognised that, depending on the circumstances, a single incident of sexual harassment is sufficient. This is an important development as the failure to recognise sexual harassment would institutionalise hostile working environments. Many women will be reluctant to approach the courts because they have already lost their jobs and would not want to risk their complaint being dismissed by the courts.

In *Phiri v Smallholder Coffee Farmers Trust*[28] the applicant alleged that during an office party a fellow employee attempted to rape her. Management took a view that the woman had committed an act of misconduct by publicising the incident and her contract was not renewed. The Court found that the employer created a hostile working environment and ordered compensation. The Court found that the employer was in breach of its legal obligation to protect female employees and that the failure of an employer to take an allegation of sexual harassment seriously was a breach of the implied contractual term relating to mutual trust and confidence.

The definition of sexual harassment in the GEA, section 6 is a potential setback in fighting gender-

24 International Labour Organisation *Equality in Employment and Occupation – General Surveys by the Committee of Experts on the Application of Conventions and Recommendations* (1988) para. 45.

25 [2008] MLLR 418 (IRC).

26 [2008] MLLR 460 (IRC).

27 [2008] MLLR 472 (IRC).

28 [2008] MLLR 482 (IRC).

based violence and it is incumbent on the courts to ensure that it does not limit women's access to justice in cases of sexual harassment. It says: "a person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature **in circumstances in which a reasonable person**, having regard to all circumstances, would have anticipated that the other person would be offended, humiliated or intimidated".[29] It is imperative that the reasonable person standard is assessed in the light of the principle of gender equality and the rights to dignity and equal protection enshrined in the Constitution. The reasonable person standard does after all refer to a person who is fair-minded and law-abiding. Following a reasonable person standard that ignores constitutional values and follows attitudes informed by outdated cultural, religious and traditional norms and beliefs will not promote justice.

Sex discrimination

In *Hlongo v Pegas Panel Beaters*[30] the employer did not provide a changing room for the applicant who was a female employee working in a workshop. When she complained about the issue she was dismissed. The Industrial Relations Court found that the dismissal was unfair as the employer could not justify the reason for the dismissal.

Marital status/associative discrimination

In *Jana v Attorney General*[31] the applicant brought an action against the Government of Malawi claiming discrimination. She alleged that she was mistreated and not promoted on the basis of the fact that her sister was married to a prominent cabinet minister who had since fallen out of favour with the ruling party and was in the opposition. The Industrial Relations Court found that a case of discrimination on the basis of gender and marital status had been made out. The Court's ruling depended on associative discrimination where the ground for the discrimination was not based on the female employee's personal characteristics but on her extended family association.

Similarly in *Kaunda v Tukombo Girls Secondary*[32] the applicant and her husband both worked for the respondent. The applicant's husband resigned from his employment with the respondent. The respondent in turn terminated the applicant's employment on account of her husband's resignation explaining that her contract was linked to that of her husband. The Court found that the reason for termination amounted to discrimination based on her marital status and ordered the respondent to pay compensation. In this matter the discrimination was not based on the woman's personal characteristic but on her association with her husband.

In *Mwanamanga v Malamulo Mission Hospital*[33] the applicant's letter of termination read as follows: "the administration in its recent meeting of the 18th January 2000 voted to terminate your services with one month notice on the grounds of marrying a polygamist." The Court faulted the employer and ordered compensation to be paid to the applicant. The Court held that the reason for

29 Emphasis added.
30 Case No. 563/2007 (IRC) (unreported).
31 [2008] MLLR 391 (IRC).
32 [2008] MLLR 446 (IRC).
33 [2008] MLLR 457 (IRC).

termination amounted to an interference with the applicant's right to marry a person of her choice and denied the applicant the right to economic activity through employment.

As seen by the cases above, the IRC has been developing jurisprudence which protects the rights of women. The Court has found that women can enter into contracts in their personal capacity to advance their economic empowerment and that women can marry, establish a family and still earn a living through gainful employment. The IRC endorses the participation of women with HIV in economic development through employment. It also found that procreation is a natural process and that women must not be discriminated against on this basis. The IRC promotes a conducive working environment for women so that they can freely enjoy their economic rights and freedoms by punishing institutions and employers that practice, encourage or condone hostile working environments including cases of sexual harassment.

Awareness on Promotion of Gender Equality

Publicising cases from the IRC and the Commercial Court is a way to raise awareness of the different forms of discrimination faced by women. It is important to inform women who may face work discrimination about the case law outlined above. Knowing which court to go to, what to tell the court and what remedy to expect are essential information if women are actually going to be able to access justice.

Publicising the case law cited above will demonstrate to employers what not to do and how they will be held responsible for any of the prohibited acts. For example, a recent media article reported on an interview of a female train driver who had experienced difficulties carrying out her work when there was derailment in remote areas that have no sanitation facilities.[34] It is necessary for the employer, in this case Central East Africa Railway (CEAR), to seriously consider making arrangements that would reverse the situation by creating or developing conditions that would make the work environment for its female drivers safe, secure, hygienic and conducive to preservation of human dignity.

In addition, such cases provide an opportunity for courts to learn from each other[35] and provide examples on best practices as well as areas that need improvement, such as remedies and admission of evidence.

The examples cited of women accessing the IRC and Commercial Courts illustrate that courts need more support to assist it to broaden access to justice and ensure that more cases can be adjudicated upon.

The Malawi Human Rights Commission should also work alongside the courts because it has the mandate to enforce the provisions of the GEA. As cases are adjudicated, judgments delivered and holdings publicised, awareness is raised.

34 The female driver was featured in one of the weekend papers in Malawi.

35 The IRC and Commercial Court are highly specialised courts and their officers gain experience through targeted, on the job training.

Conclusion

Most of the barriers to women's access to economic rights and justice can be removed through political will, transformation of people's mindsets and attitudes, institutional reforms and inclusiveness. The courts have an important role to play in ensuring that the vision of gender equality enshrined in the Constitution is achieved in practice. The Constitution provides that gender equality shall be achieved through "full participation of women in all spheres of Malawian society on the basis of equal opportunities with men; the implementation of the principles of non-discrimination and such other measures as may be required; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property."[36]

Malawi is tasked with implementing the 2030 Agenda for Sustainable Development. Goal 16 of the Sustainable Development Goals aims to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Critical to achieving sustainable development is the recognition of the economic rights of women and their equal participation in formal and informal economies. The role of the courts in enforcing the GEA and in upholding the economic rights of women is an important part of achieving sustainable development. It requires that courts develop specific measures to address the economic, social and cultural barriers faced by women in accessing the courts and it further requires the courts to appreciate the barriers faced by women in the workplace when determining cases.

Many of the Industrial Relations Court cases discussed in this paper speaks to the targets under Goals 16 of the Sustainable Development Goals. For example, target 16.1 focuses on the reduction of all forms of violence. Sexual violence and sexual harassment within the workplace can be reduced if courts send a clear message that there will be no impunity for violence against women in any sphere of society. Target 16.3 of Goal 16 focuses on the promotion of rule of law and ensuring equal access to justice for all. As illustrated in this paper much work remains to ensure increased access to the courts for women. In this respect, it is important that indicators on access to justice are disaggregated and that discrepancies in access between men and women are analysed and addressed through concrete measures. Target 16.10 seeks to ensure public access to information and protection of fundamental freedoms in accordance with national legislation and international agreements. The Gender Equality Act is one example of national legislation that should be actively enforced to protect fundamental freedoms and address pervasive forms of discrimination. In addition, public information on the courts system and other complaints mechanisms available to assert one's rights are a critical component of access to information. Here the courts too have an important role to play.

36 Constitution of Malawi, 1994, section 13(a); see also section 14 "The principles of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution."

BEYOND SYMBOLISM AND RHETORIC: THE ROLE OF THE LEGAL COMMUNITY IN ADVANCING ACCESS TO JUSTICE AND DEVELOPMENT FOR PERSONS WITH DISABILITIES

Chipo Nkhata,[1] *Johnson Jasson*[2] *and Annabel Raw*[3]

Introduction: Accessible Justice for Sustainable Development

People with disabilities in Southern Africa face exclusion and discrimination in many areas of life. Disability is a development issue. It is both a cause and result of poverty; research shows that people with disabilities and their families are more likely to experience socio-economic disadvantages.[4] Unfortunately, the justice system is a microcosm of these forms of discrimination and exclusion.

The language of the Sustainable Development Goals (SDGs)[5] make repeated reference to the ideas of equality and non-discrimination, acknowledging the vital link between equal inclusion and the sustainability of development. Sustainable Development Goal 16 aims to promote just, peaceful and inclusive societies. Targets under Goal 16 speak to promoting "equal access to justice for all" and the objective to promote and enforce non-discriminatory laws and policies.[6] Goal 10 requires reduced inequality within nations. Targets of this goal include empowering and promoting the social, economic and political inclusion of all, irrespective of disability or other status, and ensuring equal opportunity and reducing inequalities of outcome, including by eliminating discriminatory laws, policies and practices.[7]

Although the concept of "access to justice" has no single accepted meaning, a number of elements can be identified as relevant in determining the extent to which a justice system is accessible. Some of these are:

a) A conducive legal framework;
b) A population that has sufficient legal knowledge;
c) Readily available legal advice and representation;
d) The presence of and access to justice institutions;
e) legal procedures; and
f) Enforceable solutions.[8]

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4 World Report on Disability World Health Organisation and the World Bank (2011).

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

6 *Id* targets 16.3 and 16.b.

7 *Id* targets 10.2 and 10.3.

8 "Access to Justice, Equality under the Law and Women's Rights: Participants Training Packet" ABA Rule of Law Initiative (2014) 9.

In this paper, we argue that the legal community has an obligation and an opportunity to guarantee dignity and equality to persons with disabilities. Lawyers and judges should take practically meaningful steps to improve the justice systems of our region and, in this way, contribute to sustainable development. We begin by examining national, regional and international commitments in Southern Africa to non-discrimination against persons with disabilities and the obligation on lawyers and the judiciary to promote access to justice. We proceed to consider some examples of access-to-justice restrictions and opportunities in the region. We look specifically at physical access to courts and legal proceedings, legal capacity restrictions, restrictive rules and practices of courts, the provision of pro bono legal services, challenges faced by lawyers with disabilities, and how support institutions can be held to account. We aim to outline things the legal community should be doing to advance access to justice for persons with disabilities.

Non-Discrimination against Persons with Disabilities

The human rights of persons with disabilities within Southern Africa are recognised and affirmed in constitutions, international treaties and regional human rights laws. Public and private actors are legally obliged not to discriminate against persons with disabilities and to uphold their human rights to equality before the law and to human dignity.

International and regional law

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) enjoys significant recognition in Southern Africa. The CRPD has been ratified or acceded to by all States in the Southern Africa Development Community (SADC) except for Botswana. Respect for inherent dignity, individual autonomy and non-discrimination are amongst the foundational principles in the CRPD.[9]

Article 1 of the CRPD, which describes the purpose of the Convention, states that:

> "Persons with disabilities **include** those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[10]

This understanding of "persons with disabilities" is open-ended, and should not be used as a limiting principle for what is understood as a "disability". This expansive meaning is signalled through the use of the word "include". Furthermore, the provision acknowledges a social model of disability. This understanding of disability does not frame it as a medical condition measured against social standards of "normalcy", but rather as representing the interaction between people living with impairments and environments that includes physical, attitude, communication and social barriers that prevent their equal participation in society.

The African Charter on Human and Peoples' Rights (Banjul Charter)[11] does not list disability as

9 CRPD, article 3.

10 Emphasis added.

11 Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter") CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

explicit grounds of prohibited discrimination, but frames the prohibition against discrimination broadly and in open-ended language.[12] It recognises the equality of "every individual" before the law[13] and links the recognition of every individual's legal status to the right to respect for a person's inherent human dignity.[14] Article 18(4) makes express mention of the right to "special measures" for persons with disabilities "in keeping with their physical or moral needs".[15] The African Commission on Human and Peoples' Rights (ACHPR) has applied the prohibition against discrimination and the right to equality before the law to persons with disabilities in a case concerning persons with mental disabilities in the Gambia.[16] In February 2016, the African Commission adopted a Draft Protocol to the Banjul Charter on the Rights of Persons with Disabilities in Africa.[17] The Draft Protocol details the rights of persons with disabilities, contextualising to Africa provisions from the CRPD. It will now be subjected to the treaty-making process of the African Union, opening it to ratification by Member States.

Constitutional and legislative protections

In some Southern Africa countries, the rights of persons with disabilities are expressly protected in the constitution. For example, the non-discrimination provisions of constitutions in South Africa,[18] Swaziland,[19] and Zimbabwe[20] expressly include disability as a prohibited grounds of discrimination. In Zambia, the definition of "discrimination" in the Constitution, includes disability as a grounds of discrimination.[21] Special protections in the provision of services and to advance the interests of persons with disabilities are explicitly guaranteed in the constitutions of the Democratic Republic of the Congo[22] and the Seychelles.[23]

In contrast, some constitutions in Southern Africa do not recognise disability as an *explicit* prohibited ground of discrimination. However, the language of their non-discrimination provisions are typically open-ended, allowing room for courts to interpret the prohibition on discrimination as inclusive of other grounds, including disability. For example, in Botswana, the Constitution does

12 *Id* article 2, "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status" (emphasis added).

13 *Id* article 3.

14 *Id* article 5.

15 The linking of disability rights with the rights of the "aged" in this provision has been criticised as a problematic conflation of issues. See H Combrinck "Disability rights in the African regional human rights system during 2011-2012" (2013) 1 *African Disability Rights Yearbook* 361.

16 *Purohit and Another v The Gambia* AHRLR 96 (ACHPR 2003).

17 "Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa" ACHPR (2016) available at: http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf (last accessed: 24 November 2016).

18 Constitution of South Africa, 1996, section 9.

19 Constitution of Swaziland, 2005, sections 14(3) "a person of whatever…disability shall be entitled to the fundamental rights and freedoms of the individual" and section 20 "All persons are equal before and under the law...a person shall not be discriminated against on the grounds of…disability."

20 Constitution of Zimbabwe, 2013, sections 22, 56, and 83.

21 Constitution of Zambia, as amended (Act 2 of 2016), article 266.

22 Constitution of the Democratic Republic of Congo, 2006, articles 45 (access to education) and 49.

23 Constitution of Seychelles, 1993, article 36: "The State recognises the right of…the disabled to special protection and… undertakes…to make reasonable provision for improving the quality of life and for the welfare and maintenance of the… disabled…[and] to promote programmes specifically aimed at achieving the greatest possible development of the disabled."

not include disability as a listed prohibited ground of discrimination but courts have repeatedly affirmed that the grounds of discrimination are open-ended. The Botswana Court of Appeal has particularly referred to persons with disabilities as an example of a category of persons against whom discrimination would be unjust and inhuman, who "*should have been* included in the definition" of discrimination.[24] In Tanzania, the Constitution also does not explicitly prohibit discrimination on the basis of disability. However, there is a coming referendum on a proposed new Constitution which prohibits discrimination on the basis of disability in article 52.[25] This was the result of concerted efforts by disability movement pressure groups after failure to have it mentioned in the Constitution when such opportunity arose during the 1990 constitutional amendment process.

Despite the non-explicit nature of the constitutional protection of persons with disabilities from discrimination in these constitutions, other provisions establish a supportive interpretive framework. For example, section 15 of the Botswana Constitution embodies *substantive* notions of equality and the Namibian Constitution under section 23 embraces the principle of affirmative action.[26] These constitutional principles make room for "reasonable accommodations" for persons with disabilities in light of their varied and different needs in order to achieve meaningful equality.[27]

The Legal Community's Obligation to Promote Access to Justice

> "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."[28]

It cannot be denied that persons with disabilities have legal rights to equality, freedom from discrimination, access to justice, and human dignity. It is also clear that domestic legislatures help further protect the rights of persons with disabilities through laws focused on the particular needs of these citizens. These constitutional and legislative obligations extend to the courts and legal profession.

Many constitutions in Southern Africa impose legal obligations on all spheres of government, including the judiciary. A number of constitutions further recognise the binding nature of constitutional obligations on individuals and even corporate entities. Section 2(2) of the Zimbabwe Constitution states, for example:

24 *Attorney General v Dow* (1992) BLR 119 (CA) 147 (emphasis added).

25 The draft Constitution is available in Kiswahili at http://www.sheria.go.tz (last accessed: 14 November 2016).

26 Constitution of Namibia, 1990, section 23(2) "Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service."

27 See CRPD, article 2 "'reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

28 CRPD, article 13(1).

> "The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

By further example, in Zambia, the Constitution mandates that, in exercising judicial authority, the courts shall be guided by the principle that "justice shall be done to all, without discrimination".[29] In Swaziland, section 30 of the Constitution guarantees persons with disabilities the right to "respect and human dignity" and mandates that "the government and society shall take appropriate measures to ensure" their achievement of their physical and mental potential.[30]

In Lesotho, the Law Society Rules (2012) state that the Law Society and its members "shall at all times assist and protect the courts to ensure their independence, impartiality, dignity, *accessibility* and effectiveness."[31]

The judiciary and lawyers, as officers of the courts, may function as gate-keepers to the justice process. In recognising that human rights obligations toward persons with disabilities apply to the judiciary and legal practitioners as individuals, we need to think, in practical terms, what we can do as a legal community to promote access to justice. We offer some ideas below.

Physical Access to Courts and Proceedings

> "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas."[32]

Physical obstructions and inadequate accommodations to ensure people with disabilities are able to access court buildings, legal information, and legal proceedings are significant barriers for persons with disabilities to access justice. For example, persons with mobility constraints, or visual or hearing impairment may have difficulty getting into and around court buildings, participating in court proceedings and finding out necessary information. Provisions in law and policy, applicable to civil and criminal proceedings, can however support the role that the legal community can play in overcoming these barriers.

In Lesotho, the Buildings Control Act requires that all public buildings accommodate physical access for persons with disabilities.[33] In Mozambique, the Constitution obliges the State to promote priority treatment of disabled citizens by both public and private services and to promote easy access to public places.[34] National laws further require the construction, amendment and/or maintenance of structures allowing for persons with physical disabilities to access premises.[35]

29 Constitution of Zambia, as amended (Act 2 of 2016) article 118(2)(a).
30 Emphasis added.
31 Law Society Rules (Lesotho Legal Notice No. 50 of 2012) rule 15(4) (emphasis added).
32 CRPD, article 9(1).
33 Building Control Act (No. 8 of 1995) section 19(2).
34 Constitution of Mozambique, 2004, section 125.
35 Decree No. 53/2008 (Laws of Mozambique).

In Namibia, the role of the Ministry of Justice in advancing access to justice for persons with disabilities is meaningfully framed in the National Policy on Disability, a schedule to the National Disability Council Act.[36] In section 4.3.11 of the National Policy, it is noted that the Ministry has:

> "a vital role of ensuring that disabled people are given advice about the Namibian legal system generally and information on how to seek and qualify for legal aid. This information should also be readily available to people with sensory loss. For example, for those who are blind or partially sighted information should be available in Braille and in large prints respectively. This information should also be made available to deaf and hard of hearing people, especially when requiring legal assistance. Furthermore, trained sign language interpreters should be made available in courts for deaf people who use this form of communication."

In addition, fair trial rights for persons who are criminally accused typically require that accused persons be tried in a *language* they understand. For example, the Malawi Constitution states that every accused person has the right:

> "to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands".[37]

Unlike Malawi's constitutional right to legal representation, the enjoyment of the right to be tried in a language one understands at State expense is not qualified by the requirement that the State fund the right's realisation only when "in the interests of justice".[38]

The CRPD defines "language" as including "spoken and signed language and other forms of non-spoken languages." The CRPD defines "communication" as including:

> "languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human–reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology".[39]

Legal provisions that provide for communication accessibility should be interpreted broadly when applied to persons with disabilities. Legal practitioners and the courts have an obligation to consider a wide variety of communication tools and aids to guarantee effective access to justice for persons with physical and mental disabilities.

Lawyers and judges who use judicial buildings and who engage in court proceedings every day are well-placed to verify that accessible structures and resources are put in place, to monitor their maintenance in consultation with persons with disabilities, and to ensure that where parties require accommodations, that these are sensitively, timeously and meaningfully sought. There is a need to make members of the legal profession and the judiciary conscientious of their role in this regard.

36 No. 26 of 2004.

37 Constitution of Malawi, 1994, section 42(2)(f)(ix).

38 *Id* section 42(2)(f)(v).

39 CRPD, section 2.

Legal Capacity and Restrictive Rules and Practices in Litigation

> "[P]ersons with disabilities have the right to recognition everywhere as persons before the law."[40]

State parties to the CRPD undertake to recognise that persons with disabilities "enjoy legal capacity on an equal basis with others in all aspects of life"[41] and to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[42] However, in many countries in the region, persons with disabilities are denied testimonial capacity; this is particularly true of persons with mental and intellectual disabilities. In addition, legislation and rules of court often limit any form of legal capacity for persons with disabilities. This prevents them from accessing justice independently, regardless of their capacity to give informed consent to legal practitioners to pursue their legal interests. For example, in Botswana, the High Court Rules state that:

> "A person under disability may not bring, or make a claim in, any proceedings except by his guardian, and may not defend, make a counter-claim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on him expect by his guardian *ad litem*."[43]

"Person under disability" is defined to include persons with both mental and physical disabilities.[44]

In States like South Africa[45] and Zimbabwe,[46] the criminal procedure rules mandate a court to enquire into the mental state of a witness whose competence to give evidence is brought into question. It has been argued that the approaches in the two countries to the assessment of testimonial competence is deficient "because it treats incompetence as inherent in the individual thereby overlooking the impact of the environment on the competence and credibility of a witness."[47]

The constitutionality of these kinds of provisions are questionable on many bases, including provisions guaranteeing equality before the law, the right to a remedy, and the rights guaranteed to all accused persons. Courts themselves have frequently stated that justice should not be hindered by undue technicalities in procedure, particularly when parties seek to assert fundamental rights. In Zambia, this is stated in the Constitution as an obligation on the courts that "justice shall be administered without undue regard to procedural technicalities".[48] Further order 3 rule 2 of the

40 CRPD, article 12(1).

41 *Id* article 12(2).

42 *Id* article 12(3).

43 Rules of the High Court (Statutory Instrument No. 1 of 2011) order 7, section 2(1).

44 *Id* order 7, section 1 "'patient' means a person who, by reason of age, infirmity, disability or mental disorder, is incapable of managing and administering his property and affairs; 'person under disability' means a person who is under the age of 21 years or a patient".

45 *S v Katoo* (2004) ZASCA 109 (interpreting Criminal Procedure Act, 51 of 1977, section 194).

46 *S v Ndiweni* S-149-89 (interpreting Criminal Procedure and Evidence Act, Chap 9:07 of the Laws of Zimbabwe, section 246).

47 D Msipa "How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe" (2015) 3 *African Disability Rights Yearbook* 63, 69.

48 Constitution of Zambia, as amended (Act 2 of 2016) article 118(2)(e).

High Court rules of Zambia[49] empowers the courts to make any order in the interest of justice. It can be argued that the power of courts to adjust rules and procedures to ensure the equitable administration of justice, including reasonable accommodations for persons with disabilities, is founded in the courts' inherent jurisdiction to determine their own procedure and in the premise of the court's independence in administering justice.

In the light of these powers and obligations, courts should realise the right to legal capacity by adapting procedures appropriately to ensure that environmental factors do not interfere with persons with disabilities' ability to exercise that capacity. Instead of assuming, for example, that a person with a disability is incapable of giving evidence or understanding legal proceedings, simple efforts such as allowing for support persons to accompany witnesses or being flexible as to the manner in which witnesses communicate evidence, can enable persons with disabilities to enjoy their rights to access courts and to exercise legal capacity without undermining the fair administration of justice.

In some States, particular legislative provisions have been enacted to ensure the availability of reasonable accommodations in judicial proceedings for persons with disabilities. For example, in Zambia, the Persons with Disabilities Act,[50] requires that in realising the right to legal capacity on an equal basis with others:

> "(2) The Judicature shall take necessary means to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.
> (3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person with disability to access justice and participate effectively in proceedings."[51]

In Namibia, in terms of the Criminal Procedure Amendment Act,[52] provision is made for courts, on application by any party, to make special arrangements for "vulnerable witnesses", including relocating the trial to a different location, rearranging the furniture in the court room, directing that certain persons sit or stand in certain locations, allow for a "support person" to accompany the witness while giving evidence, and to take "any other steps" to facilitate a vulnerable witness to give evidence.[53] "Vulnerable witnesses" is defined to include persons "who as a result of some mental or physical disability" could possibly be intimidated by the accused or another person, or "for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence."[54]

While inherent jurisdiction of the courts to regulate their own procedure should empower the courts to make these types of accommodations in the absence of particular legislative and regulatory frameworks, the existence of available procedures for accommodations for persons with disabilities

49 Rules passed pursuant to High Court Act (Chapter 27 of the Laws of Zambia) and Subordinate Court Act (Chapter 28 of the Laws of Zambia).

50 No. 6 of 2012.

51 *Id* section 8(2) and (3).

52 No. 24 of 2003.

53 *Id* section 158A.

54 *Id* section 158A(3)(d).

ensures that such procedural accommodations are more readily accessible and navigable by courts and legal practitioners. Ensuring that procedural regulations, practice directives and rules are developed, can avoid the burden of case-by–case innovation that would otherwise fall on litigants and courts. Even so, the need for particular procedural accommodations should be determined by a support person to the litigant or witness with disabilities; working either with or without the help of a professional. Ideally, this support person would be independent but would work closely with the legal representative of the litigant or witness with disability as well as the courts to ensure that the necessary accommodation are made.

Pro-Bono Legal Services

The provision of pro bono services for persons with disabilities cannot be overemphasised. To ensure effective access to justice, the legal profession and justice institutions need to make a deliberate effort to provide legal advice, legal support and legal representation to persons with disabilities and ensure that these services enable persons with disabilities to use justice institutions to obtain remedies. It is important to note that:

> "pro bono legal services go beyond legal representation in court. They empower the indigent to know their legal and other rights and assert them. This equally enables lawyers to use the law as an instrument of social order and justice, and to identify themselves with the people."[55]

The practice of lawyers offering pro bono legal services is not novel in the region. In some jurisdictions, legal practitioners are required to provide mandatory pro bono services to renew annual registrations. Furthermore, many law societies and bar associations in developing countries aspire to use the law to contribute to the development of their nations. For example, one of the objectives of the Law Association of Zambia is to "contribute effectively to the development of law as an instrument of justice and social change."[56]

For many lawyers, providing legal services to persons with disabilities can be an affront to our own ignorance – an uncomfortable prospect for persons versed in a profession steeped in habit and tradition and established precedent. There are valuable sources of knowledge to overcome this ignorance. First, persons with disabilities themselves are the most knowledgeable advocates for their needs. Service organisations, community-based organisations and non-governmental organisations working with persons with disabilities may also offer useful guidance to lawyers wishing to learn more about appropriate client services. Furthermore, a number of law schools in the region have disability rights projects where expertise is being developed. For example, the University of Pretoria's Centre for Human Rights is coordinating the Disability Rights Law Schools Project in Africa. This project brings together faculties from many law schools, including the University of Botswana, the University of Zambia, Midlands State University in Zimbabwe, Eduardo Mondlane University in Mozambique, Chancellor College in Malawi, the University of Dodoma in Tanzania, and the University of Namibia. These law schools are seeking to deepen understandings and research on disability issues, to develop disability advocates and to conduct

55 Chipo Mushota Nkhata "The Benefits of Developing a Pro bono Culture; A Call for Enhanced Effort in the Provision of Free Legal Services in Zambia" paper presented at the Law Association of Zambia Annual Law Conference (2014) 3.

56 Law Association of Zambia Act, Chapter 31 of the Laws of Zambia, section 4.

outreach. They can be an important source of information and prospect for collaboration for lawyers in private practice.

The practice of pro bono legal services should be inculcated in law students, legal practitioners, and the legal community more broadly to improve effective access to justice by persons with disabilities.

Challenges Facing Lawyers with Disabilities

There has been a practice in some countries for lawyers with disabilities to assume a leading role in facilitating other persons with disabilities to access court and other bodies dispensing justice. This is well documented in Tanzania where two firms of advocates run by lawyers with disabilities are known to frequently represent persons with disabilities. Such interventions are in addition to other legal aid providers.

However, lawyers with disabilities encounter numerous challenges in discharging their daily activities. One of the major challenges and obstacles is the incursion of extra expenses to accomplish daily tasks. Persons with disabilities typically need special devices or the assistance of fellow human beings, all of which raises operating costs. Generally, to do the same assignment as an able-bodied lawyer, lawyers with disabilities need additional income. It follows that with the same level of income, a disabled lawyer may be able to do far fewer things, and may be seriously deprived of the capabilities that he or she is able to provide. Further, lawyers with disabilities have other continuous needs, such as lifelong medicines, hearing aids, accompanying assistants, or skin lotion.

Lawyers with physical disabilities may also have to pay for adaptations to the offices, higher rent offices on generally accessible ground floors, or individualised cars. These can be necessities which would be considered a luxury for a non-disabled lawyer. Further, lawyers with disabilities often have to pay more for some basic daily needs. For instance, people with limited mobility may have to use the nearest shops, rather than the cheapest shops.

Therefore, lawyers with disabilities have higher operating costs that make their legal practice less competitive than their colleagues in the market. It is therefore suggested that in a bid to increase the level of persons with disabilities' participation in the justice system and access to justice, the legal community should consider devising measures to remove obstacles which make it difficult for them to practice law. The measures envisaged may include, but are not limited to, waiving practicing fees and registration fees together with other contributions to the bar and other statutory bodies. This could lead to just and favourable conditions of work for lawyers with disabilities, which in turn may promote equal opportunities and equal income for work of equal value compared with their able-bodied colleagues. In turn, lawyers with disabilities will be in a better position to offer assistance to persons with disabilities in the community.

Holding Support Institutions to Account

In some Southern African jurisdictions, specific bodies are established under law to advance the rights of persons with disabilities. For example, the Zimbabwe Disabled Persons Act[57] establishes the National Disability Board. The Board's functions include the formulation and development of measures and policies to ensure persons with disabilities have "full access" to social services, are able to lead independent lives, and to prevent discrimination against persons with disabilities.[58] To fulfil its functions, the Board has broad powers "to do all things that are necessary or convenient to be done for…the performance of its functions".[59] Its powers include issuing adjustment orders to ensure persons with disabilities have access to premises and services ordinarily provided to members of the public.[60] The orders take the form of a direction to the owner of a building or to a service provider to ensure reasonable access to the building and services for persons with disabilities.[61] Non-compliance with adjustment orders is a criminal offence under the Act.[62]

The legal community is in a good position to ensure these bodies remain informed about restrictions to accessing justice for persons with disabilities, and that they are held accountable to performing their statutory functions with respect to access to justice.

Conclusion: Beyond Symbolism and Rhetoric

In South Africa's Constitutional Court building, design elements were thoughtfully incorporated in an effort to create an inclusive and inviting atmosphere for persons with disabilities who use the building. On the 8 metre high timber doors, engravings representing the 27 rights in the Bill of Rights include sign language symbols amongst the eleven official languages. The handle of the door is marked with braille. Ramps are included directly alongside stairs into and inside of the building.

Stacey Vorster, the art curator of the Court, acknowledges the importance of these gestures for persons with disabilities but questions whether these "triumphalist symbolic moments" translate to meaningful access, inclusion and dignity for persons with disabilities.[63] She points out that while there are ramps to access the entrance of the court building, there is no prioritised access to the building for staff with disabilities and questions whether the materials and construction of the available ramps actually serve bodies with different abilities. She gives the further example of how the railing in the judges' chambers was not designed for persons with visual impairment. Only through the use of these rails by Justice Yacoob (a judge of the Court between 1998 and 2013 who is blind) was it understood that the rails needed to be adjusted. Access is not a realistic prospect for persons with disabilities without their inclusion in the process.

57 Cap. 17:01 of the Laws of Zimbabwe.

58 *Id* section 5(1).

59 *Id* section 5(2).

60 *Id* section 7.

61 It is noted that the Board may not issue an adjustment order to public healthcare institutions or educational institutions without the consent of the relevant Minister responsible for the institution, however no such exclusion is made with respect to judicial institutions or legal bodies. Disabled Persons Act, section 7(7).

62 Disabled Persons Act, section 7(10).

63 Interview, 11 October 2016, Johannesburg, South Africa.

Vorster questions further to what extent the design of the building accommodates persons with invisible disabilities, persons whose physical and mental disabilities are not immediately perceptible. For example, the Court building was symbolically built on the grounds of a notorious prison from the apartheid and colonial era and incorporates design and art features of the prison in the new court building to acknowledge the historical context of South Africa's constitutional democracy and its transition from an oppressive past. And yet for survivors of political persecution and violence, entering the site can be an intimidating and re-traumatising experience. How do people with mental and intellectual disabilities experience these features when using the building? Even in these most well-intended gestures of the aesthetics of a space for justice, the human rights of persons with disabilities may be neglected.

Ensuring access to justice for persons with disabilities requires us to move beyond symbolism and rhetoric and to invite change into our habits of thought and practices as a legal community. The inclusion of persons with disabilities in the judiciary, in legal practice and scholarship, and as clients, is indispensable to creating systems of justice regionally that give substance to our commitments to equality before the law. Humbling our assumptions about communication, about the unequal effects of our environments and actions on peoples' capacities to participate, and about what people with disabilities need, are important first steps in the right direction. As discrimination in all areas of life continue to drive the relationship between disability and poverty, the promise of the law and legal process to enforce fundamental rights is vital for persons with disabilities to break this cycle. Access to justice for persons with disabilities is in this way not only a fundamental right to which the legal community must contribute, but is also a vital contribution to sustainable development.

PROTECTING RURAL ZAMBIAN COMMUNITIES FROM DISPLACEMENT RESULTING FROM LAND-BASED INVESTMENT

Brigadier Siachitema[1]

Introduction

In Zambia, displacement of rural communities from their land, with little or no compensation, represents one of the negative impacts of land-based investments. This includes displacement of rural communities from the land they depend on for growing food, building shelters, fetching water, grazing their animals, and for accessing land-based resources. Investment resulting in displacements of rural communities without providing due compensation or leading to actual economic improvement is contrary to "alternative land-based" models of compensation. The Nairobi Action Plan on Large Scale Land-based Investment in Africa[2] resolved to promote land-based models that:

> "[A]im to increase agricultural productivity, maximize opportunities for Africa's farmers, with special attention to smallholders and minimize the potential negative impacts of large-scale land acquisitions, such as land dispossession and environmental degradation, in order to achieve an equitable and sustainable agricultural and economic transformation that will ensure food security and development."[3]

When rural communities are displaced to pave the way for land-based investment, the main loss is their land, which is both a basic necessity and the primary basis for a sustainable livelihood.[4] The members of these communities become more vulnerable because of the new fragility of their livelihood.[5] Their agriculture productivity drastically decreases because of the loss of quantity or fertility of their land. The opportunity for smallholder farmers, the majority of whom are women, is significantly minimised and their poverty and food insecurity is substantially worsened. The future prospects for their school-going children become bleak as they relocate to new places without infrastructure or where basic services such as schools and clinics are far away.

In most cases, rural communities are not consulted before the decision leading to their displacement is made. It is often the case that they discover something is going on when they see government officials surveying their land or investors moving onto their land with construction, earth moving or exploration machines. They are only informed after they inquire that their land has been allocated for land-based investment and that they will have to be relocated or offered compensation. When

1 Women's Land and Property Rights Programme Lawyer, Southern Africa Litigation Centre; legal practitioner in Zambia; LL.B (University of Zambia), LL.M and Certificate in Arbitration and Dispute Resolution (Georgetown University).

2 Adopted at the High Level Forum on Foreign Direct Investment in Land in Africa in Nairobi, Kenya (4-5 October 2011).

3 *Id* 2.

4 See *Mazarura v Kativhu* (HC 6416/12) ZWHHC 287 (2014).

5 Zambia National Resettlement Policy (2015) 11.

the relocation or compensation offer is made, the poor and mostly uneducated communities do not receive independent advice concerning the terms of the resettlement or compensation. Frequently, by the time civil society organisations, mostly based in urban areas, learn about the displacements, communities have already given away their main asset and source of sustainable livelihood, with a thumb print, almost for free to the land-based investor or the government.

The aim of this paper is to illustrate how the rule of law and access to justice can be promoted and attained by using the courts and existing legal framework to protect the customary land rights of poor rural communities.

Overview of the Relevant Legal Provisions on Customary Land Rights in Zambia

In Zambia, all land is vested in the President in trust for the people of Zambia.[6] This land is classified as State land or customary land.[7] Section 7 of the Lands Act[8] specifically provides for the recognition and continuation of customary land holdings, stating that:

> "(1) Notwithstanding subsection (2) of section thirty-two but subject to section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognised and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.
>
> (2) Notwithstanding section thirty-two, the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law."

Clearly, the amended Constitution and the Lands Act recognise customary land rights. These rights, just like those applicable to State land, can only be taken away or lost to pave the way for land-based investments in accordance with the legal requirements set out by law. Statute, judicial precedents, common law,[9] principles of equity,[10] and customary law establish these requirements.

6 See Lands Act (29 of 1995), section 3(1) "Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia."

7 Article 254(1) of Zambia Constitution (Amendment)(2 of 2016).

8 Lands Act (29 of 1995).

9 See English Law (Extent of Application] Act (4 of 1963) section 2.

10 See High Court Act (41 of 1960) section 13 "…in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail"; see also *Banda and Nyanje v Mudenda* (2010) HP/A39 (Unreported) Justice Dr P Matibini, SC: "[t]he second, and central question in this appeal is simply this: who is entitled to own the property in dispute: in answering this question I will provide the backcloth of the germane law. It is instructive to note that in terms of section 13 of the High Court Act, I am required to administer law, and equity concurrently. In this particular case, the resolution of the dispute at hand, largely imports principles of equity."

Failure to Follow Mandatory Procedure Requirements Renders Compulsory Taking of Customary Land for Land-based Investment Illegal and a Nullity

The taking of a property interest or property right by the State without the owner's consent amounts to a compulsory acquisition. In Zambia, compulsory acquisition is governed by Article 16(1) of the Constitution, and section 3 of the Lands Acquisition Act.[11] Article 16(1) of the Constitution reads:

> "Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."

Section 3 of the Lands Acquisition Acts provides "[s]ubject to the provisions of this Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description." Further and most important, section 5 of the Land Acquisition Act provides that:

> "(1) If the President resolves that it is desirable or expedient in the interest of the Republic to acquire any property, the Minister shall give notice in the prescribed form to the persons interested in such property and to the persons entitled to transfer the same or to such of them as shall be after reasonable inquiry be known to him.
>
> (2) Every such notice shall, in addition, invite any person claiming to be interested in such property to submit such claim to the Minister within four weeks of the publication of the Gazette notice in terms of section seven."

Under sections 5 and 6 of the Lands Acquisition Act, the State cannot compulsorily acquire property, or an interest in or right over property, without giving the prescribed notice of its intention to do so in addition to the notice to yield possession. Before publication in the Gazette, the notice must be served either personally on the interested person, left at his usual place of residence or business, or with the current occupier of the property in the owner's absence.[12] If the acquisition moves forward, the State must pay adequate compensation for the acquired property.[13] For land in rural areas, compensation is payable if the land is used for agricultural or pastoral purposes because it is deemed developed and unitised.[14] The compensation may be paid in monetary form or in the form of alternative land.[15]

The State is required to strictly follow the law and procedure for compulsory acquisition of property set out above. This is illustrated in the case of *Mpogwe Farms Limited (in Receivership) and Others*

11 Lands Acquisition Act (2 of 1970).

12 *Id* section 7(1); see also *Wise v Attorney General* (1991) ZMHC 12 "the notices of intention to acquire property and to yield up possession…are irregular and unlawful and therefore nullified".

13 Lands Acquisition Act (2 of 1970), section 10.

14 *Id* section 15(3).

15 *Id* section 10.

v Attorney General,[16] in which the Court observed that "[t]he State itself passed the legislation and devised statutory procedure to govern compulsory acquisition of property. For whatever purpose such property is acquired, the State must follow that law and procedure. This is what the Rule of Law entails".[17] In *Zambia National Holdings Limited and Another v Attorney General*,[18] it was held that the President's decision to compulsorily acquire property could be challenged by the landowner both as to its legality and arbitrariness.[19] In the context of rural communities, "interested person" would include not only those in physical occupation but also those enjoying user and access rights to resources for sustainable livelihood.

Compulsory acquisition must be for a public purpose. The silence of the Land Acquisition Act on the question of purposes for which the State may compulsorily acquire property upon payment of compensation does not *per se* give the State a blanket right to compulsorily acquire property without recourse to such a "public purpose". What constitutes public use usually depends upon the facts surrounding the subject.[20] When the facts of a case do not point towards public use, courts can protect rural communities by declaring acquisition lacking a public purpose as null and void. Allusions to employment or taxation generation are insufficient to justify such a lack of public purpose.

Taking over of customary land without following the required procedure is unconstitutional

Courts have established that there can be a compulsory acquisition of property by the State even when it claims to not be acting under the Land Acquisition Act. For example, the State may justify a claim by its power to repossess undeveloped property under the Lands Act.

The case of *Lt General Musengule v Attorney General*,[21] in which the State attempted to repossess the land that was offered to the petitioner on the basis of irregularity, illustrates this. In that case, the Court held that the State's bid amounted to a compulsory acquisition. The Court first reasoned that the acquisition of land could not be justified by possession or re-entry because the petitioner had committed neither fraud nor breached the lessee's covenant. The Court then held that the State did not follow the prescribed procedure for a compulsory acquisition and that the compulsory acquisition was therefore null and void. Equally, the taking of customary land under the guise of an unrelated statutory power which does not even provide for adequate compensation can and should be challenged for being an unconstitutional and unlawful compulsory acquisition. This is because the Constitution only authorises the President to act "under the authority of an Act of Parliament *which provides for payment of adequate compensation* for the property or interest or right to be taken possession of or acquired".[22]

16 2004/HP/0010.

17 *Id.*

18 SCZ Judgment (No. 3 of 1994) ZMSC 30.

19 *Id* 32, "the President's resolve can…be challenged in the courts both as to legality and…arbitrariness".

20 See *Wise v Attorney General* (1991) ZMHC 12, the Court held that the compulsory acquisition of two farms belonging to a private company and subsequent leasing of them to a different private company was not for a public purpose but undertaken with a clear profit motive.

21 (2009) ZR 359.

22 Article 16(1) of the Zambian Constitution 1991 (emphasis added).

Consent to compulsory acquisition must be free, prior and informed consent

Where the State alleges that it obtained the consent of the rural community members to take away their customary land for investment, it must prove that the consent was legally valid and effective. Consent is only legally valid and effective when it is freely given with full knowledge on the part of the community members as to what their rights are and what the result of their consent would be.

In *Mercantile Credit Co Ltd v Cross,*[23] a British case concerning hire purchase agreements, it was held that consent must be full, free and informed. The Court dismissed the appeal after determining that the defendant had been fully informed of his rights and gave full and free consent.[24] This position is similar to that followed in South Africa where the Constitutional Court held that the onus is on the party relying on consent to establish that such consent was given freely, voluntarily and in full knowledge of the rights waived in consequence of the consent.[25]

The common law requirements for free, voluntarily and informed consent illustrated in the above cases is in consonance with the international requirement of "free, prior, informed consent" (FPIC) before disposing or appropriating community resources.[26] For example, in the case of *Mary and Carrier Dan v United States*,[27] the Inter-American Commission on Human Rights (IACHR) stated that the process of fully informed and mutual consent "requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."[28]

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*,[29] the African Commission on Human and Peoples' Right (ACHPR), after noting that the Endorois are "an indigenous community" and a "people", stated that for "any development or investment project that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[30] Similarly, in its *Resolution on a human rights-based approach to natural resources governance*, the ACHPR has called on States to take all measures necessary to "ensure participation, including the free, prior and informed consent of communities in decision making related to natural resource governance".[31] This is also in sync with the Committee on the Elimination of Discrimination against Women's (CEDAW) General Recommendation No. 34 on the rights of rural women,[32] which requires State parties to:

23 (1965) 2 Q.B. 205.

24 *Id* 207.

25 *Mohamed and Another v President of the Republic of South Africa and Others* (2001) ZACC 18, paras. 62 to 64; see also *Laws v Rutherford* 1924 AD 261, 263.

26 See P Tamang "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices" PFII/2004/WS.2/8 (January 2005).

27 Report No. 75/02, Inter-Am. C.H.R. (2002).

28 *Id* para. 140.

29 Communication 276/03 (2009).

30 *Id* paras. 162 and 291.

31 ACHPR Resolution 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (2012).

32 CEDAW/C/GC/34.

> "Obtain the free and informed consent of rural women prior to approval of any acquisitions or projects affecting rural lands or territories and resources, including as related to lease and sale of land, land expropriation, and resettlement. When such land acquisitions occur, they should be in line with international standards, and rural women should be adequately compensated".[33]

Thus, whenever the government alleges that it obtained the consent of the rural community before taking their customary land, it must prove that such consent was free, voluntarily given and after community members had received full information about their rights and the consequences of their consent. In other words, the government must have satisfied the international requirement of free, prior, informed consent. Implicit in this statement is an obligation to obtain consent from each member of the community, including women; not just the chief or headman. If the requirement of free, prior, informed consent, as established under both common law and international law, is not met, the court ought to declare the taking of the customary land a nullity for being a compulsory acquisition without following the required procedure.

Adequate compensation for taking customary land should go beyond the open market value in order to achieve justice

Article 16 of the Constitution guarantees the right to adequate compensation for deprivation of property. Section 10 of the Land Acquisition Act permits the President to give the person deprived of the land, in lieu of or in addition to any compensation, "a grant of other land not exceeding the value of the land acquired". In *Goswami and Another v Commissioner of Lands*,[34] the Supreme Court of Zambia examined adequate compensation for State land. It held that "[o]ur constitution does not countenance the deprivation of property belonging to anyone without compensation", and further stated:

> "The right to compensation was clearly unarguable…the appellant was very clearly entitled to compensation in the sum of K35 million payable by the Government. This is the sum which more approximates the real value of the property and which meets the justice of this case."

For customary land occupied and used by rural communities, only compensation that goes beyond the market value of the land deprived and is based on the totality of the rights and privileges extinguished or negatively impacted by the deprivation or displacement will be adequate and meet the justice of deprivation or displacement. This is in sync with Guiding Principles on Large Scale Land-based Investment in Africa,[35] a continental aspiration that states that:

> "Rights holders need to be appropriately compensated if their rights are to be affected or lost. It is important for compensation to go beyond compensation for land lost to encompass rights and benefits which would have accrued to rights holders by reason of their landholding or customary use, whether individual or collective."[36]

33 *Id* para. 62.

34 SCZ Judgment No. 3 of 2001.

35 "Guiding Principles on Large Scale Land Based Investments in Africa" United Nations Economic Commission for Africa (2014) available at http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf (last accessed: 15 November 2016).

36 *Id* 8.

Compensation should take into account the fact that land, especially for rural communities, is regarded:

> "not simply as an economic or environmental asset, but as a social, cultural and ontological resource. Land remains an important factor in the construction of social identity, the organization of religious life and the production and reproduction of culture. The link across generations is ultimately defined by the complement of land resources which families, lineages and communities share and control. Indeed land is fully embodied in the very spirituality of society."[37]

Because it is difficult to value the social and cultural aspects of the land making it unique and important to the rural communities, only compensation that goes beyond the market value of the land lost would be genuinely adequate and achieve justice. Compensation aimed at merely placing rural communities in a better position than they were before displacement may not be genuinely adequate and may not achieve justice if it fails to take into account the rights and benefits that would have accrued to rural communities by reason of their land holding or customary use. Besides, rural communities may have made a deliberate decision to not exploit their rich land-based resources to improve their quality of life in order to preserve their land-based resources for future generations.

Courts Can Set Aside Unconscionable Agreements

Land-based investors wishing to use customary land require the consent and agreement of the rural communities occupying and using the land. This is an established position under common law, customary law, and international law. Land agreements entered into by rural communities in Zambia can be challenged under the equitable doctrine of unconscionable bargain if:

1. The rural community suffered from a bargain weakness due to poverty, inexperience and lack of independent advice;
2. The investor exploited the bargain weakness in a culpable manner; and
3. The rural community received no or inadequate compensation for giving up their customary land.

The English case of *Fry v Lane*,[38] which involved sales by 'poor and ignorant' persons at considerable undervalued rates and without independent advice is a foundational case examining unconscionable bargains and inequality of bargaining power. Kay J held that a court of equity could set aside the sale in those circumstances. He said:

> "The result of the decision is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction…The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable.'"[39]

37 "Framework and Guidelines on Land Policy in Africa - Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods" United Nations Economic Commission for Africa (2010) section 2.5.1.

38 (1885) 40 Ch. D 312.

39 *Id* 322.

Lord Denning succinctly laid down the proposition in the case of *Lloyds Bank Ltd v Bundy*[40] when he said that:

> "...the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."[41]

In a similar fashion, *Clifford Davis Management Ltd v Wea Records Ltd*[42] held that there is a presumption of invalidity where an agreement, bargained between parties with unequal bargaining power and no independent legal advice, has terms that are manifestly unfair. This is the rule in many common law jurisdictions. In the Canadian case of *Saugstad v McGillivray*[43] the Supreme Court of British Columbia stated:

> "Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to ignorance, need, or distress of the weaker, which would have him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When it has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable."[44]

Australian courts have reached the same conclusion on the equitable principle of unconscionable bargains and inequality of bargaining powers. In *Commercial Bank of Australia v Amadio*,[45] the High Court of Australia set out the three requirements as follows:

> "The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable".[46]

Kenyan courts have also set similar requirements for a claimant to succeed on the basis of unconscionable bargains or inequality of bargaining powers. In *LTI Kisii Safari Inns Ltd and Others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') and Others*,[47] the Court of Appeal for Kenya stated that:

> "This is also an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain

40 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326; this case's treatment of undue influence was cited with approval by the Supreme Court of Zambia in *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others* (SCZ No. 19 of 2007).

41 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 339.

42 *Clifford Davis Management Ltd v Wea Records Ltd and Another* (1975) 1 W.L.R. 61.

43 (1995) 51 A.C.W.S. 3d 550.

44 *Id* para. 4.

45 (1983) 151 CLR 447.

46 *Id* 474.

47 (2011) eKLR.

> reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behavior of the stronger party is morally reprehensible." [48]

In Zambia, government officials initiate and negotiate most of the land agreements on behalf of investors. In some cases, such as the Farm Blocks program,[49] the government itself enters into agreements directly with impoverished and illiterate rural communities. These government officials, habituated to the significance and permanence of legal agreements, possess drastically unequal knowledge when compared with some members of rural communities who may be unaware of the binding and irreversible significance of an agreement with no material benefits to them whatsoever.

The agreements often provide for no or inadequate compensation. Unrepresented communities end up giving away their fertile and resource rich land, almost for free, and become landless, with serious negative impacts. They often feel their only option is to enter into the agreement because of threats of eviction by powerful and influential government authorities and their traditional chiefs. Most of these land deals should be challenged in courts on the basis of unconscionable bargains or inequality of bargaining powers.

Restrictions on Alienation of Customary Land Should Be Strictly Followed

Although the Lands Act vests all land in the President and gives him all powers to administer and control land, including allocation of land,[50] some restriction are placed on alienation or allocation of traditional land held under customary tenure. Under section 3(4) of the Lands Act, the President has no authority to alienate any land held under customary tenure:

> "(a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;
> (b) without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;
> (c) without consulting any other person or body whose interest might be affected by the grant; and
> (d) if an applicant for a leasehold title has not obtained the prior approval of the chief and the local authority within whose area the land is situated."

This section limits the powers of the President to alienate customary land. Protecting villagers and peasant farmers from displacements by wealthy applicants, such as large-scale land-based investors was clearly part of the legislative intent behind the inclusion of section 3(4) in the Lands

48 *Id* para. 52.

49 See *Farm Block Development Plan 2005-2007* Republic of Zambia Ministry of Finance and National Planning (2005) available at https://www.oaklandinstitute.org/zambia-farm-block-development (last accessed: 15 November 2016).

50 See *Justin Chansa v Lusaka City Council* (2007) ZR 256, in which the Supreme Court held that the authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.

Act. This is evidenced by the statements of the Minister of Land, Dr Shimaponda, during the Second Reading of the Lands Bill:[51]

> "The fear expressed in this august House last year to the effect that upon the passage of that Bill, that villagers and peasant farmers would be displaced from the land by the wealth applicants has been taken care of. Sir by providing in sub-clause 4(c) of 3 that:
> -the President shall not alienate any land situated in a district or area where land is held under customary tenure:
> (c) without consulting any other person or body whose interest might be adversely affected
> The President's powers to alienate are also limited by the obligation contained in Clause 3. Sub-clause 4(a) to take into account the local customary law on land tenure which is not in conflict with the Land Bill."[52]

Before a traditional Chief can give consent, they are required to consult and obtain consent from any person or anybody who might be affected by alienation or conversion of customary land. If they fail to do this, the alienation, allocation or conversion is null and void.[53]

In *Still Waters Limited v Mpongwe District Council and Others*,[54] the Chief allocated land to the appellant company after consulting the traditional councillors. The third and fourth respondents contended that they were interested in the land because it was adjacent to their farms and further to that the previous chief had already allocated it to them. However, the chief had neither consulted nor obtained consent from the third and fourth respondents before allocating the land to the appellant company. In delivering the judgment of the Supreme Court, Chibesakunda JS stated:

> "Although we agree with Dr Sakala's forceful argument that Chiefs enjoy autochthonic powers over land held under customary tenure and especially undeveloped land nonetheless section 3(4) of the Lands Act is couched in such a way that it is mandatory for the 3rd and 4th respondent to have been consulted before allocating the land to the appellant company. Failure to do so results in the purported allocation to be null and void…In the *Siwale v Siwale,* the deceased who had been given land by the colonial authorities with the approval of the local Chief sometime in 1929, died intestate. The appellants who were his siblings objected to their last brother obtaining 'title' deeds to the land without their consent. This court agreed with them that under section 3(4) it was obligatory on the part of the traditional chief to seek their consent, as according to that section, their interest would have been affected by one of their brothers, obtaining title deeds of the land. This Court pointed out to the fact that land held under customary tenure can only be alienated if consent is obtained by the traditional chief from those whose interest maybe affected by such allocation. In the *Siwale* case the core contention was exactly the same contention as in the case before us. In this case before us the core question is whether or not the procedure adopted by the current chief in allocating to the appellant Company without consulting the 3rd and 4th respondents was a proper procedure. Our view is that the procedure adopted by the current chief was wrong and as such the allocation of the land to the appellant is null and void."[55]

51 *Official Verbatim Report of the Parliamentary Debates of the Fourth Session (Resumes) of the Seventh National Assembly* (25 July - 15 August 1995).

52 *Id* 416.

53 See S*iwale and Others v Siwale* (1999) ZR 84; see also *Village Headman Mupwaya and Another v Mbaimbai* SCZ Appeal No. 41 of 1999.

54 Supreme Court Appeal No. 90 of 2001.

55 *Id*.

Similarly, before customary land is alienated, allocated or converted for land-based investment, rural community members must be consulted and give their consent. Thus in *Village Headman Mupwaya and Another v Mbaimbai,*[56] the Supreme Court of Zambia held that failure to consult any person whose interest may be affected by the grant, as required under section 3(4)(c) of the Lands Act, was fatal.

The required consultation should supply sufficient information and opportunity to the rural community to consent or object

Although section 3(4) and the cases cited above provide no clear guidance on the extent of the required consultation, guidance can be sought from English decisions. In *Rollo v Minister of Town and Country Planning*,[57] before an area of land could be developed as a new township, Bucknill LJ held that:

> "Consultation in the sub-section means that on the one hand, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice."[58]

Similarly in *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*,[59] which dealt with the question of what amounts to sufficient consultation, it was held that:

> "[T]he essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."[60]

Rural community members must be supplied with sufficient information and sufficient opportunity to enable them to consent or object to the alienation, allocation or conversion of their land. Failure to do so should be deemed as a failure to follow the procedure under section 3(4)(c) and should result in declaring the alienation, allocation, grant or conversion null and void.

Publishing a notice in the Gazette or newspaper would certainly not afford community members an opportunity to consent or object. It is self-evident that the majority of the people in rural communities do not have access to a Gazette Notice. In fact, sending a notice relating to land-based investment affecting a rural community through a Gazette or newspaper can amount to

56 SCZ Appeal No. 41 of 1999.
57 (1948) 1 All ER 13 (involving the duties of the Minister to consult local authorities under the New Town Act of 1946).
58 *Id.*
59 (1985) 17 H.L.R. 487.
60 *Id* 491.

discrimination against rural communities.

Uncompensated Displacement of Rural Communities Violate Human Rights Guaranteed by International Law and the Constitution

Displacement of rural communities from their customary land without compensation can, in itself, constitute a gross violation of human rights. It can result in landlessness, homelessness and a number of negative social, economic and political impacts. These represent infringement on the right to property,[61] dignity,[62] life,[63] not be subjected to inhuman and degrading treatment,[64] and non-discrimination.[65]

Displacement leads to violations of the right to not be subjected to inhuman and degrading treatment

Article 15 of the Constitution, states that "[n]o person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment." This right is so important that the framers of the Constitution did not allow any limitation whatsoever. Courts across the region have interpreted this right broadly; it encompasses more than freedom from torture. The Supreme Court of Zimbabwe held in *Mukoko v Attorney General*[66] that:

> Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment".[67]

Like the Supreme Court of Zimbabwe, the African Commission in *Doebbler v Sudan*[68] emphasised that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but also those that "humiliate or force the individual against his will or

61 See Universal Declaration of Human Rights (UDHR) article 17(1), "Everyone has the right to own property"; African Charter on Human and Peoples' Rights (African Charter) article 13(3), "Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

62 See UDHR article 1 "All human being are born free and equal in dignity and rights"; see also the International Covenant on Economic, Social and Cultural Rights (ICESCR) Preamble; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Preamble; International Covenant on Civil and Political Rights (ICCPR) article 1; African Charter, article 5, "Every individual shall have the right to respect of dignity inherent in a human being and to recognition of his legal status"; and Women's Protocol to the African Charter, article 3(1), "Every woman shall have the right to dignity inherent to a human being and to the recognition and protection of her human and legal rights".

63 See ICCPR, article 6(1); African Charter, article 4, "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

64 See ICCPR, article 7; African Charter, article 5, "All forms of exploitation and degradation of man particularly… cruel, inhuman or degrading punishment and treatment shall be prohibited".

65 See Special Rapporteur on Adequate Housing "Basic Principles and Guidelines on Development–Based Evictions and Displacement" A/HRC/4/18, annex I (2007) para 7, "forced evictions intensify inequality, social conflict, segregation and 'ghettoization', and invariably affects the poorest, most socially and economically vulnerable and marginalised sectors of society, especially women, children minorities and indigenous people".

66 Const. Application No. 36/09 (2012) ZWSC 11.

67 *Id* (citations omitted).

68 ACHPR Comm. 236/00 (2003).

conscience."[69] Communities who have occupied their land for generations have a special social, political and spiritual interest in that land. Their land is not only a fundamental asset and the basis of sustainable livelihood, but also a source of social identity where their ancestors are buried. Losing this land with no adequate compensation humiliates, causes anguish, and lowers the respect and worth of rural communities.

Human dignity, is one of the national values and principles of the Constitution.[70] In the South African Constitutional Court case of *S v Makwanyane*,[71] O'Regan J stated:

> "Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the rights that are specifically entrenched in [the Bill of Rights]."[72]

The displacement of poor communities from their customary land without providing them with adequate compensation, whether monetary or alternative land, inevitably harms their self-worth and dignity. It does not treat rural communities as worthy of respect and concern. It is therefore a violation of their rights to not be subjected to inhuman and degrading treatment because it subjects them to a host of negative impacts and risks landlessness, homelessness, loss of access to common property, food insecurity, joblessness, social marginalisation, increased mortality, social disintegration, and loss of access to community services. The lives of the displaced families become more fragile.[73]

In the Indian case of *Mullin v Administrator, Union Territory of Delhi*,[74] the Supreme Court referred to Directive Principles in the Constitution as a means of interpreting the justiciable right to life. The Court declared that "the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessity of life such as adequate nutrition, clothing and shelter".[75] Furthermore, the South African Constitutional Court explicitly connected this right to dignity with housing and property rights in *Sarrahwitz v Martiz N.O. and Another.*[76] The Court held that:

> "Generally speaking, it is very difficult for a homeless person to keep her self-worth or dignity intact. She is at the mercy of any landlord, relative or friend who might be providing her with accommodation. And no vulnerable person who has tasted what it means to have a place they can truly call home should be deprived of it without justification."[77]

Rural communities often lose the land they depend on for growing food, building shelters, fetching water, and pasturing their livestock, with no adequate compensation to pave the way for land-based investment. They become destitute and have to depend on neighbouring communities, relatives and, to a limited extent, the government for accommodation and land. They are perpetually at the mercy of those who offer them shelter or land. They lose the bare necessities such as housing,

69 *Id* para. 36.
70 Constitution of Zambia Amendment Act (2 of 2016) articles 8(d) and 9(1)(a).
71 *S v Makwanyane* (1995) ZACC 3.
72 *Id* para. 328.
73 Zambia National Resettlement Policy (2015) 11.
74 (1981) SCR (2) 516.
75 *Id*.
76 (2015) ZACC 14.
77 *Id* para. 42.

nutrition and shelter, and with those, their dignity.

Displacement of rural communities disproportionately impacts on rural women

Forced eviction indirectly discriminates against women. In the case of *R (on the applications of Baiai and another) v Secretary of State for the Home Department*,[78] Silber J stated:

> "The difference between direct and indirect discrimination is that indirect discrimination results from a rule or practice applied equally to all individuals without differentiation but which has a proportionate and unjustified adverse impact on members of a particular group or minority."[79]

Similarly, Zambian courts ought to take judicial notice that women are disproportionately affected by the land-based investments that results in displacements. As the UN Committee on Economic Social and Cultural Rights stated:

> "Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless."[80]

It is women who have to look after their families without shelter, food and crop-growing areas.[81] To make matters worse, once women lose their secondary rights to customary land, it is extremely difficult for them to acquire alternative land because they cannot be allocated land under customary law and they cannot afford purchasing statutory land or housing due to lack of income. Men do not look after children and can either migrate into urban areas or might be given land by other headmen or chiefs. Because women suffer disproportionately when compared to men, displacements or forced eviction of communities from customary land amounts to indirect discrimination.

Conclusion

While land-based investments are necessary for economic development, they may lead to displacements of rural communities without their free, prior and informed consent and the provision of adequate compensation. Customary land is recognised in Zambia and rural communities' land rights can be protected by strictly applying the statutory procedure for compulsory acquisition, alienation or conversion of customary land. The common law and international principles of free, prior and informed consent, and the equitable principles of unconscionable bargains can be effectively applied to ensure rural communities retain or can claim back their land or receive adequate compensation. Land-based deals can also be challenged for violating the constitutional rights to life and not to being subjected to inhuman and degrading treatment and also for indirectly discriminating against women.

78 (2006) EWHC 823 (Admin).

79 *Id* para. 114.

80 UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions" (20 May 1997) E/1998/22, para. 10.

81 "Women in Human Settlements Development: Getting the Issues Right" United Nations Centre for Human Settlements (HABITAT) (1995) available at http://collections.infocollections.org/ukedu/en/d/Jh1559e/9.html#jh1559e.9 (last accessed: 15 November 2016).

ACCESS TO COMPLAINTS MECHANISMS FOR VICTIMS OF HEALTHCARE DISCRIMINATION: A DEVELOPMENTAL IMPERATIVE

Annabel Raw[1]

Introduction

> "[O]ver thirty years into the [HIV] epidemic, stigma remains high … and access to justice in the context of HIV is very low."[2]

Southern Africa carries a disproportionately high share of the HIV burden. Stigma and discrimination are amongst the most significant barriers to effective HIV prevention and treatment.[3] Indications are that stigma and discrimination remain high, not only amongst people living with HIV, but also amongst those most vulnerable to HIV, including sex workers, lesbian, gay, bisexual and transgender (LGBT) persons, people who use drugs, prisoners and others.

In order to combat stigma and discrimination in healthcare, research indicates that interventions need to focus on individual, environmental, and policy levels.[4] To be effective, policies and laws need to be routinely monitored and implemented.[5] Advancing accountability and redress for discrimination in healthcare is therefore invaluable not only to realising the human rights of those who experience stigma and discrimination, but also vital to ensuring an effective response to HIV in the region.

Sustainable Development Goal[6] (SDG) 16 draws on the principles of access to justice, accountability of public institutions, and inclusion. This paper considers how complaints mechanisms may be used and improved to ensure the realisation of SDG 16 in the context of healthcare discrimination.

Discrimination in Healthcare in Southern Africa

Healthcare discrimination is unlawful and unethical

The right to freedom from discrimination is central to international human rights law.[7] The

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2 Joint United Nations Programme on HIV/AIDS (UNAIDS) "Guidance Note: Key Programmes to Reduce Stigma and Discrimination and Increase Access to Justice in National HIV Responses" (2012) 5.

3 *Id* 2.

4 L Nyblade et al. "Combating HIV stigma in healthcare settings: what works?" (2009) 12 *J Int AIDS Soc*.

5 *Id*.

6 *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

7 See article 2 of the Universal Declaration of Human Rights (UDHR) A/810 (10 December 1948); article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (16 December 1966) 993 UNTS 3; articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) (16 December 1966) 999 UNTS 171; and articles 2 and 28 of the African Charter on Human and Peoples' Rights (African Charter) (1982) 21 ILM 58.

prohibition against discrimination under international and regional African law[8] includes both direct[9] and indirect[10] discrimination. The grounds of discrimination that are prohibited are considered non-exhaustive[11] and include health status, actual or perceived HIV status,[12] age, disability, marital or family status, sexual orientation,[13] and gender identity. Because the rights to non-discrimination and equality are both self-standing as well as applicable to the enjoyment of other human rights, jurisprudence on the right to health under international law[14] and regional African law[15] is inclusive of the obligation to ensure these rights are enjoyed without discrimination. The Committee on Economic, Social and Cultural Rights (CESCR) has stated, for example, in relation to the right to health under the International Covenant on Economic, Social and Cultural Rights (ICESCR), that healthcare and services must be available, in sufficient quantity, services must be accessible (physically and economically) to all without discrimination, and must be culturally acceptable and of good quality."[16]

While the right to health under international law is understood as subject to "progressive realisation" by States, the obligation not to discriminate in the provision of services and to provide those services equitably, paying attention to vulnerable and marginalised populations, is immediately realisable.[17]

Under domestic laws, freedom from discrimination and the right to equality have been strongly entrenched in southern African constitutions.[18] Regional jurisprudence is further developing to

8 See *Good v Republic of Botswana* (African Commission on Human and Peoples' Rights (ACHPR) Recommendation) 313/05 (26 May 2010) para. 219.

9 UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)" (2 July 2009) para. 10(a).

10 *Id* para. 10(b).

11 *Id* paras. 27 to 35. See also *Good v Republic of Botswana* (African Commission on Human and Peoples' Rights (ACHPR) Recommendation) 313/05 (26 May 2010) para. 218.

12 See also UN Human Rights Committee (HRC) Concluding Observations of the Human Rights Committee: Republic of Moldova (4 November 2009) para.12.

13 See *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* ACHPR Recommendation 284/03, para. 155.

14 Article 25 of the UDHR A/810 (10 December 1948) provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services". Article 12(1) of the ICESCR provides that "[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." See also article 24 of the Convention on the Rights of the Child (CRC) A/RES/44/25 (1989); article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) A/34/46 (1980).

15 Article 16 of the African Charter provides:
"1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

16 Open Society Institute et al. *Human Rights in Patient Care - A Practitioner Guide Armenia* (2009) 33; see also CESCR "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)" (11 August 2000) para.12.

17 The Committee identified the following, amongst others, as "minimum core" obligations of the right to health:
"(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; …
(e) To ensure equitable distribution of all health facilities, goods and services."
CESCR "General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)" (11 August 2000) para. 43.

18 See sections 3 and 15 of the Constitution of Botswana (1966); sections 4 and 18 of the Constitution of Lesotho (1993); sections 4 and 20 of the Constitution of Malawi (1994); article 10 of the Constitution of the Republic of Namibia (1990); section 9 of the Constitution of the Republic of South Africa (1996); sections 14(3) and 20 of the Constitution of the Kingdom of Swaziland

affirm that lesbian, gay, bi-sexual and transgender (LGBT) persons,[19] sex workers,[20] prisoners and non-citizens,[21] have the right not to be discriminated against in the enjoyment of health services. Penal Code provisions that prohibit same-sex sexual activities and activities relating to sex work, for example, do not preclude LGBT persons or sex workers from otherwise enjoying rights and services without discrimination. Furthermore, ethical obligations that govern the conduct of healthcare professionals and nurses generally require that patients be treated with dignity and without discrimination and that patient-confidentiality is respected.

Experiences of healthcare discrimination

The Joint United Nations Programme on HIV/AIDS (UNAIDS) defines HIV-related discrimination as:

> "the unfair and unjust treatment (act or omission) of an individual based on his or her real or perceived HIV status. Discrimination in the context of HIV also includes the unfair treatment of other key populations, such as in some social contexts, women, sex workers, people who inject drugs, men who have sex with men, transgender people, people in prisons and other closed settings and, in some social contexts, women, young people, migrants, refugees and internally displaced people. HIV-related discrimination is usually based on stigmatising attitudes and beliefs about populations, behaviours, practices, sex, illness and death. Discrimination can be institutionalised through existing laws, policies and practices that negatively focus on people living with HIV and marginalised groups, including criminalised populations."[22]

Many studies have been undertaken on stigma and discrimination in Southern Africa, including studies at national levels through a tool called the People Living with HIV Stigma Index.[23] Due to restrictive criminal law environments and institutionally-sanctioned social prejudice, these evaluations are often not fully reflective of the experiences of "key populations"[24] and "vulnerable populations".[25] In a 2016 research report by the Southern Africa Litigation Centre (SALC Report),[26]

Act (2005); articles 8 and 11 of the Constitution of Zambia (1996), subject to the Constitution of Zambia (Amendment) Act (2 of 2016); and section 56 of the Constitution of Zimbabwe (2013).

19 *Attorney General v Rammoge and Others* Court of Appeal of the Republic of Botswana (2016) CACGB-128-14.

20 *S v Mwanza Police, Mwanza District Hospital* Malawi High Court (2015) (unreported). For an analysis of the decision see A Meerkotter and I Southey-Swartz "Malawi High Court Rules that Mandatory HIV Testing is Unconstitutional" *Southern Africa Litigation Centre: Blo*g (20 May 2015) available at http://www.southernafricalitigationcentre.org/2015/05/20/malawi-high-court-rules-that-mandatory-hiv-testing-is-unconstitutional/ (last accessed: 24 October 2016).

21 *Attorney General and Others v Tapela and Others* Botswana Court of Appeal (2015) CACGB-096-14.

22 UNAIDS "Reduction of HIV-Related Stigma and Discrimination" (2014) 2.

23 The following Southern African countries have undertaken implementation of the People Living with Stigma Index at the time of writing: The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe. More information on the Index and reports following its implementation are available on the People Living with Stigma Index website, available at http://www.stigmaindex.org/ (last accessed: 24 October 2016).

24 "Key populations are defined groups who, due to specific higher-risk behaviours, are at increased risk of HIV irrespective of the epidemic type or local context. Also, they often have legal and social issues related to their behaviours that increase their vulnerability to HIV. ... The key populations are important to the dynamics of HIV transmission. They also are essential partners in an effective response to the epidemic." World Health Organisation (WHO) "Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care of Key Populations" (2016) xii.

25 "Vulnerable populations are groups of people who are particularly vulnerable to HIV infection in certain situations or contexts, such as adolescents (particularly adolescent girls in sub-Saharan Africa), orphans, street children, people with disabilities and migrant and mobile workers. These populations are not affected by HIV uniformly across all countries and epidemics." *Id.*

26 Southern Africa Litigation Centre "Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia" (2016) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/09/Discrimination-in-healthcare.pdf (last accessed: 24 October 2016).

anecdotal accounts of discrimination in healthcare against sex workers, LGBT persons, women living with HIV and persons with disabilities in Botswana, Malawi and Zambia are described. While these accounts do not indicate the prevalence of healthcare discrimination, the context, form and experiences of discrimination narrated highlight the dual vulnerabilities faced by these persons when accessing healthcare: the vulnerability to discrimination and abuse, and the difficulties faced in seeking accountability and redress when violations occur.

Respondents in the SALC Report described discriminatory conduct and practices that included being denied treatment, being subjected to physical and verbal abuse, failures to observe patient confidentiality, failures to conduct proper informed consent procedures, and sexual coercion and abuse. Sex workers recounted particular vulnerability to sexual coercion and abuse by healthcare workers and of being verbally abused or denied treatment when accessing treatment for sexually transmitted infections. LGBT persons described having to conceal their identities and healthcare needs, or having to avoid accessing healthcare at all, in order to avoid discrimination or being reported to police by healthcare workers. Women living with HIV described being denied information about their health and treatment and of being segregated from other healthcare users when accessing HIV treatment, practices that were perceived to exacerbate stigma. Persons with disabilities had significant difficulties physically accessing healthcare services, obtaining information about their health and treatment, and difficulties receiving treatment confidentially and with respect for their dignity, autonomy and privacy.

Barriers to accountability and redress

The SALC Report describes further that when these phenomena occur, the healthcare users and even community-based organisations (CBOs) and non-governmental organisations (NGOs) interviewed did not know how to access relief. Few were aware of their legal rights and healthcare workers' ethical obligations to treat them without discrimination and with due regard to their human dignity. Even fewer were aware of the avenues to complain when conduct fails to meet these standards. CBOs and NGOs highlighted that significant barriers exist for healthcare users to access justice for healthcare discrimination in the courts, including financial cost, physical distance, and difficulties accessing evidence to prove legal claims. Complaint options outside of formal court process (including complaints at facility-level, to health professions and nursing councils, national human rights institutions and specialised complaints bodies) were largely unknown.

Moreover, key populations and vulnerable populations were fearful of reporting discrimination and abuses in healthcare. Many were particularly afraid of being denied access to healthcare services if reporting an incident. For example, healthcare users in rural areas may be entirely reliant on a single healthcare professional in the health centre in their community for treatment and services, leaving them vulnerable to treatment denial and reprisals when reporting abuses. LGBT persons and sex workers were afraid that if they reported discriminatory conduct, their sexual orientation, gender identity, health status or occupations would be revealed to community members and families. They feared this would expose them and their dependents to social repercussions, loss of livelihood, targeting by law enforcement, and violence. For them, the prospect of holding abusers accountable was unrealistic.

Accountability and Right to a Remedy

Healthcare users who experience human rights violations and discrimination have a right to a remedy. It is an established principle of law that for every right there must be a remedy.[27] International and regional human rights law obliges States to ensure everyone has access to an effective remedy for acts violating fundamental rights.[28] States must make available "adequate, effective, prompt and appropriate remedies, including reparation" for victims of human rights violations.[29] Processes to ensure access to an effective remedy do not need to be limited to the courts.

The obligation to provide access to an effective remedy requires States to ensure that, in practice, people can use these remedies.[30] Processes must be affordable and accessible,[31] and rights holders must have sufficient information to enforce their rights.[32] The United Nations Human Rights Committee has explained that the right to an effective remedy requires States to adapt remedies appropriately to take account of the special vulnerabilities of certain persons.[33] In a decision of the African Commission on Human and Peoples' Rights, *Jawara v The Gambia*,[34] three elements of an effective remedy were set out: availability, effectiveness and sufficiency. The Commission stated:

> "A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[35]

These obligations are embodied and given developmental significance in SDG 16, which stresses "equal access to justice for all" and "inclusive" institutions.[36] Accountability is a closely linked concept in SDG 16.[37] Strengthening accountability in the context of healthcare has the potential not only to advance the human rights of healthcare users but also to improve healthcare systems and democratic governance. Through the effective use of complaints processes, healthcare facilities and government institutions can access vital information to identify trouble areas and develop strategies to improve services, systems and policies. These outcomes can contribute to improving

27 The Latin maxim *ubi jus ibi remedium* ("where there is a right there is a remedy") is often cited as an embodiment of this idea.

28 See UDHR article 8; and ICCPR article 2(3); see also article 25(a) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol") (11 July 2013).

29 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (21 March 2006) A/RES/60/147; see also "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (29 November 1985) A/RES/40/34.

30 See HRC CCPR "General Comment No. 3: Article 2 (Implementation at the National Level)" (29 July 1981); CEDAW "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010).

31 See "General Recommendation No. 28" para. 34; HRC "General Comment No 32: Article 14, Right to equality before courts and tribunals and to fair trial" (23 August 2007).

32 See HRC CCPR "General Comment No. 3: Article 2 (Implementation at the National Level)" (29 July 1981); CEDAW "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) para. 2; CEDAW "General Recommendation No 26 on Women Migrant Workers" (5 December 2008) para. 26.

33 HRC "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004) para 15.

34 Communication 147/95.

35 *Id* para. 32.

36 *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1, paras. 16.3 and 16.7.

37 For the purposes of this paper, "accountability" is understood as the answerability of an office or duty and includes access to information, transparency in decision-making, and rules of procedural fairness or due process, LC Reif *The Ombudsman, Good Governance, and the International Human Rights System* (2004) 79.

self-regulation by healthcare providers. In addition, effective complaints systems can improve user confidence, citizen participation and service-provider morale.[38]

Healthcare Complaints Processes

There exist a number of options for healthcare users to relay complaints outside of the court system. These may include internal or facility-level complaints processes, health professions and nursing councils, and national human rights institutions (NHRIs). As shown above, to fulfil the right to an effective remedy, these processes ought to be available, effective and sufficient. It is argued here that in order to ensure effectiveness, certain procedural fairness standards should be observed in these processes; and in order to ensure availability, these processes need to include protections for vulnerable complainants who may otherwise find these processes inaccessible.

Internal and facility-level processes

In the SALC Report, healthcare users, CBO and NGO respondents from Botswana, Malawi and Zambia, were typically unaware of complaints options outside of the court process. Those who were aware of extra-judicial options generally referred to internal or facility level complaints processes. These are complaints that would be made within the healthcare system or at the healthcare facility where the violation occurred. These types of complaints may include informal use of suggestion boxes, verbal complaints to healthcare workers, or more formalised complaints to supervisors, superiors and managers within the facility or healthcare system.

Facility-level and internal complaints have the potential to advance availability of remedies to healthcare users; they are typically accessible at point-of-care and do not require formal submission procedures that may otherwise constrain persons with restricted abilities to read, write, or gather relevant evidence. In addition, these processes have the potential to provide sufficient remedies for complainants: health facilities should be able to adapt problematic policies, discipline employees, and provide redress to injured parties.

However, the SALC Report found vastly disparate and inconsistent accounts of how complaints are handled within the healthcare systems in Botswana, Malawi and Zambia. This suggests the absence of uniform processes and decision-making criteria. These processes are vulnerable to ineffectiveness because there are no determinable criteria to ensure decisions are made fairly, impartially, or in good time, if at all. To the extent that decisions on internal healthcare complaints at public healthcare facilities can be considered to be "administrative" decisions that affect the interests of both complainants and possibly healthcare workers, these processes should be subjected to principles of administrative fairness.

In the absence of clear complaints-handling processes, concerns about confidentiality might preclude complaints from vulnerable populations. Clearly structured options for anonymous, third-party and confidential complaints should be developed in addition to procedures that ensure treatment-access during the complaint resolution process. This will guarantee complainants are able to access these processes safely and effectively.

38 T Vian "Complaints Mechanisms in Health Organisations" (2013) 6 *U4 Brief* 1.

Health Professions and Nursing Councils

Health professions and nursing councils are typically statutory bodies established to regulate their respective professions. One of their functions is the discipline of members who fail to observe professional ethics and codes of conduct. Healthcare users can initiate a disciplinary process through filing a complaint against a registered healthcare worker. The remedial scope of these disciplinary processes are typically limited to the professional discipline of the relevant healthcare worker. This could include warnings, fines, suspensions or being struck from the register of professionals.

Procedures in these bodies are formalised and sometimes classified as judicial proceedings. While typically not subject to strict rules of evidence, regulatory and legislative rules generally mandate an investigatory stage and a disciplinary hearing, and establish an independent body charged with determining the outcome of the process. Accused persons are usually allowed to lead evidence, to cross examine witnesses, and have a right to legal representation. However, the rights of complainants vary: in some cases there is no right of appearance or legal representation but complainants are at a minimum entitled to information on the status of their complaint.

These complaints processes may be very important in jurisdictions that suffer from significant shortages of healthcare workers and health systems investment. As a strategy for advancing accountability and human rights, suing individual healthcare workers in courts may be undesirable for persons who are sympathetic with the constraints under which healthcare workers operate and how system failures can exacerbate individual abuses. In addition, health systems and facilities may be reluctant to punish or fire healthcare workers, fearing the consequences of pushing much-needed staff out of the system. Professional complaints bodies, however, are able to hold their peers accountable through varied sanctions that can be tailored to the gravity of the offence, ensuring a consensus of standards of behaviour from within the profession and allowing for opportunities to continue to train and develop healthcare workers when they fail in fulfilling their ethical obligations.

The SALC Report indicates that health professions and nursing councils in Botswana, Malawi and Zambia currently handle a relatively low volume of complaints and are, at times, reticent to engage with concepts of human rights and discrimination. Options for vulnerable complainants are more limited due to the more formalised processes. However, some councils have the power to order interim measures to protect vulnerable complainants[39] and some are open to receiving informal, third-party or anonymous complaints.

From opinions expressed by a number of CBO and NGO respondents in the SALC Report, there is a sense of distrust toward health profession and nursing councils as their impartiality is doubted when having to decide against their peers. In order to ensure effectiveness of these institutions, it is important that the procedural rules established by regulations and legislation governing these councils are observed and enforced. In addition to these norms, courts in the region have recognised

39 For example, the Nursing and Midwifery Council of Botswana has the power to make interim orders to protect the physical or mental health of any person during the conduct of an investigation into misconduct, regulation 9 of the Nurses and Midwives (Disciplinary) Regulations (2011).

that natural justice principles apply to the proceedings of health professions and nursing councils.[40] To this extent, while complainants do not enjoy many procedural rights under legislated provisions governing the councils' procedures, to the extent that they have an interest in the proceedings, they should enjoy natural justice protections, including a right to be heard and to a reasoned decision.

National Human Rights Institutions

National human rights institutions (NHRIs), such as human rights commissions or ombudspersons with human rights mandates, may provide an additional avenue for healthcare users to seek accountability and redress when experiencing discrimination. Due to the inquisitorial nature of NHRI processes, it is doubtful whether legal standards of administrative fairness or natural justice are applicable to their proceedings. In addition, the outcome of complaints filed with these bodies are seldom binding. However, these institutions may provide meaningful avenues to pursue accountability for systemic discrimination. They also offer a wide range of discretionary complainant protections due to their procedural flexibility. This could include anonymous, confidential or third-party complaints.

While unlikely to offer meaningful remedial outcomes for individual complainants, NHRIs are well-positioned to make authoritative interventions and recommendations on broader, structural issues. Due to their investigatory powers (which often include powers to summon witnesses and to search and seize evidence), NHRIs may be important means for complainants, CBOs and NGOs to access information or evidence. Additionally, NHRIs can often convene public inquiries and mediate negotiations with government officials, offering prospects for information gathering, consultation and government-engagement that may otherwise be unavailable to complainants.

Conclusion

SDG 16 places accountability and access to justice on the global development agenda and commits States to making accountability and justice-processes more equitably accessible. Improving healthcare services and effectively addressing HIV are similarly pressing developmental imperatives and human rights concerns in Southern Africa. Stigma and discrimination in healthcare – against persons living with HIV and those most vulnerable to HIV – obstruct the achievement of these goals.

Complaints processes have the potential to provide access to remedies for victims of discrimination and to improve accountability at national, facility and individual levels within the healthcare system. To ensure that these processes adequately fulfil the human right to a remedy, they must be available, effective and sufficient for complainants. As has been highlighted in this paper, of particular concern is that these processes adhere to principles of procedural fairness where applicable and that they protect the confidentiality and personal information of those complainants who are vulnerable to secondary victimisation. Ensuring safety for key populations and vulnerable populations is an important component of ensuring equal access to these procedures.

40 See *Wells v Botswana Health Professions Council and Another 2009 1 BLR 467 HC; Wang v Health Professionals Council of Zambia* (2012/HK/339) (2013) ZMHC 24; and *Moodley v Health Professions Council of South* Afric*a and Another* (2011) 3 All SA 88 (GNP), (2010) ZAGPPHC 242.

THE DEATH PENALTY IN BOTSWANA: TIME FOR A RE-THINK?[1]

Dr Elizabeth Macharia-Mokobi[2]

An Introduction to the Death Penalty in Botswana

Current statistics show that by the end of 2015, 102 countries had abolished the death penalty. This represents more than half of all nations. Out of 55 countries in Africa, 36 retain the death penalty in their books but the majority of these are abolitionist in practice, only 11 nations continue to execute prisoners. Most of Botswana's neighbours are abolitionists: South Africa and Namibia by law, Zambia in practice. Zimbabwe, Lesotho and Swaziland are the only other countries to retain the use of the death penalty in Southern Africa.

There were 39 executions for capital crimes in Botswana from its independence in 1966 until 2006.[3] A further seven executions occurred from 2007 to 2011, bringing the total number of persons executed to 46 at the end of 2011.[4] With 2 executions reported in 2012, one in 2013, and the execution of Patrick Gabaakanye in May 2016, the number of executions since independence is 50, one for every year of independence. [5]

The death sentence has been a part of Botswana's legal culture since time immemorial. Prior to the colonial era, customary law, *ngwao ya Setswana* or *mekgwa le melao ya Setswana* (customs and usages of Setswana), applied to the Tswana tribes living in the territory.[6] The Chief could impose the death penalty as punishment for murder, sorcery, incest, bestiality and conspiracy.[7]

Botswana became a British protectorate in 1885.[8] With the creation of a protectorate came the reception of Roman-Dutch common law in 1891, the law in force in the Cape of Good Hope.[9] The common law and statutes applicable in the Bechuanaland Protectorate became those in force in the Cape of Good Hope as at 10 June 1891. There was no written criminal code in the Cape of Good Hope at the material time.[10] The general criminal law received into the Bechuanaland Protectorate

1 Paper presented at Judicial Colloquium entitled Working towards a just, peaceful and inclusive Botswana: 50 years of promoting rule of law and equal access to justice, held at Avani Hotel, Gaborone, on 11 and 12 April 2016.

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3 See http://www.ditshwanelo.org.bw and http://www.handsoffcain.info (last accessed: 217 November 2016).

4 "Death penalty statistics, country by country" *The Guardian* (2012) http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world (last accessed: 17 November 2016).

5 Cornell Centre on the Death Penalty Worldwide *Death Penalty Database* (last updated: 15 November 2016) http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Botswana (last accessed: 17 November 2016).

6 A Molokomme "Customary Law in Botswana: past present and Future" in S Brothers, J Hermans and D Nteta (eds) B*otswana in the 21st Century: proceedings of a symposium* (1994) 347, 348.

7 I Schapera A *handbook of Tswana law and custom* 2nd ed (1994) 49.

8 Proclamation No. 1, British Bechuanaland (30 September 1885).

9 General Administration Proclamation by the British High Commissioner in the Cape of Good Hope (10 June 1891) section 19.

10 DDN Nsereko "Extenuating circumstances in capital offences in Botswana" (1991) 2(2) *Criminal Law Forum* 235, 236 to 237.

was in the form of unwritten Roman-Dutch common law rules, also referred to as Cape colonial law.[11] The criminal law offences recognised in the new protectorate were those recognised at the Cape prior to 10 June 1891. The death penalty was received into the Protectorate as part its general criminal law. The Cape colonial law remained in force until a Penal Code was promulgated for Botswana in 1964.[12] Section 2 of the Penal Code stated that "…after the commencement of this law, the unwritten substantive criminal law in force in the Cape Colony of Good Hope of 10 June 1891 shall no longer be of force in the territory."[13] This provision effectively abolished the common law crimes in Botswana.[14] However, the death penalty survived this abolition and was retained as a method of punishment under the Penal Code. The sole method of execution prescribed in Botswana is hanging.[15]

Between 1891 and 1934, Roman-Dutch common law existed side by side with the customary law. Initially, this was not problematic as the received law was intended to apply only to the European population since the High Commissioner had been enjoined to respect native law and custom.[16] As time went on native matters increasingly came under the jurisdiction of the new common law courts of the territory and aspects of the Roman-Dutch common law began to apply to the indigenous population.[17] By the turn of the century, the British administration was beginning to make inroads into the chief's jurisdiction in criminal matters.[18]

In 1934, the High Commissioner issued Proclamation 75 of 1934 wherein he curtailed the chief's powers to try treason, sedition, murder or attempted murder, culpable homicide, rape or attempted rape, currency offences, perjury, subversion of the chief or sub-chief and any offences created by statute in the territory in native tribunals.[19] The offences of murder and the offence of challenging the chief's authority[20] had always attracted the death penalty. With this proclamation, the chiefs were stripped of their power to impose the death penalty and the punishment was imposed solely by common law courts. *Kgosi* Tshekedi and *Kgosi* Bathoen II challenged Proclamation 75 of 1934, as well as Proclamation 74 of 1934 which also severely limited the powers of chiefs at the Privy Council without success.[21]

11 B Forster "Introduction to the History of the Administration of Justice of the Republic of Botswana" (1981) 13 *Botswana Notes and Records* 89, 91.

12 B Otlhogile *A history of the higher courts of Botswana* (1994) 4.

13 Republic of Botswana Penal Code (2 of 1964) section 2 (This section was omitted beginning with the 2002 version of the Penal Code, being replaced by the current section 3 "…no person shall be liable to punishment by the common law for any act.")

14 *Id* section 4, abolishes the reign of Roman-Dutch common law by specifically providing that the Penal Code be interpreted in accordance with English legal principles.

15 Republic of Botswana Penal Code (Cap. 08:01) section 26; but see, Botswana Defence Force Act (13 of 1977) section 128(a) (allows the president to determine the manner of execution). Other methods of execution that have been used in other countries include electrocution, the administration of a lethal injection, death by firing squad and the gas chamber. See Death Penalty Information Centre "Methods of execution" (2016) available at http://www.deathpenaltyinfo.org/methods-execution (last accessed: 18 November 2016).

16 B Otlhogile *A history of the higher courts of Botswana* (1994) 3 – 4.

17 A Molokomme "The reception and development of Roman-Dutch law in Botswana" (1985) 1(1) *Lesotho Law Journal* 121, 124.

18 A Molokomme and B Otlhogile "Legal Developments in Botswana since independence" (1989) 6 *Pula - Botswana Journal of African Studies* 17, 18.

19 Bechuanaland Protectorate Proclamation No. 75 of 1934, section 8(1).

20 This offence is characterised by serious insubordination, rebelliousness, disobedience or defiance to the chief.

21 *Khama and Another v High Commissioner* (1926-1953) HCTLR 9. For a full discussion of the decision see B Otlhogile "*Tshekedi Khama and Another v High Commissioner*: The making of the court" (1993) 25 *Botswana Notes and Records* 29.

Public attitudes towards the death penalty in Botswana remain largely sympathetic and supportive.[22] This may be because the views of many are formed by traditional or customary attitudes towards crime and punishment and many see nothing objectionable with the imposition of the death penalty.[23] The death penalty has, after all, been part of Botswana's legal history for over a 100 years. Public attitudes in support of the death penalty have strengthened in the wake of the perception that Botswana's neighbour, South Africa, suffers a high rate of serious crimes like murder and armed robbery partly because criminal elements do not face the possibility of capital punishment.[24] For instance, a series of *Kgotla* meetings conducted by the Botswana National Assembly Parliamentary Law Reform Committee in 1996 and 1997 found that the majority of citizens expressed support for the retention of the death penalty.[25] The government often relies on the reports of the Parliamentary Law Reform Committee to explain its retentionist stance.

The Death Penalty Preserved in the Constitution

Section 7(1) of the Constitution outlaws torture, and cruel and inhuman punishment; however, section 7(2) of the Constitution makes an exception with regard to punishments that were lawful in the country prior to promulgation of the Constitution. Section 7(2) of the Constitution provides:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution."

The framers of the Botswana Constitution anticipated that its legality may be challenged on the basis of section 7(1) and had the foresight to include a savings clause to preserve the death penalty.

The death penalty in Botswana is the punishment prescribed for murder without extenuating circumstances,[26] treason,[27] piracy,[28] grave breaches of the Geneva Conventions,[29] and certain military offences.[30]

The only other place where similar constitutional arrangements exist preserving the death penalty in a country's Constitution is in the commonwealth Caribbean.[31] The unique challenge that this presents is that it becomes virtually impossible to use constitutional litigation to strike down the death penalty.

22 See K Frimpong "The death penalty in Botswana" *BIICL* (2004) 4, available at http://www.biicl.org/files/2193_country_report_botswana_frimpong.pdf (last accessed: 27 November 2016); "The Botswana Centre for Human Rights Benchmark Report on Death Penalty within selected SALAN Member States (Malawi, South Africa, Zimbabwe and Botswana)" *Ditshwanelo* (2015) 17, available at http://www.ditshwanelo.org.bw/publications.html (last accessed: 27 November 2016).

23 OB Tshosa "The death penalty in Botswana in the light of international law: The case for abolition" *BIICL* (2004) 6 available at http://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf (last accessed: 20 January 2016).

24 Botswana National Assembly Law Reform Committee "Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II" 1997.

25 *Id*.

26 Penal Code of Botswana (2 of 1964) sections 202 and 203.

27 *Id* sections 34(1) and 35.

28 *Id* section 63.

29 Geneva Conventions Act, Cap 39:03 of the Laws of Botswana, section 3(1)(d)(ii).

30 Botswana Defence Force Act, Cap 21:05 of the Laws of Botswana, sections 27 - 29.

31 Q Whitaker "Challenging the death penalty in the Caribbean: Litigation at the Privy Council" *Against the death penalty: International initiatives and implications* (2008) 104.

Attempts to Challenge the Constitutionality of the Death Penalty

The constitutionality of the death penalty has been challenged in several decisions in Botswana. In *Molale v State,*[32] the first case raising a constitutional challenge to the death penalty, the Court of Appeal was also asked to consider whether hanging was anachronistic, primitive and barbaric and, whether the death penalty was inhuman, degrading and unconstitutional. The Court did not deal with the constitutional questions as it overturned the capital sentence on other grounds.

In the same sitting of the Court of Appeal in 1995, the same justices of appeal[33] heard the decisive case of *Ntesang v State*.[34] The Court of Appeal had to decide whether the imposition of the death sentence for murder without extenuating circumstances was *ultra vires* the Constitution. First, the appellant argued that the death penalty is anachronistic, antediluvian and barbaric. Second, that hanging as a form of carrying out the death penalty constitutes torture, and inhuman and degrading treatment and third, that provisions of the Penal Code permitting the death penalty were unconstitutional and therefore null and void.

With respect to the first issue, the Court of Appeal accepted that many countries, including some African States regarded the death penalty as anachronistic, antediluvian and barbaric. However, the Court of Appeal pointed out that there were many other nations, like Botswana, that had yet to abolish the death penalty. The Court of Appeal took the view that the first point was not decisive of the issue before the Court. The Court considered that the question of amending Botswana's laws to be in step with the international community was not a matter for it but for the legislature stating:

> "Of course this Court, as well as other institutions of government of this country cannot and should not close its ears and eyes to happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicatory and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in these proceedings."[35]

On the issue of whether the death penalty amounts to cruel and inhuman punishment contrary to section 7(1) of the Constitution, the Court of Appeal held that in the absence of very compelling reasons, it could not hold that one provision of the Constitution is contradictory and opposed to another, and hence refuse to give effect to the one in favour of the other. The Court of Appeal had no power to re-write the Constitution in order to give effect to progressive movements taking place world-wide.[36]

On the issue of whether the provisions of the Penal Code prescribing the death penalty were beyond the powers granted by the Constitution, the Court of Appeal took issue with the appellant's position that the provisions of the Penal Code prescribing the death sentence contradicted sections 3 and 4 of the Constitution that guarantee the right to life. The Court noted the exception to

32 1995 BLR 146 (CA).
33 Aguda JA, Lord Wylie JA, Steyn JA, Tebbutt JA and Lord Cowie JA.
34 1995 BLR 151 (CA).
35 *Id.*
36 *Id.*

section 4(1) of the Constitution that clearly sanctioned the death penalty.[37]

The question of legality of the death penalty was raised again in *Ditshwanelo and Others v Attorney General and Another*,[38] a case filed by Ditshwanelo on behalf of two death row inmates. The case was filed against the Attorney General, seeking a stay in execution. The Court of Appeal reaffirmed the decision in *Ntesang* but left the door open for Ditshwanelo to approach the Court on the question should new constitutional matters arise.[39]

Constitutionality of the death penalty was challenged once again in *Kobedi v State (2)*.[40] Citing the *Ntesang* decision with approval, the Court of Appeal stated it had, in a full bench decision, pronounced on the constitutionality of the death penalty and held that it is not unconstitutional and that the method of execution, hanging, was not *ultra vires* the Constitution. This challenge also failed.

However in 2004, almost ten years after *Ntesang*, the High Court was presented with a new constitutional question when it was asked in *State v Masoko*[41] to rule on the constitutionality of the mandatory death penalty. After finding the accused guilty of murder without extenuating circumstances, the only sentence available to the Court was a mandatory death sentence.[42] The Court considered that its judicial discretion to determine a suitable penalty to fit the crime was entirely circumscribed and restricted by the Penal Code which precluded the consideration of mitigating factors.[43]

The Court found this sentencing scheme for murder without extenuating circumstances to be arbitrary.[44] Motswagole J held that section 203 of the Penal Code was unconstitutional.[45] The effect of *Masoko* was to outlaw the mandatory death sentence in Botswana where an accused is convicted of murder without extenuating circumstances. The *Masoko* matter was taken on appeal by the State. The Court of Appeal overturned the High Court decision on the constitutionality of the mandatory death penalty, reaffirming that even mandatory capital sentences are constitutional in Botswana.[46] *Ntesang* remains binding precedent on the constitutionality of the death penalty in Botswana.

Challenges to Abolition of the Death Penalty

The abolition of the death penalty in Botswana continues to be a subject of debate. Current hurdles towards this goal include the constitutional savings clause, public opinion in support of the death penalty, inadequate legal representation of accused persons in capital cases, the clemency process, and secret executions. Each of these issues is examined in more detail below.

37 Constitution of Botswana, 1966, section 4(1).
38 1999 (2) BLR 56 (HC).
39 *Id* 62.
40 2005 (2) BLR 76 (CA).
41 CTHFT 000008–07 (unreported, cyclostyled judgment).
42 Penal Code, section 203(1).
43 *State v Masoko* CTHFT 000008–07 (unreported, cyclostyled judgment), 74 to 75.
44 *Id* 123.
45 *Id* 174 to 175.
46 *State v Masoko* CLCGB 058-14 (unreported).

The constitutional savings clause

The text of the Constitution makes it very difficult to bring a successful constitutional claim to abolish the death penalty in the courts of Botswana. The courts have clearly indicated that they are not empowered to re-write the Constitution and declare the death penalty unconstitutional. There may have been some headway made in finding the mandatory death penalty unconstitutional in the *Masoko* High Court decision, however, this decision has been overturned on appeal thus retaining the mandatory death penalty for murder without extenuating circumstances.

Public opinion

Public perceptions in Botswana are in favour of retaining the death penalty.[47] Public consultation of the nation with regard to the death penalty in the spirit of *therisanyo*[48] was conducted between January 1996 and September 1997 by the Parliamentary Law Reform Committee.[49] The minutes of the results of the consultation from *Kgotla* meetings country wide indicated overwhelming support for the death penalty.[50] Abolition of the death penalty would likely result in considerable public disquiet.

Adequacy of representations

The right to legal representation in Botswana is not absolute.[51] An accused person has a right to legal representation of his choice at his own cost. The sole exception in criminal matters is capital cases. Where the accused faces the death penalty, he is entitled to legal representation. If he cannot afford a lawyer, the Registrar of the High Court appoints a *pro deo* attorney for the accused. The adequacy of *pro deo* counsel was raised as an issue in the *Kobedi (2)*[52] case and the *Maauwe* and *Motswetla* cases.[53] The issue of adequacy of legal representation is one of concern in capital cases in Botswana. A report filed by the International Federation for Human Rights (FIDH) in conjunction

47 "Botswana unmoved on death penalty" *GabzFM* (30 January 2013).

48 PC Moumakwa "The Botswana *Kgotla* system: a mechanism for traditional conflict resolution in modern Botswana case study of the Kanye *Kgotla*" University of Tromsø Master Thesis (2010) 77 ("*Therisanyo* is very important in Botswana as a means of communication between the communities and the government. The government of Botswana usually consults people through *Kgotla* meetings organised by the chief. The chief is the ex-officio on government issues… Since independence, BDP [the ruling party] has been in power until now; the party leaders have adopted this way of discussing government policies and initiatives, developments etc… The president and the cabinet ministers usually go around each village addressing people at the *Kgotla* on any issue the public needs to know or to get the public opinion.") available at http://munin.uit.no/bitstream/handle/10037/3211/thesis.pdf (last accessed: 20 January 2016).

49 Botswana National Assembly Law Reform Committee "Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II" 1997.

50 For instance, at the *Kgotla* meeting in the Lobatse Customary Court, the public indicated their support for the death penalty and urged government to minimise delays in execution and wasting public funds feeding condemned prisoners. Members of the public also lamented the South African experience with the abolition of the death penalty. At the Kanye *Kgotla*, The majority supported capital punishment as a deterrent with only one individual speaking against it. At the Tlokweng *Kgotla*, the death penalty received support. It was proposed that capital trials be sped up and the death penalty be extended to rapists. At the Moshupa *Kgotla* meeting, one person spoke against the death penalty urging that it be replaced with life imprisonment. At the Jwaneng Customary Court, support for the death penalty was indicated with a request that it be extended to persons committing abortions. In Gaborone Babusi Ward *Kgotla* meeting, the death penalty received support with one person calling for a referendum on the matter.

51 See *Mathiba v State* 2010 1 BLR 711 (HC); *Makhura and Another v State* [1991] B.L.R. 104 (HC) 110 D-H.

52 2005 (2) BLR 76 (CA).

53 1999 (2) BLR 56 (HC).

with Ditshwanelo found that capital cases in Botswana were argued by inexperienced attorneys who lacked the necessary skills to defend persons facing the death penalty. Another concern raised was the low fees paid to attorneys in *pro deo* cases; there was little incentive to zealously represent clients and fully prepare for the time consuming cases. Attorneys in *pro deo* cases lacked the necessary resources to prepare for capital cases.[54]

The clemency process

The clemency process in Botswana has been criticised as opaque and not transparent.[55] Ditshwanelo has taken issue with the process, as did the South African High Court in the *Tsebe* case.[56] One issue raised with the clemency process is the fact that the Attorney General is a member of the clemency committee; this creates a conflict of interest. Further, campaigners against the death penalty are dissatisfied with the provision of the law that allows the clemency committee to sit even with one of its members absent. The committee regulates its own procedure, which contributes to the opaqueness of the process.[57] Another area of concern is that there is no possibility of making oral submissions to the clemency committee. The clemency committee does not provide a written "decision" but merely makes a pronouncement that the application has been denied. The system has been criticised as broadly inadequate and in need of more transparency and independence.

Secret executions

Executions in Botswana have been carried out without notice to the condemned prisoners' family, friends or attorneys. An example is the condemned prisoner Mr Ping. Ditshwanelo reported that Mr Ping's family was not informed of his execution although there was opportunity to do so. Ditshwanelo maintained that the failure to inform the family of the date of the execution and the refusal to give the family access to the prisoner resulted in inhuman and degrading treatment and punishment for both the prisoner and his family.[58] In the case of *Interights application on behalf of Mariette Bosch*, the African Commission stated that the justice system must have a human face and allow the condemned prisoner to arrange his affairs and receive family and visits prior to his execution.[59]

The Case for Abolition of the Death Penalty

The death penalty should be abolished for many reasons. This paper focuses on those most relevant for the Botswana legal and cultural context, which could benefit from a strengthening of its human rights culture.

54 FIDH and Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 21.

55 *Id* 26.

56 *Minister of Home Affairs and Others v Tsebe and Others and Amnesty International* (2012) ZACC 16.

57 In April 2016, the Botswana Guardian reported that a case was filed by Patrick Gabaakanye, who was on death row at the time, interdicting the President from signing his warrant of execution and seeking clarity on the procedure for clemency. "Death row inmate interdicts Khama – to stop him signing warrant of execution" *Botswana Guardian* (1 April 2016).

58 FIDH and Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007), 27.

59 *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswan*a ACHPR 240/01 (2003) para. 41 available at http://caselaw.ihrda.org/doc/240.01/ (last accessed: 28 November 2016).

The death penalty is no deterrent

There is a popularly held belief that the death penalty is an individual and general deterrent. However, empirical evidence does not support this argument. The death penalty is not an individual deterrent. Since the death penalty permanently incapacitates the prisoner, it cannot be proven that such a prisoner would have repeated the offence for which he was convicted had he not been executed.[60] In fact, evidence supports the view that the deterrent effect of the death penalty is no more effective than the deterrent effect of life imprisonment.[61] This is because imprisonment also incapacitates the offender making it impossible for him to repeat the crime for so long as he remains in custody.[62] The death penalty therefore runs the risk of being "nothing more than a purposeless and needless imposition of pain and suffering".[63]

With regard to general deterrence, Ancel notes that the abolition of the death penalty is never followed by a notable decrease in the incidence of the crime punishable by death.[64] In fact, crime rates are not lower in countries that have the death penalty.[65] This position is reiterated by Amnesty International which has stated that the death penalty has never been empirically proved to be a deterrent to crime.[66]

The death penalty brutalises all those involved in the process

Amnesty International reports that the cruelty of the death penalty is suffered by the prisoner from the moment of conviction with some prisoners abandoning the appeals process resigning themselves to execution "as if it were some form of suicide".[67] This is because the prisoner convicted to death is often treated differently from other prisoners. The ritual leading up to the execution is itself dehumanising to the prisoner. Preceding the death penalty, the prisoner may be placed in solitary confinement, the death warrant may be read out aloud, the prisoner may be placed under constant observation, and his property may be removed. The prisoner may be measured for clothing to be worn during the execution, the death certificate may be prepared with his knowledge and the prisoner offered a last meal.[68]

In *Soering v United Kingdom and Germany*,[69] the European Court held that the death row phenomenon was contrary to the European Convention on Human Rights. In *Pratt and Morgan v Attorney General for Jamaica*[70] the Privy Council considered long post-trial detention and held that no one should be subjected to execution after waiting more than five years on death row. The

60 RJ Simon and DA Blaskovich *A comparative analysis of capital punishment: Statutes, policies, frequencies and public attitudes the word over* (2002) 41; "When the State kills: The death penalty v human rights" Amnesty International (1989) 5.

61 R Hood *The death penalty – a worldwide perspective* (2002) 209; V Streib *Death penalty in a nutshell* (2008) 17.

62 V Streib D*eath penalty in a nutshell* (2008) 15.

63 *Coker v Georgia* (1977) 433 U.S. 584.

64 WA Schabas "The United Nations and the abolition of the death penalty" *Against the death penalty: International initiatives and implications* (2008) 14.

65 "When the State kills: The death penalty v human rights" *Amnesty International* (1989)10.

66 *Id* 5.

67 *Id* 61.

68 *Id* 65.

69 (1989) 11 EHRR 439.

70 (1993) 4 All ER 769.

Court considered this to be cruel and inhuman treatment, contrary to the Jamaican Constitution.

Advocates against the death penalty state that capital punishment causes the State to be viewed as the perpetrator of violence against its citizens.[71] The guards, chaplains, jurors, lawyers, judges, prosecutors, doctors and police officers that are required to participate in the execution often find it to be a traumatic and disturbing experience.[72] Indeed, repaying death with death may not always be a fair punishment as society, in executing a prisoner, descends to the same moral depravity as the offender.[73]

Hodgkinson states that victim's families are often ignored.[74] The death penalty perpetuates the pain and anger of the victim's family.[75] Victims' families suffer the extended process of the trial, conviction and execution of the offender for a capital offence. In capital cases, the victims' families report that they experience a shift of attention from the victim of the crime to the prisoner who perpetrated the offence often resulting in frustration and a feeling of disillusionment with the law.[76] On the other hand, the family and friends of the prisoner often suffer when a loved one is convicted, sentenced and executed. Often they are not afforded a chance to say goodbye. They are sometimes denied advance notice of the execution. They suffer grief at the death of the prisoner. They suffer humiliation at the manner of death of their loved one. They are also dejected as they have no way of preventing the execution.[77]

The death penalty is imposed arbitrarily and may result in the execution of the innocent

The death penalty has been criticised as being too arbitrary and subject to error.[78] Amnesty International notes that it is not possible to achieve fairness, consistency and infallibility in any criminal justice process that determines who should live and who should die. The possibility of error is ever present due to the human frailty of judges, prosecutors and defence attorneys. Public opinion on particular cases may influence the decision-makers from arrest to clemency. Expediency and discretion also affect the mind of the decision-maker.[79]

The death penalty should be abolished due to the risk of errors that could have affected the process of investigation, trial, conviction and clemency, which could then result in the execution of the innocent. Innocent persons have been convicted to death and subjected to the death penalty.[80] Abolition of the death penalty is the most effective way to avoid wrongful executions.[81]

71 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 67.

72 *Id* 67.

73 V Streib *Death penalty in a nutshell (*2008) 12 to 13.

74 P Hodgkinson "Capital punishment: meeting the needs of the families of the homicide victim and the condemned" *Capital punishment: Strategies for abolition* (2004) 332.

75 P Hodgkinson "Capital punishment: improve it or remove it?" *Capital punishment: Strategies for abolition* (2004) 1.

76 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 68.

77 *Id.*

78 RJ Simon and DA Blaskovich *A comparative analysis of capital punishment: statutes, policies, frequencies and public attitudes the word over* (2002) 47.

79 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 7, 9–10.

80 V Streib *Death penalty in a nutshell* (2008) 19.

81 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 31.

The death penalty is a violation of the fundamental human rights of prisoners

There is an increase in the number of international agreements, both binding and non-binding, that have seen the international community move steadily towards abolition.[82] Hodgkinson notes that political pressure and the desire to reject injustices propagated in some nations by totalitarian regimes has driven the steady march towards abolition.[83] The question of the death penalty cannot be separated from the question of human rights.[84] The death penalty is a violation of a person's right to life. Beccaria states that no person has the right to take another's life.[85] The death penalty is an extreme physical and mental assault on the prisoner. The pain caused by the act of killing the prisoner cannot be quantified.[86] The death penalty violates a person's right to be free from torture, cruel, inhuman or degrading punishment.[87]

In response to the argument that capital punishment is justifiable as retribution for crime, Amnesty International argues that human rights are inalienable and should not be taken away despite the heinousness of a crime.[88] Whilst the desire for vengeance is understandable, the law serves to restrict personal vengeance in favour of public policy and legal codes to mete out justice.[89]

The argument that the public would not support the abolition of the death penalty can also be refuted on the basis of human rights. The mere fact that the public would support some form of punishment does not give credence to the punishment. Public support for the death penalty is often based on an incomplete understanding of the facts surrounding the death penalty from arrest to execution.[90] Persons who are informed about the cruelty of the death penalty and the risks of error inherent in the process of condemning a person to death are less likely to continue to offer their support for the punishment. Attitudes often change when the public is well-informed about what States do on their behalf.[91]

The cost of incarceration of a prisoner is not a convincing argument in support of capital punishment. It was held in *Tsebe* that the question of cost should not deter any criminal justice system from protecting the human rights.[92] Amnesty International states that an inordinate amount of resources is concentrated on capital cases; these resources could be reallocated to other areas of law enforcement if the death penalty was abolished.[93]

82 P Hodgkinson "Capital punishment: improve it or remove it?" *Capital punishment: Strategies for abolition* (2004) 3.

83 *Id* 3.

84 "When the State kills: The death penalty v human rights" *Amnesty International (*1989) 1.

85 C Beccaria "The death penalty will not discourage crime" (1764) available in The death penalty: *opposing viewpoints* 3rd ed (1997) 22.

86 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 2.

87 *Id* 2.

88 *Id* 6.

89 *Id* 7.

90 *Id* 22.

91 *Id.*

92 *Minister of Home Affairs and Others v Tsebe and Others and Amnesty International* (2012) ZACC 16.

93 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 24.

Ineffective clemency process vitiates the rights of the prisoner

Clemency is an administrative decision to commute the death penalty after all appeals have been exhausted in the court process.[94] It is also referred to as mercy, pardon or reprieve. Traditionally exercised by the monarch, it is now usually exercised by the head of the executive arm of government.[95]

In terms of article 6 of the ICCPR, the right of the prisoner sentenced to death to seek clemency is preserved. The right to clemency exists in many countries, but Amnesty International notes that it is often exercised arbitrarily or entirely overlooked.[96] In some countries the decision is made in a few short hours or days by an executive fully engaged with other government matters creating a real risk of error where decisions must be made under pressure.[97]

The death penalty and public opinion

The argument that public support for the death penalty is insurmountable is a fallacy. Many people erroneously believe that the death penalty is an effective general deterrent.[98] Hood states that there is no connection between public support for the death penalty and the incidence of homicide.[99] It has been argued that once the public are properly educated about what it takes to execute a human being, public support for the death penalty would wane.

Hodgkinson states that strong public support for the death penalty is better challenged through raising public awareness and understanding of the death penalty.[100] In the Royal Commission Report on Capital Punishment (1949 – 1953), the UK Attorney General cautioned against reliance on public opinion stating that in his view, any reliance placed on public opinion had to be founded on the confidence that the public was "well informed and instructed."[101] In fact, legislative abolition of the death penalty in the United Kingdom occurred in the face of public opinion polls in favour of the death penalty.[102] Similar views were expressed by Justice Thurgood Marshall from the US Supreme Court in his dissent in *Gregg v Georgia*[103] where he stated that "the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable".[104]

In another decision of the US Supreme Court in *Furman v Georgia*[105] the Court noted that public opinion "lies at the periphery-not the core-of the judicial process in constitutional cases."[106] According to the US Supreme Court, the assessment of public opinion was a matter for the

94 *Id* 33.
95 *Id*.
96 *Id* 34.
97 *Id*.
98 WA Schabas "Public Opinion and the death penalty" *Capital punishment: Strategies for abolition* (2004) 312.
99 R Hood *The death penalty – a worldwide perspective* (2002) 243.
100 P Hodgkinson "Capital punishment: improve it or remove it?" *Capital punishment: Strategies for abolition* (2004) 18.
101 *Id* 19.
102 WA Schabas "Public Opinion and the death penalty" *Capital punishment: Strategies for abolition* (2004) 309.
103 (1976) 428 US 153.
104 *Id* 233 (dissent).
105 (1972) 408 US 238.
106 *Id* 443.

legislature and not a judicial function.[107] Similarly, in South Africa, the death penalty was abolished by the Constitutional Court in *State v Makwanyane*[108] in the face of strong public support for the death penalty.[109]

Abolition of the Death Penalty within the Framework of the UN Sustainable Development Goals 2016-2030

Goal 16 of the UN Sustainable Development Goals encourages States to provide access to justice for all and to build accountable and inclusive institutions at all levels. As illustrated above, the death penalty infringes on the human rights of the offender. Where the death penalty exists, the legal system may appear, to those whose rights are limited by it, as ineffective and vindictive. The legal system may adopt a rudimentary posture towards punishment seeking justice for the victim without the balance provided by the protection of the human rights of the offender. Instead, an effective judiciary as a national institution should have the protection of the human rights of all at its core: both victims and offenders. All States should move away from punishments that do not meet the criteria of fairness and equality. A judicial system that carries out executions secretly without the safeguards of transparency from trial stage to clemency stage lacks accountability. Improvements can be made to ensure that the offender, their representatives and family interact with the State in capital cases at all stages with transparency. In order to meet goal 16 in the specific area of the death penalty, the Government of Botswana should consider setting up a commission of inquiry to study the continued usefulness of the death penalty in Botswana along the lines of the Lansdown Inquiry in South Africa, the Royal Commission of Inquiry in the United Kingdom as well as the Barnett and Fraser Commissions in Jamaica. The proposed commission should be charged with considering whether or not the death penalty should be abolished, and if so, to make recommendations for alternative sentencing arrangements.

In the interim, the Government of Botswana should consider a review of the Constitution with a view to securing greater protection of the right to life and human dignity by abolishing the death penalty. A two-stage process which would involve a moratorium on the death penalty and commutation of all death sentences to life imprisonment is proposed. Moratoria have been used by numerous nations as the first tier in the ladder of abolition. A moratorium would give the Government of Botswana a window to engage in public education and develop an alternative sentencing scheme suitable for commutation of all death sentences to life imprisonment with or without the possibility of parole. This proposed scheme would propel Botswana's criminal justice system into the 21st century. Abolition of the death penalty in Botswana would be a landmark moment for the protection of human rights in Botswana.

107 *Id.*

108 (1995) ZACC 3.

109 WA Schabas "Public Opinion and the death penalty" *Capital punishment: Strategies for abolition* (2004) 311.

THE ROLE OF THE JUDICIARY IN SAFEGUARDING AND ENSURING ACCESS TO CRIMINAL JUSTICE: THE CASE OF ZAMBIA[1]

Anderson Ngulube[2]

Introduction

The phrase "access to justice" tends to conjure a very specific mental image: poor people needing legal aid because they are unable to afford the legal services of private legal practitioners. The Legal Aid Board is seen as the institution that facilitates access to justice for the poor. This, however, is only part of the story. The Legal Aid Committee of the Law Association of Zambia and a number of civil society organisations also help facilitate access to justice.

Accessing justice can be challenging in Zambia. The poor have some access to both criminal legal aid and civil legal aid, but the government focuses resources on criminal legal aid. This creates an overwhelming burden on the poor who often have to deal with civil cases unaided. Even in criminal court, legal aid does not cover all cases; the majority of criminal cases which take place in the subordinate courts are prosecuted by public prosecutors (schooled and experienced in prosecution) while the accused persons defend themselves. This paper focuses on the criminal justice system.

This paper argues that the justice system in Zambia should make a concerted effort to guarantee the rights and liberties of citizens, residents and visitors. This effort must include the whole legal profession: legal aid providers, prosecutors and, perhaps most importantly, the judiciary. The judiciary should take a leading role to promote access to justice and the rule of law.

The judiciary must ensure access to criminal justice. It should take measures to protect access and prevent any legal occurrence, whether procedural or substantive, which will restrict or take away access to justice. In addition the judiciary must be proactive in enhancing access to justice. Increasing the capacity of the courts are essential to helping people in Zambia access justice.

Access to justice does not exist in a vacuum. Access to justice can only be meaningfully discussed in a broad context that includes the rule of law, human rights, good governance and democratic values.[3] The international community has taken steps to codify and protect these rights. Some of the key international human rights instruments include the International Covenant on Civil and Political Rights (ICCPR), the Convention of the Elimination of all Forms Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Zambia has ratified

1 This paper was presented at a Judicial Colloquium entitled Working towards just, peaceful and inclusive societies: Promoting rule of law and equal access to justice, held at Twangale Park Hotel, Lusaka, on 21 and 22 April 2016.

2 Director of Legal Aid for the Republic of Zambia; LL.B (University of Zambia).

3 J Shezongo-Macmillan "Zambia: Justice Sector and the Rule of Law" *Open Society Initiative for Southern Africa* (March 2013) 102 to 113.

these instruments as well as the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[4]

Rule of Law and Access to Justice

Access to justice as a concept can be defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.[5] There are three pillars on which access to justice stands namely substantive law, legal institutions and legal services.[6] Access to justice deals with how members of society work through various justice institutions to deal with their legal issues. Members of society can include men, women, children, groups, incorporated and unincorporated bodies, offenders, victims, rich and poor. One of the obvious obstacles to accessing justice is the limited infrastructure and funding challenges that justice institutions have to operate in.

Rights can only be meaningfully asserted or protected in a justice system that secures remedies for the aggrieved persons. Rights can be easily disregarded if the justice system cannot be accessed or if it fails to provide a fair and just hearing, and outcome.

In 2013, Lord Neuberger, current President of the UK Supreme Court, considered some of the practical implications of the rule of law on access to justice:

> "The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves. And the rule of law also requires that, save to the extent that it would involve a denial of justice, the determination of any such claim is carried out in public. So citizens must have access to the courts to have their claims, and their defences, determined by judges in public according to the law…Courts exist to resolve disputes, and also to vindicate rights – and to do so in public."[7]

Lord Neuberger noted that access to justice has a number of components:

> "First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the court; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice.
>
> Cutting the cost of legal aid deprives the very people who most need the protection of the courts of the ability to get legal advice and representation. That is true whether one reduces the types of claim which qualify for legal aid or increases the stringency of the requirements of eligibility for

4 See ICCPR article 2(3) (access to judicial processes for redress of any violation of rights); article 6 (right to life); article 9(4) (recourse to the courts to challenge unlawful deprivation of liberty); article 14 (fair and public trial); and article 26 (equality before the law and non-discrimination).

5 "Access to Justice: The concept" Van Vollenhoven Institute (2010) available at http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-to-justice/the-concept.html (last accessed: 18 November 2016).

6 Commission on Legal Empowerment of the Poor, Republic of Zambia, Draft Working Group 1, Access to Justice and the Rule of Law Meeting, July 2007.

7 Lord Neuberger "Justice in an Age of Austerity" *Tom Sargent Memorial Lecture (*15 October 2013) paras. 23 and 27 available at https://www.supremecourt.uk/docs/speech-131015.pdf (last accessed: 18 November 2016).

> legal aid. The recent changes have done both. If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs' time and of the judge's time in and out of court. So that it means greater costs for the court system, and delay for other litigants."[8]

Access to justice through legal aid secures a voice for the weakest members of society. Access, financial means, knowledge of legal rights, the ability to claim the rights, and effective representation are all necessary to achieve true equality before the law. Where there is no effective legal aid system the indigent and vulnerable persons are denied the right to enforce their rights. Access to justice accordingly includes access to courts, access to counsel, understanding rights and remedies, access to information, and access to remedies and enforcement mechanisms. Equal access to justice should be regarded as essential to economic development and maintenance of social harmony.

Implementing Goal 16

There are many substantial issues facing the international community, such as global development, peace, good governance, and an increasingly interconnected economy. To address these, the United Nations adopted seventeen sustainable development goals at the United Nations Sustainable Development Summit in New York in September 2015.[9] Goal 16 challenges States to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." Under Goal 16, there are ten targets to be achieved by 2030. Some of the most relevant to this discussion include:

> "…16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all...
> 16.6 Develop effective, accountable and transparent institutions at all levels...
> 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements."[10]

Goal 16 has stirred up some controversy:

> "Much of the discussion of this highly controversial SDG has focused on reducing violence, security, the rule of law, and creating strong inclusive and effective institutions to deliver justice and public services, alongside the difficulty of creating appropriate targets and metrics.
> SDG 16 is both an end in itself, and a crucial part of delivering sustainable development in all countries. It has in fact been seen by many commentators as being *the* transformational goal and key to ensuring that the Agenda can be accomplished."[11]

It is the duty of both the State and the citizens to create and maintain peace; they should take deliberate steps towards an inclusive society. Inclusiveness is important because it addresses the issues of marginalised communities, such as the poor, the vulnerable, persons with disabilities,

8 *Id* paras. 31 and 44.

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

10 *Id* 25 and 26.

11 "UN Sustainable Development Goal (SDG) 16 – importance of participatory institutions and policymaking" *Foundation for Democracy and Sustainable Development (*2016) available at www.fdsd.org/ideas/sustainable-development-goal-sdg-16-democratic-institutions/ (last accessed: 18 November 2016).

women, children, and minority groups. Society must uphold the rule of law and fundamental freedoms, and ensure equal access to justice. Laws and policies should be formulated and enforced without unlawful discrimination.[12] Goal 16 accordingly has the ability to facilitate social transformation, but only if governments and citizens work together towards its targets.

There are tangible steps we can take to achieve equal justice as set out in Goal 16.

First, we need a cadre of professional leaders in the justice sector who are well-meaning, personally trained and situated in institutions with the capacity to advance the agenda of justice.

Second, we need to realise that laws by themselves do not guarantee inclusion of marginalised and disadvantaged people. Good laws do not guarantee good governance. Good laws must go hand in hand with legal and political empowerment at the local and national levels. Individuals, whether vulnerable or disadvantaged, will often require a guiding hand in order to effectively assert their rights and access justice. Those with the least means are the most disadvantaged and are routinely left out. Although this may not be intentional, it is still the duty of the various functionaries to deliberately seek out and assist the poor and vulnerable.

Third, we are in an era of enhanced information and communication technologies. Creative use of these technologies can help make information readily available to those who need it. Presentation formatting can be targeted at selected groups to better achieve the desired understanding. When people do not understand information that has been presented to them, this is a communication failure that needs to be addressed.

Access to Justice and the Current Policy Framework in Zambia

Access to justice is heavily impacted by the capacity of judges, lawyers and the institutions they work in. Zambia's Sixth National Development Plan (SNDP)[13] and the Revised Sixth National Development Plan (RSNDP)[14] were the overall planning framework from 2011 to 2016. Governance was not a stand-alone feature of these plans. It was featured as a cross-cutting issue and good governance was referenced as "the cornerstone for prudent management of public affairs and ensuring that development outcomes benefit the people of Zambia".[15] The government focused on developing human capacity and infrastructure for governance institutions to enhance their delivery capacity. Whether or not the government achieved these goals has yet to be evaluated.

Access to justice was also one of the priority areas for the Government under the Governance Chapter in the Fifth National Development Plan (FNDP)[16] which covered the period 2006 to 2010. The FNDP identified policy and programme coordination in the justice sector as critical but weak. The diversity of agencies with a "governance" mandate, the limited tradition for institutions

12 Section 266 of the Constitution of Zambia (2 of 2016) defines "discrimination" as "directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status".

13 SNDP 2011-2015 "Sustained Economic Growth and Poverty Reduction" Republic of Zambia (2011).

14 RSNDP 2013-2016 "People Centered Economic Growth and Development" Republic of Zambia (2014).

15 SNDP 2011-2015 "Sustained Economic Growth and Poverty Reduction" Republic of Zambia (2011) para. 3.2.

16 FNDP 2006-2011 "Broad based wealth and job creation through citizenry participation and technological advancement" Republic of Zambia (December 2006).

to work at cross-institutional level, and human resource capacity shortages contributed to this situation. Weaknesses were found at institutional levels, individual institutions had capacity constraints in planning and implementation, cross-institutional coordination was very limited and budgetary and legislative follow-up on national plans and reforms rarely happened.[17]

Access to Criminal Justice

An uncomfortable reality is that there are shortcomings in society such as achievement gaps, income gaps, transportation gaps, infrastructure and technology gaps, and political gaps. One of these apparent gaps is a justice gap. The absence of concerted efforts by the State and other players to make access to justice a reality will prevent any sort of bridging process from developing that would lessen the gap.

The presence of legal aid in Zambia has helped more indigent clients access justice through a limited policy and legal framework that covers the Legal Aid Board. However, there is no policy or legal framework to guide the provision of legal aid services by civil society organisations (CSOs) and community-based organisations (CBOs). These services are provided in an ad hoc and unregulated manner. The Law Association of Zambia has not been active in legal aid matters except under the legal aid scheme administered by the Legal Aid Board. In addition, the scope of the legal profession's legal aid work remains limited as there is no specific framework supporting the provision of legal aid by legal practitioners in private practice.

The judiciary has a role to play in changing this scenario. In Zambia, the judiciary has not traditionally been seen as being a key player in helping people to access justice. The judiciary if often seen as a laid-back arbiter that waits for litigants to present their cases and thereafter makes rulings and/or delivers judgments.

The judiciary can however enhance access to justice by encouraging pro bono work by the bar, seeking bar students[18] and law students to provide legal assistance to the needy, and facilitating connections between corporate counsel and criminal defendants. In fact, doing so will ensure that the judiciary complies with its constitutional mandate:

Article 118(1) of the Constitution[19] provides that judicial authority "shall be exercised in a just manner and such exercise shall promote accountability". Article 118 continues:

> "(2) In exercising judicial authority, the courts shall be guided by the following principles:
> a) justice shall be done to all, without discrimination;
> b) justice shall not be delayed;
> c) adequate compensation shall be awarded, where payable;
> d) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted, subject to clause (3);
> e) justice shall be administered without undue regard to procedural technicalities; and
> f) the values and principles of this Constitution shall be protected and promoted."

17 *Id* 279.

18 Bar students are those at the Zambia Institute of Advanced Legal Education.

19 Act 2 of 2016.

Access to justice goes beyond access to a court and having legal counsel. Access to justice does not exist if poor or marginalised groups, such as persons with disabilities, are afraid of the justice system or see it as complex and unusable. Similarly, there is no access to justice if the justice system is weak, financially inaccessible, or people have no knowledge of their rights.[20] Integrity, independence and impartiality of the judiciary are critical pillars for the due performance of judicial office, protection of human rights, upholding the rule of law and ensuring a fair trial. Achieving equal access to justice is within grasp when these three pillars are in place. It is for the judiciary to stay on the path of integrity, assert independence, and ensure equality of treatment to all. In so doing the judiciary will effectively play its role of safeguarding and ensuring access to criminal justice.

There are specific groups within Zambia who are more vulnerable to be left out of the justice system than others. Special mention should be made of women and persons with disabilities.

Gender-based violence[21] is one of the most frequent issues facing women in Zambia. The media is replete with stories of women being subjected to various forms of abuse.[22] There is an apparent lack of sufficient awareness and knowledge among adjudicators, prosecutors, police, and defence counsel on what constitutes gender-based violence and sexual harassment. The general population suffers from the same knowledge gap. The judiciary can safeguard access to justice for women by providing specific training to adjudicators on issues of gender-based violence.

The Gender Equity and Equality Act provides that "both sexes shall have equal access to justice and protection before the law"[23] and that "the Judicature shall take necessary measures to ensure that both sexes have equal and effective protection and equal benefit of the law without discrimination".[24] Zambia's Anti-Gender-Based Violence Act[25] further provides that a victim who is not represented should be advised by the clerk of the court on the remedies available and procedure for lodging an application for a protection order.[26]

While a lot has been said and attempts are being made to enable persons with disabilities,[27] the situation remains one which violates their right to access to justice. One conspicuous effort undertaken by the judicial department is the addition of ramps to court buildings and other public buildings. For persons with disabilities, courts should have a plan for how they are going to afford

20 MA Zaza "Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices" *United Nations Development Programme* (2013) 6 to 8.

21 Section 3 of the Anti-Gender-Based Violence Act (1 of 2011) defines gender-based violence as "any physical, mental, social or economic abuse against a person because of that person's gender, and includes – a) violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship."

22 See "Gender Based Violence is on the Increase-Zambia Police" *Lusaka Times* (6 June 2016) available at https://www.lusakatimes.com/2016/06/07/gender-based-violence-increase-zambia-police/ (last accessed: 18 November 2016).

23 Act of 2015, section 14(1)(b).

24 Act of 2015, section 15(3).

25 Act 1 of 2011.

26 *Id* section 10(2).

27 Constitution of Zambia (2 of 2016) section 266, defines "disability" as "a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an activity or perform a function as specified in this Constitution or as prescribed" and "person with disability" as "a person with a permanent physical, mental, intellectual or sensory impairment". See also the definitions in section 2 of the Persons with Disabilities Act (6 of 2012).

persons with disabilities all facilities necessary to defend themselves as accused persons or help the prosecution of their cases as complainants. This obligation is in line with section 8 of the Persons with Disabilities Act 6 of 2012 which provides that:

> "(1) A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life.
> (2) The Judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.
> (3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities, to enable the person with disability to access justice and participate effectively in the proceedings."[28]

The challenge of pro se litigation (self-representation)

Self-represented litigants present legal and ethical issues to judges, magistrates and court staff who interact with them. To fully understand self-representation, it should be examined in context of its constitutional basis, the decisional law concerning pro se litigation, ethics, opinions, and the general opinions of lawyers concerning judicial and court staff assistance to self-represented litigants.

Self-represented litigants in the criminal justice system are typically remanded in custody awaiting trial in the subordinate courts. Some are granted police bond or bail. In the High Court and the Supreme Court, legal aid is guaranteed to all persons who appear for trial, sentencing, confirmation, and appeals; it is rare to have self-represented litigants in these courts. Occasionally an accused person declines legal aid services and opts to represent themselves.

Self-representation occurs and will continue to occur in subordinate courts. One of the major reasons for pro se litigation in criminal cases in the subordinate courts is the lack of sufficient numbers of legal aid counsel. As a result, the pro se litigant seeks the assistance of court staff and magistrates to help navigate the procedural rules that make up the fabric of the judicial process. They do not understand the rules of cross-examination or the grounds for objecting to certain questions and admission of evidence. They do not know how defences are to be set up or how they are to be proved.

Understandably, court staff are already overburdened with many duties. Having to deal with both lawyers and pro se litigants who need assistance in civil cases as to which rules or forms to use and how to use them merely adds to the weight they have to carry. The court staff may not have the time to help an accused person and it is difficult to assist parties during court proceedings.

In the courtroom the self-represented accused person faces barriers to justice. The judge or magistrate has a heavy workload, and other judges or magistrates may be waiting to use the court room. There will be very little room for "time-wasting". This can be problematic if an accused person makes procedural mistakes representing herself and must be corrected. The judge or

28 See also section 41(1) of the Persons with Disabilities Act (6 of 2012), which provides that "A person shall not, on the ground of disability, deny a person with disability – a) admission into any premises to which members of the public are ordinarily admitted; or b) the provision of any services or amenities to which members of the public are entitled."

magistrate often does not have the time to give a full explanation of the litigation process.

The barriers encountered by the self-represented litigant inside and outside the courtroom deprive her of access to justice. The criminal justice system must meet the needs of all people equally, including the self-represented litigant. The Zambian Constitution, tenets of democracy, and the rule of law require fairness and equality.

The judiciary must establish pro se assistance programs, consider changes in procedural rules and judicial ethics principles, and take other measures that serve to promote fair and meaningful hearings for all litigants.

Legal services for the indigent and paralegals

Legal services for the poor include legal advice, legal education, counselling, and representation in court. Legal services can "include mediation, representation before non-judicial fora, assistance with the legal aspects of administrative processes, assistance provided by [non-advocates and] non-lawyers trained to acquire legal knowledge and skills (paralegals), and even non-formal legal education."[29]

The use of paralegals will go a long way in filling the gap of providing legal information, legal assistance, and know-how on navigating the rules and procedures of court. The judiciary can safeguard access to criminal justice by embracing paralegals.

The ethical responsibilities for paralegals are substantially similar to those of lawyers. A primary ethical responsibility for paralegals is knowing their limitations. Other ethical responsibilities include:

- Confidentiality – this is at the heart of legal ethics. Confidences and secrets of the client must be kept;
- Honesty in dealing with others – these include courts, lawyers, paralegals, clients;
- Conflict of interest – loyalty at all times to the client;
- Malpractice – carelessness by a paralegal. Pay attention to details, ask questions, use systems (for example filing, communications, records of deadlines).

Paralegal certification entails that a paralegal has reached a certain level of competency in the profession. For paralegals who desire to work in law firms and organisations that do court work (such as Legal Resources Foundation) certification must be mandatory. Certification must be voluntary for paralegals in government ministries and institutions such as the Legal Aid Board, National Prosecution Authority, and in this instance there will be an effective exemption as is the case with lawyers. Should it be deemed necessary other groups or individuals can be included on the exempt list.

29 J Crichton, et al "Topic Guide on Justice" *Governance and Social Development Resource Centre* (2012) 15.

Conclusion and Recommendations

The judiciary ought to take a leading role in safeguarding access to criminal justice. There are many ways in which access to criminal justice can be safeguarded. These include relaxing the application of some rules of practice and procedure when required by rules of equity and applying ethical considerations in such a way that balances access and procedural fairness. Breaking conservative procedural moulds can help more people better access the judicial system.

The judiciary should encourage pro bono work by the bar in criminal cases so that as many people as possible are legally aided in defence of their liberty. The judiciary should include new players in the justice system such as paralegals and "lawyers in transit".

The judiciary should consider setting up an office with a specific mandate to aid self-represented litigants. The office could begin as a pilot program in Lusaka and later be replicated in other jurisdictions. Court staff should be trained and allowed to assist both counsel and litigants in court and outside court. Continuous professional development should not only be encouraged, but also undertaken consistently.

Access to justice is concerned with making justice institutions accessible to all. Justice institutions, including the judiciary, must have an effective and efficient system of justice delivery that allows for innovative and creative ways of delivering on its mandate. The judiciary must take a lead in improving the apparent poor institutional linkages and coordination among the justice institutions and other stakeholders.

As the judiciary becomes innovative and creative in making justice accessible to all, it must put in place measures to monitor, discourage, and curb corruption among the staff members who have contact with members of the public. It is very easy for someone to levy unofficial fees to unsuspecting members of the public on the provision of information and necessary forms for court cases.

Finally, the judiciary in collaboration with the National Prosecution Authority can consider giving information to the public on the role and function of the Director of Public Prosecution and the National Prosecution Authority. Very few Zambians know about the role and function of the Director of Public Prosecution. That makes it possible for some prosecutors to mislead, misinform, and even intimidate accused persons, their family members and the general public.

A proactive approach by the judiciary will make a significant contribution towards addressing the access to justice gap.

THE ROLE OF THE JUDICIARY IN SAFEGUARDING AND ENSURING ACCESS TO CRIMINAL JUSTICE DURING THE PRETRIAL STAGE: THE CASE OF MALAWI[1]

Dorothy nyaKaunda Kamanga J[2]

Introduction

Malawi's democratic Constitution contains provisions that protect various rights of criminal suspects pertaining to arrest, detention and fair trial[3] as well as the interdependent rights to dignity,[4] personal liberty[5] and access to justice[6] that are intended to fundamentally transform the administration of criminal justice. These progressive provisions are critical in protecting the rights of the accused and guiding the nation to shift away from the harsh and brutal style of law and order that prevailed during the one party era.[7]

In the last two decades of democratic governance, various initiatives have been implemented aimed at the revamping of the criminal justice system to increase access to justice for detained and accused persons. Some of the focus areas have been to ensure that remand prisoners and poor people have greater access to the criminal justice system at the pretrial stage.[8] This enormous task has yielded many promising results, although fragmented and insufficient. A 2011 audit of pretrial detainees "revealed a number of systemic procedural and structural problems in the criminal justice system" that contribute to the situation of prolonged detention without being brought before a court law to be charged or tried.[9] Considering the universal acceptability of the constitutional principle of presumption of innocence,[10] the overuse of pretrial detention is perturbing as it results in the violation of the human rights of suspects and undermines the rule of law. The criminal justice system still needs to work on reducing delays in criminal cases at the pretrial phase as there is risk of injustice to both the accused and the victim if inordinate delays are experienced.

1 Paper presented at Judicial Colloquium entitled Working towards just, peaceful and inclusive societies: Promoting rule of law and equal access to justice, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 8 and 9 January 2016.

2 Judge of the High Court of Malawi; LL.B (Hons.) (University of Malawi), M.A. (Rutgers University), LL.M (University of Cape Town).

3 Constitution of Malawi, 1994, section 42.

4 Constitution of Malawi, 1994, section 19.

5 Constitution of Malawi, 1994, section 18.

6 Constitution of Malawi, 1994, section 41.

7 *Chomela and Another v Republic* [1995] 1 MLR 93, 95; DM Chirwa Human Rights under the Malawian Constitution (2011) 415.

8 C Msiska, V Mhango and J Redpath *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013); University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011).

9 C Msiska et al. *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013) 4.

10 Constitution of Malawi, 1994, section 42(2)(f)(iii).

This paper examines legislation and case law in order to understand the critical role of the Malawi judiciary in safeguarding and ensuring access to criminal justice during the pretrial stage by ensuring that arrested persons are charged promptly and not subjected to prolonged periods of detention. The limitations of time factored into the legal regime for the protection of accused persons, such as the 48 hours rule and pretrial custody time limits, constitute a process for attaining optimum levels of efficiency.[11] It is contended that the time limits should not only guide the practice but should also be used as a tool by which the criminal justice system could be measured as they help to assess the effectiveness of the law and practices and its impact on the human rights of those in Malawi. The measurements incorporated in the criminal procedure enable a better understanding of whether the criminal justice system is achieving its objective of improving access to justice at the pretrial stage. Where there are challenges, appropriate interventions can be implemented that would lead to an improvement in problematic practices and a better performance of the criminal justice system.

The paper will begin by highlighting what "access to justice" means and its relationship to human rights. This will be followed by a discussion of the judicial enforcement of the rights of the accused through an examination of the interpretation of the 48 hours rule and pretrial custody time limits as mechanisms for reducing delays in the dispensation of justice during the pretrial process. The paper will conclude by discussing the need to uphold the accused's constitutional right to be released unless the interests of justice dictate otherwise.

Access to Justice: Meaning of the Concept and its Relationship to Human Rights

One of the targets under Goal 16 of the Sustainable Development Goals is to "promote the rule of law at the national and international levels and ensure access to justice for all".[12] Access to justice can be defined as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards".[13] The existence of various modes through which people access justice is also supported by the findings of a study on women and the administration of justice in Malawi.[14] Accordingly, access to justice is more than improving a person's access to judicial recourse but entails the availability of accessible, affordable, timely and effective means of redress or remedies.[15]

The right to access to justice is recognised in section 41 of the Constitution and is widely acknowledged under the international human rights framework. Some of the core instruments on the issue are the Universal Declaration of Human Rights,[16] the International Covenant on

11 Constitution of Malawi, 1994, section 42(2)(b); see also Statute Law (Miscellaneous Provisions) Act 27 of 1967, sections 16(6)(a)(i) and (ii); Criminal Procedure and Evidence Code (CPEC) Cap. 8:01 of the Laws of Malawi, section 35.

12 United Nations *Sustainable Development Goals* available at http://www.un.org/sustainabledevelopment/peace-justice/ (last accessed: 25 Sept 2016).

13 United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005).

14 Women and Law in Southern Africa Research Trust *In Search of Justice: Women and the Administration of Justice in Malawi* (2000) 108.

15 FE Kanyongolo *Malawi Justice Sector and Rule of Law* (2006) 20.

16 Universal Declaration of Human Rights (1948) articles 6, 8, 10.

Civil and Political Rights,[17] and the African Charter on Human and People's Rights.[18] These conventions link access to justice and human rights protection by legally recognising all persons and providing that everyone has access to the courts where they can seek an effective remedy against violations of fundamental rights.[19] The recourse to this fundamental right and important State obligation should be expeditious and have a reliable time frame for disposal of matters for it to be effective and efficient.

The Malawi Growth and Development Strategy II[20] includes improving access to justice as one of the central themes for democratic governance. To facilitate the implementation of the national development policy the Democratic Governance Sector Strategy[21] has identified its second key result area as the strengthened rule of law, improved access to justice, public safety and security. The judiciary is a key institution that plays a major role in implementing the reforms under the abovementioned strategy. Indeed the success of Malawi's democratic governance "depends on the capacity of the Judiciary to enforce constitutional limits on the executive".[22] Consequently, the judiciary articulates its mission as "to provide independent and impartial justice and judicial services that are efficient and that earn the respect, trust and confidence of society".[23] These policy documents emphasise that ensuring citizens' access to justice is a crucial fundamental right and an important State obligation.

Legislative Mechanisms to Reduce Delays at the Pretrial Stage

The judiciary has the supreme responsibility to safeguard and protect the various rights that accrue to persons arrested or detained for allegedly committing a criminal offence. Some of the main procedures that take place at the pretrial stage are the commencement of criminal proceedings, applications for release or bail pending trial and framing of charges.[24] Sections 42(2)(a), (b), (c), (d) and (e) of the Constitution guarantee an accused person various pretrial rights that must be respected and observed before trial begins. Notably section 42(2)(b) of the Constitution has elevated to a constitutional right remedies for detained persons that are contained in sections 16(6)(a)(i) and (ii) of the Statute Law (Miscellaneous Provisions) Act and section 35 of the Criminal Procedure and Evidence Code (CPEC).[25]

Delays in bringing cases to trial has been identified as one of the impediments to the efficient administration of justice which governance sector reforms must address.[26] The compliance with time limits at the pretrial stage is critical because delay in commencing criminal proceedings

17 International Covenant on Civil and Political Rights (1976) articles 2, 14, 16.

18 African Charter on Human and People's Rights (1986) articles 5, 7, 26.

19 NS Okogbule "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" (2005) 3 *SUR* 95, 97.

20 Government of Malawi, *Malawi Growth and Development Strategy* II 2011-2016 (2012) 65.

21 Government of Malawi, *Building Accountable and Transparent Institutions – Democratic Governance Sector Strategy* 2013-2017 (2012) 13.

22 J Liabunya "Judicial Accountability in Democratic Malawi: A Critical Assessment" (2012) 6(2) *Malawi LJ* 203, 205.

23 Available at http://www.sdnp.org.mw/judiciary/information.htm (last accessed: 6 December 2016).

24 D Newman *Criminal Procedure and Evidence in Malawi* (1982).

25 *In re Muluzi* [1993] 16(2) MLR 642.

26 FE Kanyongolo *Malawi Justice Sector and Rule of Law* (2006) 115; NS Okogbule "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" (2005) 3 SUR 95, 99; S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 *Malawi LJ* 126 to 127.

amounts to conduct on the part of the prosecution which is "oppressive, unfair and unjust".[27] This section will examine the legislative mechanisms for reducing delays at the pretrial stage of the criminal process and illustrate through case law how the judiciary protects the presumption of innocence and promotes access to justice for detained persons.

The 48 Hours Rule

The right to be released from detention if the detention is first, unlawful;[28] secondly if the State has failed to charge an arrested person within the period of 48 hours after arrest;[29] and thirdly in exercise of the right to bail[30] buttresses the general principle that every person charged with a criminal offence is presumed innocent until proved guilty.[31] One of the pretrial rights which pertains to the timely implementation of pretrial activities is the right of an accused to be brought before a court of law within a reasonable time and not more than 48 hours after his arrest, so that he can be charged or be informed of the reason of his detention.[32] The right is for the State to treat the citizen as the section requires in the time specified otherwise the citizen is to be brought under judicial surveillance. The 48 hours limitation of time, also known as the '48 hour rule',[33] ensures prompt judicial control and check on executive actions affecting citizen's rights. The 48 hours rule imposes a duty on the State and entrenches citizens' right to be brought before a court of law within the prescribed time.[34] The 48 hours rule affords the citizen a prompt opportunity to assert and test the reasonableness of the State's deprival of pretrial rights. The High Court in *State and Others ex p Dr Chilumpha*[35] found that the decision by the respondents to keep the applicant for more than 48 hours before taking him to court to be unreasonable in the *Wednesbury* sense and the applicant could have sought the remedy of *habeas corpus*.

Challenges to the right

The pervasive delays in bringing detained persons before courts has made enforcement of pretrial rights "one of the most litigated rights in Malawi".[36] The case statistics at the High Court Principal Registry show that a total of 1,104 motions for bail or release from custody were registered during a seven year period between January 2010 and June 2016.[37] The resultant annual average of 157 applications is an indicator of the volume of suspects of serious criminal offences on pretrial detention who have challenged their right to liberty in court. The data also provides some idea of the extent to which pretrial detention for serious offences is being used in the jurisdiction.

27 *Chinkhadze and Another v Anti-Corruption Bureau* MSCA Criminal Appeal No. 1 of 2003, [2004] MLR 39, 43.

28 Constitution of Malawi, 1994, section 42(1)(f).

29 Constitution of Malawi, 1994, section 42(2)(b).

30 Constitution of Malawi, 1994, section 42(2)(e).

31 Constitution of Malawi, 1994, section 42(2)(f)(iii); D Newman *Criminal Procedure and Evidence in Malawi* (1982) 46; DM Chirwa *Human Rights Under the Malawian Constitution* (2011) 429.

32 Constitution of Malawi, 1994, section 42(2)(b); Criminal Procedure and Evidence Code, Cap. 8:01 of the Laws of Malawi, section 35(2).

33 *State and Others ex p Dr. Chilumpha* [2006] MLR 406.

34 *In the Matter of Khasu* [2002–2003] MLR 73.

35 [2006] MLR 406.

36 DM Chirwa *Human Rights under the Malawian Constitution* (2011) 429.

37 High Court of Malawi: Principal Registry, Criminal Registry data June 2016.

In the cases where prolonged detention has been challenged, the High Court has found the State in violation of the citizen's right to be brought to a court of law within 48 hours and has invoked the constitutional provision as well as exercised its discretion to respect the presumption of innocence and terminate the continuous violation.[38] The judicial pronouncements reveal that courts have tried to take citizens' rights seriously with a general guideline direction that:

> "where the prospect of trial are as good as or better when the citizen is released on bail than when he is remanded in custody, justice and good public policy demand that the option upholding the citizen's right to liberty and presumption of innocence should be preferred."[39]

In *Chomela and Another v Republic*[40] the applicants had been in detention for about two months without being charged before a court of law. The High Court was of the view that every arrested and detained person must be brought before an independent and impartial court within 48 hours without exception and held that this provision is "in the Constitution primarily as a safeguard against wanton and arbitrary arrests and detentions; the rough and bitter experience of the past in this country which was an inescapable reality".[41] To avert the apprehension created by the State's uncertainty of when trial would commence the Court made an order that the State bring the applicants before a court of law on or before 22 September 1995, failing which the applicants were to be released on bail on the conditions that the Court had already fixed.

In the Matter of Khasu[42] the applicants who were arrested and kept in custody for 14 days on allegations of murder filed an application at the High Court contending that the State had violated section 42(2)(b) of the Constitution and sought to be released on bail. The Court observed that there seemed to be "a laxity undesirable for this application and the right violated".[43] The Court opined that:

> "State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritising and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights."[44]

Although the 48 hours rule sounds ideal, it is a time bound standard by which the efficiency in arresting, charging and bringing suspects before court in the criminal justice system should be measured. Methodical implementation requires that magistrates regularly call for apprehension reports from police stations, in accordance with section 36 of the CPEC, in order to verify whether the State is complying with the provision and follow up on the status of detained persons who have not been brought to court to be charged and take plea.

38 See *Chomela v Republic* [1995] 1 MLR 93; *In the Matter of Khasu* [2002–2003] MLR 73; *Tembo v Republic* (1) [1995] 2 MLR 408.

39 *In the Matter of Khasu* [2002–2003] MLR 73, 77.

40 [1995] 1 MLR 93.

41 *Id* 95. DM Chirwa *Human Rights under the Malawian Constitution* (2011) 424.

42 [2002–2003] MLR 73.

43 *Id* 75.

44 *Id* 78.

Pretrial custody time limits

After the expiry of the 48 hours post-arrest of an accused, computation of pretrial custody time limits begin. Pretrial custody time limits are provided for under Part IVA of the CPEC and are intended to expand on and better reflect the provisions of section 42 of the Constitution. The maximum period that an accused can be held in custody pending trial will depend on the "jurisdiction of the court trying the accused" and "the seriousness of the offence."[45] In a subordinate court an accused person can be held in custody pending commencement of his trial for a maximum period of 30 days.[46] For offences that fall within the jurisdiction of the High Court, an accused can be detained in custody pending committal for trial in the High Court for a maximum period of 30 days.[47] For those criminal matters that have been committed to the High Court the pretrial custody limit is ordinarily 60 days and a 90 days custody limit in serious cases such as homicide matters.[48] Section 161H of the CPEC allows for one additional 30 day extension, accordingly, the maximum pretrial custody time limit for homicide matters is 120 days.[49] At the expiry of a custody time limit a court may grant bail on its own motion;[50] on application by or on behalf of the accused or on information from the prosecution.[51] An extension of the time limit can be granted where the prosecution can show good and sufficient cause. The cases of *Bamusi and Others v Republic*[52] and *Taipi v Republic*[53] have held that expiry of pretrial custody time limits does not lead to an automatic release.

Detention before trial after the custody time periods are exceeded should lead a court to form the view that further detention without commencement of trial violates the presumption of innocence,[54] is unreasonable and a judicial officer should seriously consider exercising discretionary powers to release persons who have been in prison longer than necessary. Long periods of pretrial detention breach the statutory provision and cause disquietude because the practice negatively impacts on the enjoyment of human rights to liberty and dignity, as detained persons risk "losing contact with family and friends, job loss and future unemployment, or loss of livelihood, damaged careers, communicable diseases and exposure to violence and corruption".[55] The malpractice also contributes to overcrowding in our prisons which violates the human dignity of prisoners.[56]

45 University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 38-39.

46 CPEC, Cap. 8:01 of the Laws of Malawi, section 161D.

47 CPEC, Cap. 8:01 of the Laws of Malawi, section 161E.

48 CPEC, Cap. 8:01 of the Laws of Malawi, sections 161F and G.

49 See *Kandiado v Republic*, HC/PR Bail Cause No. 2 of 2016 (29 March 2016) (unreported); *Chensewu v Republic*, HC/PR Bail Cause No. 11 of 2016 (29 March 2016) (unreported).

50 CPEC, Cap. 8:01 of the Laws of Malawi, section 161I; *Gadabwali v State* MSCA Miscellaneous Criminal Appeal No. 2 of 2013 (3 May 2013) (unreported).

51 CPEC, Cap. 8:01 of the Laws of Malawi, section 161I.

52 HC/PR Bail Application No. 8 of 2013 (22 March 2013) 3.

53 MSCA Criminal Appeal No. 9 of 2014 (18 May 2015) (unreported).

54 S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 *Malawi LJ* 124.

55 Open Society Foundations (OSF) S*trengthening Pretrial Justice: A Guide to the Effective Use of Indicators* (2015) 13 available at https://www.opensocietyfoundations.org/publications/strengthening-pretrial-justice-guide-effective-use-indicators-0 (last accessed: 26 September 2016).

56 *Masangano v Attorney General* [2009] MLR 171.

Pretrial custody time limits establish a uniform approach to guide and assist prosecutors and judicial officers in their pretrial detention decision-making by setting a reasonable time for incarceration. The time limits maintain the notion that time lapsed is a critical factor to be taken in consideration when a court exercises its discretion on whether or not to grant bail. The Bail (Guidelines) Act and case law support the view that "bail is not something that has to be granted regardless of period".[57] However, the enactment in 2010 of the pretrial custody time limits overrides decisions that demanded for lengthy pretrial detention, such as *Tayub v Republic*[58] where it was held that "to release a murder suspect within two or even twelve months on bail, will be against public policy".[59]

In terms of implementation, police stations and prisons who are practically in the best position to measure custody time length have been shown to lack the procedures and tools of tracking custody time periods and ensuring adherence.[60] In practice the pretrial custody time limits have not been easy for State organs to implement over the years and study findings prove that some detainees have experienced excessive detention indicating the breach of the statutory provision.[61] Prison statistics for February 2016 reveal that out of a total of 11,187 prisoners, 2,603 were on pretrial detention and 546 of the remandees had been detained for more than 90 days.[62] It is imperative that stakeholders in the criminal justice system prioritise matters of pretrial detainees when enforcing pretrial custody time limits, considering bail and setting down matters for trial.

The case of Taipi v Republic

Enforcement of pretrial custody time limits have been the subject of a direct decision by the Supreme Court of Appeal (SCA) in the case of *Taipi v Republic*.[63] The brief facts in the abovementioned case were that the appellant, Mabvuto Taipi, was arrested on 15 September 2007, about a year from the time of the occurrence of an alleged murder and was remanded into custody at Mulanje Prison. On 11 November 2007 he escaped from lawful custody and it took almost seven years before he was re-arrested on 13 January 2014. The appellant's initial application before the High Court for pretrial bail was rejected on 23 June 2014 and his appeal to a single judge of the SCA was also dismissed. A three member panel of the SCA bench was then called upon to:

> "determine whether it is legally correct for any Court of Law to exercise discretion when considering bail in cases where the applicable pre-trial custody time limit has been exceeded, or whether in such cases the Court has no choice at all but to grant bail as a matter of course and in any event."[64]

57 *Tayub v Republic* HC/LL DR Criminal Cause No. 49 of 1997 (unreported) (4 July 1997) 10.

58 *Id.*

59 *Id.*

60 C Msiska, V Mhango and J Redpath *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013) 4.

61 University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 67; S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 *Malawi LJ* 126, 129 to 130.

62 LD Mtengano "The State of Overcrowding in Malawi Prisons: Challenges and Strategies for Reducing Prison Population" (2016) *Report of the Criminal Justice System Stakeholders Workshop* 24.

63 *Taipi v Republic* MSCA Criminal Appeal No. 9 of 2014 (18 May 2015) (unreported).

64 *Id* 6.

The SCA held that sections 161 G and I of the CPEC "being mere creatures of a Statute, cannot pretend to be as powerful as, or even to be superior to, the provisions of Section 42(2)(e) of the Constitution".[65] That the general guideline under section 42(2)(e) of the Constitution cannot be confined to a limited period of time by setting boundaries within which the constitutional provision should operate. The SCA stated that it was:

> "…convinced that in setting pre-trial custody time limits sections 161 G and I of the CP & EC were not meant to dislodge, or to otherwise overtake, the constitution on its basic requirements for considerations of bail. Rather, we believe they were meant to aid the Constitution by empowering the Courts to, even on their own motion, step in and consider bail when they see the time limits not respected. We accordingly reject the argument of the appellant to the effect that these provisions have since set up a new regime of viewing pre-trial bail in all cases where pre-trial custody time limits have been exceeded. While we are aware that in most cases where the State has held a crime suspect for a longer period of time than the prescribed pre-trial custody time limit Courts will almost inevitably conclude that it is contrary to the interests of justice to prolong such incarceration, this to us does not necessarily mean that in every such case Courts cannot choose whatever they consider to be the most just way of determining a bail application that comes before them."[66]

The SCA has settled the issue of enforcement of pretrial custody time limits by holding that the discretion section 42(2)(e) of the Constitution confers to the courts to exercise in relation to all persons that have been arrested for or accused of crime continues after the expiry of the pretrial custody time limits that have been set by the CPEC. The SCA having found the appellant to be an "undoubted flight risk" proceeded to dismiss the appeal. However, the Court knowing that swiftness is of essence in management of criminal matters and noting that there was "no visible sign that the State is at all minded to prosecute the appellant for murder it is holding him in custody for" was of the opinion that the appellant could not be kept in "endless detention without hope of a trial".[67] On 18 May 2015 the SCA ordered the Director of Public Prosecutions to commence prosecuting the appellant within 30 days of the order failing which the appellant was to be released on bail. The State having failed to comply with the conditional order, the appellant was released on bail on 24 June 2015.

The Right to be Released and the Concept of Interests of Justice

The case of *Taipi v Republic*[68] emphasises the importance of exercising discretionary powers when applying section 42(2)(e) of the Constitution, which provides an accused person a constitutional right "to be released from detention with or without bail, unless the interests of justice require otherwise". The expression "interests of justice" is a fluid concept which the case of *Kasambara v Republic*[69] has interpreted as referring "to those considerations that are aimed at achieving fair and equitable decision making in the administration of justice".[70] The Court in *Tembo and Others*

65 *Id* 7.
66 *Id* 7-8.
67 *Id* 10.
68 *Id*.
69 MSCA Criminal Appeal No. 13B of 2015 (20 November 2015) (unreported).
70 *Id* 10.

v Republic (1)[71] held that:

> "It is in the interests of justice that those accused of committing a crime should be brought to book and that it is also in the interests of justice that those not guilty of crime should be exculpated of the allegations against them."[72]

The cases of *Phiri and Another v Republic*,[73] *Zgambo v Republic*,[74] *Mvahe v Republic*,[75] and *Lunguzi v Republic*[76] in interpreting this right have held that section 42(2)(e) of the Constitution has not given an absolute right to bail and courts retain a discretion on whether to grant or refuse admission to bail. The key principles developed by the courts in considering applications to be released from detention have been codified under section 3 of the Bail (Guidelines) Act.[77] Paragraph 4(a) of part II of the Schedule under Bail (Guidelines) Act, *Selemani v Republic*,[78] and *Tembo and Others v Republic (1)*[79] put the primary consideration in determining where the interests of justice lie as whether the accused person is likely to appear at the appointed time to stand trial. The public interest in bringing offenders to justice and a citizen's right to a quick and speedy trial, are some of the factors courts regard in balancing the interests of justice when deciding whether to release the citizen unconditionally or on bail. In some matters the choice may not be easy to make. In *Phiri v Republic*[80] the Supreme Court of Appeal found that the High Court did not appear to have balanced the personal interests of a murder suspect and the interests of justice as required by section 9 of part II of the Bail (Guidelines) Act and proceeded to order the release of the appellant on bail with conditions.

The burden lies on the State to justify on a balance of probabilities why bail should not be granted.[81] To discharge this burden the State must prove that interests of justice requires that bail should not be granted by proving to court circumstances working against bail.[82] In enforcing this right an accused person can be released on bail even where pretrial custody time limits have not expired.[83] In *Banda v State*[84] the High Court granted bail to a murder suspect who had been on remand for less than a month as the Court was not satisfied by the arguments of the State that the release of the applicant from his detention would cause a sense of shock and public outrage in a community where several other homicide suspects in famous cases had been released from detention on bail and there had been no public outrage. While released, the accused failed to attend commencement of his trial on 22 July 2015 which led to revocation of his conditions of bail and issuance of a warrant of arrest.

71 [1995] 2 MLR 408.
72 *Id* 410.
73 [2000–2001] MLR 369, 370-371.
74 [1999] MLR 405.
75 MSCA Criminal Appeal No. 25 of 2005 (unreported).
76 [1995] 1 MLR 135.
77 Act 8 of 2000, Cap. 8:05 of the Laws of Malawi.
78 [1993] 16(2) MLR 793, 795.
79 [1995] 2 MLR 408.
80 MSCA Criminal Appeal No. 16 of 2015 (unreported) (18 November 2015) 5.
81 *Kamwangala v Republic* MSCA Miscellaneous Criminal Appeal No. 6 of 2013 (unreported).
82 *Id* 13.
83 Section 161J of the CPEC.
84 HC/PR Bail Application No. 81 of 2014 (unreported) (21 August 2014).

Where bail is denied the applicant can re-apply for the relief where there is proof of a change in the circumstances of the accused or he can appeal. In *Republic v Yiannakis*[85] the fact that more than six months had passed since the arrest of the accused without a prospect of a reasonably speedy trial was considered to be a changed circumstances that merited admitting the accused to bail.

Conclusion

This paper has shown that the Constitution of Malawi and the CPEC provide for time limits aimed at increasing access to justice for the accused by fostering speedy processes at the pretrial stage. The implementation of the 48 hours rule and pretrial custody time limits can contribute to upholding the principle of presumption of innocence and thereby avoid pretrial detention unless the interests of justice dictate otherwise.[86] However, the case law and prisoner statistics reveal violations of the law in that some accused are experiencing pretrial detention of excessively long duration. Detention places accused persons in a vulnerable position and long periods of incarceration exceeding the legally permissible period without trial are contrary to the interests of justice and breach human rights. The challenges in upholding the time limits call for the need to devise and implement strategies that would improve the implementation of custody time limits which may entail developing and promulgating appropriate rules of criminal procedure. However, proactive approaches taken by stakeholders in the criminal justice system to curtail prolonged pretrial detention and control the remand prisoner population by regularly conducting camp courts, where considerations for pretrial release or setting down matters for plea and directions hearing can be made, are a welcome development as they contribute towards the protection and promotion of pretrial rights of poor and marginalised detainees.[87]

85 [1995] 2 MLR 497.

86 Constitution of Malawi, 1994, section 42(2)(e); Open Society Foundations (OSF) S*trengthening Pretrial Justice: A Guide to the Effective Use of Indicators* (2015) 20; S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 Malawi LJ 126, 133.

87 See for example Court User Committee *Performance Standards for the Criminal Justice System and Guidelines for Visiting Prisons and Police Stations* (2013) 6 to 7.

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

Zione Ntaba J[1]

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.

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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 juridiction 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 means 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.gsdrc.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.sdnp.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] For instance, in the case of theft where the values are small, like theft of a goat, sentences of five years have been meted out 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).

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.

JURISDICTIONAL LIMITS FOR MAGISTRATES ARE HINDERING ACCESS TO JUSTICE IN MALAWI

Sylvester A. Kalembera J[1]

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 Act[16] 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 Code[17] 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 Code[29] 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 XLII.
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 MWK200,000[33] or both.[34] A Third Grade Magistrate may impose any sentence not exceeding 3 years or a fine not exceeding MWK150,000[35] 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 MWK100,000[37] 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 Act[55] 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 Tsumba 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.

CONSIDERING THE BEST INTERESTS OF THE CHILD IN DECISIONS ON INCARCERATION OF CARE-GIVERS IN MALAWI

Chikondi Chijozi[1] *and Nyasha Chingore*[2]

Introduction

In 2001 the African Commission on Human and People's Rights (ACHPR) Special Rapporteur on Prisons and Conditions of Detention in Africa, after a visit to Malawi prisons, contended that the prison is not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers.[3] She argued for creative solutions to minimise the imprisonment of pregnant women and primary care-givers, such as the use of bail for remand prisoners, non-custodial sentences, conditional/early release, parole, probation, or suspended sentences for convicted prisoners.[4] Despite such recommendations, children continue to be found in prisons in Malawi. Conversely, children of convicted women will often be separated from their mothers, who are typically the primary care-givers.[5] Whether detained with or separated from parents, children of incarcerated parents are vulnerable and are entitled to specific kinds of care and protection.

The concern with babies and young children born, living and/or growing up inside prisons has received a lot of attention in Malawi's media recently.[6] It is generally agreed that prisons are not an appropriate environment for children. While authors agree that there is a limited body of research thoroughly examining the plight of children in prison or the impact of children living in prison,[7] the harsh, punitive environment of prisons is considered an impediment to early childhood development, which can damage the psychological and mental well-being of children.[8] Children

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3 VM Chirwa "Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi" (17-28 June 2001) 36, available at http://www.achpr.org/files/sessions/30th/mission-reports/malawi/achpr30_misrep_specmec_priso_malawi_2001_eng.pdf (last accessed: 18 November 2016).

4 *Id*.

5 Most literature on children of incarcerated care-givers refers specifically to children with imprisoned mothers because mothers tend to be the primary care-givers of children and it is imprisonment of mothers that often results in the greatest impact on the family. However, it is now generally recognised that this also applies to fathers, foster parents or other primary care-givers. This is particularly true in Africa where many children are orphaned or living separately from their parents. African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Care-givers" (2013).

6 See O Khamula "Advocacy Group Bemoans Increased Number of Babies in Malawi Prisons" *Nyasa Times* (7 December 2015) available at http://www.nyasatimes.com/advocacy-group-bemoans-increased-number-of-babies-in-malawi-prisons/#sthash.dZizBYx9.dpuf (last accessed 18 November 2016).

7 O Robertson "Children Imprisoned by Circumstance" *Quaker United Nations Office* (2008) 1.

8 E Kamwendo "The Invisible Prisoners: A Case of Children in Malawian Prisons" *Lund University Master Thesis* (2009) 22, available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1398803&fileOId=1423180 (last accessed: 18 November 2016).

imprisoned with their mothers in Malawi face particularly acute challenges since lack of funding from the government prevents the Malawi Prison Service from providing the basic needs of the children.[9] The children in prison are not provided with a special diet, rather, mothers share the food issued to them with their children, and this occurs in the midst of already frequent prison food shortages.[10] In addition there is no adequate provision for breast-feeding mothers. The health services in prison are inadequate to cope with the needs of babies and small children. Only Zomba Central Prison provides children with a chance of attending nursery school, whilst other prisons do not have nursery schools.[11] The prisons, moreover, do not have recreational facilities for the children. The children spend most of their time with adults inside the prison and do not have a chance to play and interact freely with other children.[12]

While the physical presence of infants and toddlers in prison is an issue of grave concern, it sometimes overshadows the equally problematic plight of children who are separated from their care-givers when they are incarcerated. The number of children separated from parents due to incarceration is unknown because judicial, prison and other systems rarely track this data.[13] Psychologists argue that the separation of children from their care-givers may have serious negative repercussions for the children. Children with incarcerated care-givers are at increased risk for antisocial behaviour compared with their peers.[14] Children with an incarcerated care-giver experience a variety of emotional and behavioural problems after separation including worsening performance and attendance rates at school and displaying increased aggression, antisocial or criminal tendencies.[15] In addition, the children are at risk of receiving inadequate care since imprisoned women often rely on the extended family, which may be buckling under socio-economic stresses, to care for their children. This situation is further exacerbated by the fact that in Malawi, as in many other African countries, some prisons do not have facilities for women, so women are frequently placed in prisons further from their homes.[16]

9 Centre for Human Rights Education, Advice and Assistance (CHREAA) Press Release "Malawi Prison Health Service Needs Reform" (5 June 2014) available at http://chreaa.org/press-release-malawi-prison-health-service-needs-reform/ (last accessed: 18 November 2016).

10 E Kamwendo, "The Invisible Prisoners: A Case of Children in Malawian Prisons" *Lund University Master Thesis* (2009) 32.

11 Presentation by Agnes Patemba, Chief Resident Magistrate (East), at a workshop for magistrates on imprisoning mothers with their children held in Lilongwe on 15 December 2015. The workshop was organised by CHREAA and the Southern Africa Litigation Centre (SALC).

12 *Id.*

13 O Robertson "The impact of parental imprisonment on children" *Women in Prison and Children of Imprisoned Mothers Series Quaker United Nations Office* (2007) 7.

14 J Murray, D Farrington and I Sekol, "Children's Antisocial Behaviour, Mental Health, Drug Use, and Educational Performance after Parental Incarceration: A Systematic Review and Meta-Analysis" (2012) 138(2) *Psychological Bulletin* 175.

15 O Robertson "The impact of parental imprisonment on children" *Women in Prison and Children of Imprisoned Mothers Series* Quaker United Nations Office (2007).

16 S Twea, "Women as offenders – the social and legal circumstances of women who commit crimes: A case study of selected prisons in Malawi" *University of Zimbabwe, Dissertation* (2004); see also L Vetten "The Imprisonment of women in Africa" in Sarkin (ed) *Human Rights in African Prisons* (2008) 134 to 154.

The Legal Framework

The Constitution of the Republic of Malawi in its principles of national policy provides that:

> "The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—
> (h) Children
> To encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society."[17]

Section 23 of Malawi's Constitution also provides that:

> 1) "All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be the primary consideration in all decisions affecting them.
> 2) …
> 3) Children have the right to know, and to be raised by, their parents."

Section 3(1) of the Child Care, Protection and Justice Act (CCPJ)[18] provides that:

> 1) "In addition to the duties and responsibilities imposed by section 23 of the Constitution, a parent or guardian-
> 2) shall not deprive a child of his or her welfare;
> 3) has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to- (i) protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards; (ii) provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention".

Malawian law provides that a breastfeeding child of a female prisoner may be permitted to live with the mother until the child has been weaned. Section 60 of the Prisons Act[19] provides that:

> "Subject to such conditions as may be specified by the Commissioner any unweaned infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessaries at the public expense."

Once the child has been weaned, the Prison Service is required to place the child with a relative or family friend able and willing to support the child and, in the absence of such a person, with a government-approved child care provider.[20]

In most cases women who take their children with them to prison do so because there is no relative or friend to take care of them. So where the officer in charge of the prison exercises his power to remove the child from prison, often the only option available would be to hand over the child to a welfare authority. However, there are very few welfare authorities in Malawi. The CCPJ Act

17 Constitution of Malawi, 1994, section 13(h).
18 Child Care, Protection and Justice Act (CCPJ) (No. 22 of 2010).
19 Prisons Act, Cap. 9:02 of the Laws of Malawi, section 60.
20 *Id.*

provides for public and private foster homes, but currently Malawi does not have a lot of public foster homes to take in children in need of care and protection as envisaged by the Act and the reality is thus that a government approved child care provider is seldom accessible.[21]

Malawi law allows judicial officers to order pre-sentencing reports which enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary care-giver of any children and the effect that their incarceration will have on their children. Section 260 of the Criminal Procedure and Evidence Code[22] tates: "(1) The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed." Section 321J states: "(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed." According to subsection (2) of both provisions, "The information or evidence that the court may receive…may… include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court to assess the gravity of the offence." These reports may include information on whether the convicted person is a primary care-giver.[23]

International and Regional Law Framework

In addition to Malawi's obligations under its domestic law, Malawi is signatory to both continental and global legal instruments that provide best practice on the issue of incarceration of care-givers and considerations of the best interests of the child.[24] In particular the United Nations Convention on the Rights of a Child (CRC)[25] states:

> "(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."[26]

21 Child Care, Protection and Justice Act (CCPJ) (No. 22 of 2010) sections 46 and 47.

22 Cap 8:01 of the Laws of Malawi.

23 Presentation by Hon. Justice Twea, SC, JA at a workshop for magistrates on imprisoning mothers with their children held in Lilongwe on 15 December 2015. The workshop was organised by CHREAA and SALC.

24 The United Nations Convention on the Rights of a Child (CRC) and the Organisation of African Union Charter on the Rights and Welfare of the African Child (African Children's Charter) are both recognised in section 4(c) of the Third Schedule (Guiding Principles in Matters Concerning Children) in the CCPJ.

25 Malawi ratified the CRC on 2 January 1991.

26 CRC, article 3.

The CRC recognises the need to ensure that a child is not separated from their parent, except when in the best interests of the child and when certain conditions are met:

> "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child…"[27]

Article 6(2) of the Convention also provides that "States Parties shall ensure to the maximum extent possible the survival and development of the child." While article 27(1) of the Convention provides that States Parties should "recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

The African Charter on the Rights and Welfare of the Child, which Malawi ratified on 16 September 1999, has specific provisions on imprisonment of mothers. It provides:

> "States Parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
>
> (a) *ensure that a non-custodial sentence will always be first considered when sentencing such mothers*;
> (b) *establish and promote measures alternative to institutional confinement for the treatment of such mothers*;
> (c) establish special alternative institutions for holding such mothers;
> (d) ensure that a mother shall not be imprisoned with her child;
> (e) ensure that a death sentence shall not be imposed on such mothers;
> (f) *the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation*."[28]

General Comment 1 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)[29] strengthens the understanding of article 30 of the African Charter on the Rights and Welfare of the Child and outlines the legislation, policy and practice necessary to achieve its full implementation. Importantly, the General Comment clarifies that the provisions of article 30 do not just apply to mothers but also to fathers and primary care-givers who may be a foster parent or another family member such as a grandparent.[30] The General Comment also emphasises the importance of treating children whose primary care-givers are in conflict with the law in a way that is nuanced, informed and based on actual information about their situation.[31] It also clarifies that article 30 applies when primary care-givers are accused or found guilty of infringing the criminal law. This encompasses all stages of criminal proceedings starting from arrest and continuing through to release and integration.

In addition to binding conventions, the United Nations also has guidelines on incarceration of care-givers and children in prison. On incarceration of women who are care-givers, the United

27 *Id*, article 9(1).

28 African Charter on the Rights and Welfare of the Child, article 30 (emphasis added).

29 ACERWC General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" (2013).

30 *Id* para. 10.

31 *Id* paras. 14 -16.

Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)[32] provide:

> Rule 61
> "When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative nonseverity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds."
>
> Rule 64
> "Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children."

On children living in prison, the Bangkok Rules provide under rule 49 that:

> "Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners."

Where children are allowed in prison, rule 51 of the Bangkok rules provides that:

> "(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
> (2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison."

Current Practice on Courts' Consideration of Best Interests of the Child in Decisions to Incarcerate Care-givers

In the past, courts in Malawi have held a rather stringent view that hardship to families and dependents is an inevitable consequence of indulging in criminal activities and has not taken this into consideration as a mitigating circumstance, suggesting that accused persons should think of all consequences before they engage in criminal activities. In *Republic v Cosmas and Others*, Chipeta J states:

> "Under the applicable principles of sentencing in criminal procedure courts are normally guided by the principle that before one embarks on a path of crime, it is incumbent on him to take these circumstances on board. A man who opts for and goes ahead to commit a crime should factor in the possibility that if the long arm of the law catches up with him and accords him a custodial penalty his family will suffer and that courts are not encouraged to be moved by such pleas." [33]

In another case, the same Chipeta J completely dismissed a submission that the applicant was breastfeeding as an exceptional circumstance to entitle the accused bail in a homicide matter.[34]

32 Resolution 2010/16.

33 *Republic v Cosmas and Others*, Criminal Case No. 53 of 2000, (2001) MWHC 11.

34 *Gadama v Republic* High Court Misc. Criminal Application No. 145 of 2001.

Recently, the courts have considered child care responsibilities in several decisions on whether to incarcerate primary care-givers in Malawi. In *Dickson and Another v Republic*,[35] in considering the granting of bail to the applicant who had a child with her in prison, Singini J (as he then was) stated that "one compelling factor for the grant of bail is the plight of this baby who is in custody with the applicant as her mother and in my judgment, the best interest of the child requires that the mother be released on bail". In the recent High Court case of *Alasoni v Republic*,[36] Kapindu J, in considering whether to grant bail pending confirmation of sentence, stated that the best interests of the child of the applicant who was with her in prison required that she be released on bail.

It is well established in Malawi that in deciding on an appropriate sentence, the court will investigate if the sentence fits the offence (crime), the victim, the offender, and the public interest or public goals.[37] In *Republic v Keke*[38] the High Court indicated that in considering the offender, a sentencer must pay attention to gender. For example, a prison sentence should be reduced where the woman is pregnant. In *Republic v Jeke*,[39] the High Court considered the fact that the applicant was "still a young woman of about 20 years and she has a young child to look after", and decided to reduce the sentence on humanitarian grounds.[40]

This approach which tends to look at children as a "circumstance" relating to the offender has been criticised by some, who argue that courts sentencing primary care-givers are obliged to apply a child-centred approach and not to merely treat children as a circumstance of an accused. It is argued that a child-centred approach requires a fresh approach to sentencing, adding an extra element to the responsibilities of a sentencing court over and above the traditional sentencing approach already described.[41]

Most recently in *Republic v Masauko*,[42] the High Court, in sentencing, also considered the best interests of children who would be separated from their mother who was accused of killing her epileptic son. The accused was the primary care-giver of five children, including the epileptic child, and appeared to have been under immense mental and emotional stress. Although eventually deciding on a custodial sentence in that case, Justice Tembo, considered the accused's other four children to whom she was the primary care-giver, stating that:

> "As rightly observed by the accused person, her incarceration will result in her being taken away from her children who need her support. It is well that the law provides that unweaned children be received in prison and provided necessities at public expense….However there is still need to consider the needs of the other weaned children of the accused person for whom the accused person was the primary or sole carer. Each child has a Constitutional right to know and to be raised by the parents as provided in section 23(3) of the Constitution. The fact that in this case the mother is a convict does not in the view of the court take away the right of the children to know her as a parent."[43]

35 Miscellaneous Criminal Case No. 107 of 2007 (High Court) (Lilongwe District Registry) (unreported).

36 Miscellaneous Criminal Application No. 72 of 2015 (High Court) (Zomba) (unreported).

37 *Republic v Keke* (404 of 2010) (2013) MWHC 450.

38 *Id.*

39 *Republic v Jeke* (139 of 2008) (2008) MWHC 51.

40 *Id.*

41 See *M v State* CCT 53/06 (2007) ZACC 18, a South African Constitutional Court decision discussed in the following section. In particular, see the arguments by the Centre for Child Law, University of Pretoria who were admitted as *amicus curiae*.

42 Principal Registry Homicide Cause No. 6 of 2015.

43 *Id* (emphasis added).

This case is encouraging as it was the State who initially raised concern around the impact of imprisonment on the accused's children. Of particular concern to the State was the accused's youngest child who was one year old and still breastfeeding.[44] The Court then went on to make important remarks about considerations to be followed when the child was eventually separated from the mother, as well as the impact of imprisonment on the accused's older children, highlighting that consideration should be made to allow those children to be able to continue a relationship with their mother.[45]

In the *Masauko* case, the Court was guided by section 321J of the Criminal Procedure and Evidence Act of Malawi which allows the High Court to request any reports that may aid it in sentencing. The magistrate may also order pre-sentencing reports which enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary care-giver of any children and the effect that their incarceration will have on their children. However, it is not clear to what extent these pre-sentencing reports are used, particularly in the lower courts where most women interface with the legal system. There is a need for presiding officers to be capacitated with enough information to strengthen their jurisprudence by looking to international and regional standards such as the ACERWC's General Comment No. 1 and comparative law from the Southern Africa region.[46]

Comparative Jurisprudence

In addition to standards set by the international and regional human rights framework, one of the leading cases on judicial approach to sentencing of primary care-givers in the region is the South African Constitutional Court case of *M v State*.[47] In this case, the Court was asked to determine the duties of the sentencing court when the person being sentenced is the primary care-giver of minor children in the light of section 28(2) of the Constitution of the Republic of South Africa[48] and any relevant statutory provisions. The Court held:

> "Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court."[49]

The South African Constitutional Court proposed the following guidelines in order to promote

44 *Id* 3.

45 *Id* 6 and 7.

46 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) "General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on Children of Incarcerated and Imprisoned Parents and Primary Care-givers" (2013).

47 CCT 53/06 (2007) ZACC 18.

48 Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

49 *M v State* CCT 53/06 (2007) ZACC 18, para. 33.

uniformity of principle, consistency of treatment and individualisation of outcome:

> "(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
> (b) …The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
> (c) If … the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
> (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
> (e) Finally, if there is a range of appropriate sentences…, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."[50]

The United Kingdom, has sentencing guidelines for magistrates. These require magistrates to consider the age and maturity of the offender, and the offender's responsibility for minor dependants as important mitigating factors.[51] In *R (on the application of Stokes) v Gwent Magistrates Court*,[52] the High Court stated that a court considering an order to imprison which would separate completely a mother from her young children with unknown consequences of the effect of that order on those children, had to take into account the need for proportionality and ask itself whether the proposed interference with the children's right to respect for their family life was proportionate to the need which made it legitimate.[53] Committal to prison must be a remedy of final resort if all else has failed. In *R (on the application of P and Q) v Secretary of State for the Home Department,*[54] the Court of Appeal stated the following:

> "... If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound … to carry out the balancing exercise … before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations … ask for more."[55]

In *R (on the application of Aldous) v Dartford Magistrates' Court*,[56] the Court of Appeal emphasised the need to recognise the detrimental consequences of imprisoning mothers:

> "The existence of children cannot of course keep a person out of prison who should properly be sent to prison, but a sentencing court needs to be able to bear in mind what the effect on the children will be, and, if there are children and if the court does not have the information it needs in order to assess the effect of the parent's imprisonment on them, then the court must make

50 *Id* para. 36 (emphasis added); affirmed in S v S (*Centre for Child Law as Amicus Curiae*) (2011) (7) BCLR 740 (CC).

51 "Magistrates' Court Sentencing Guidelines" *Sentencing Guidelines Council* (2008) 223 available at https://www.sentencingcouncil.org.uk/wp-content/uploads/MCSG_web_-_October_2014.pdf (last accessed: 19 November 2016).

52 (2001) All ER (D) 125 (Jul).

53 *Id* para. 36.

54 (2001) EWCA Civ 1151.

55 *Id* para. 79.

56 (2011) EWHC 1919 (Admin).

enquiries so that it is properly informed. Those enquiries were not made in this case."[57]

Conclusion

The impact of incarceration of care-givers needs to be carefully examined by all stakeholders in the sentencing process. Domestic law, international treaties, and regional human rights treaties to which Malawi is a signatory all have progressive provisions concerning the rights of children whose care-givers are in conflict with the law. Goal 16 of the Sustainable Development Goals suggests that peace, justice and effective, accountable and inclusive institutions are at the core of sustainable development. Part of achieving this is through protecting fundamental freedoms in accordance with national legislation and international agreements.[58] Children's best interests and their rights should be taken into consideration in decision-making, including in decisions relating to sentencing of care-givers.

Judicial officers can play their part by developing jurisprudence that makes children visible when making decisions about sentencing care-givers or holding them in places of detention prior to conviction. Malawi needs to adopt a standardised approach to dealing with incarceration of care-givers. Firstly, this means that it is important for Malawi to gather data about this group of children to help develop effective policy and practice. Malawi may also need to review women's interaction with the justice system, as they are most often the primary care-givers. Women tend to interact with the criminal justice system at the lowest levels, often because they commit less serious offences; they often have no access to legal advice or aid and are less likely to appeal decisions. It is for this reason that it is also important to develop a systematic process for educating judicial officers (including those at the lowest levels of the justice system), prosecutors and legal practitioners about the impact of incarceration on the rights of children, as well as consider a review of any current sentencing guidelines for lower courts to ensure that these aspects are adequately canvassed. The use of pre-sentencing reports increase children's visibility in the criminal justice system and judicial officers should be required to use these consistently. In sentencing care-givers, courts should:

- Consider the rights and the best interests of the child;
- Only sentence an offender who is the carer of young children to imprisonment if such sentence is absolutely necessary;
- Consider alternative sentences such as suspended sentences, community service or fines if a custodial sentence is not absolutely necessary. Fines should only be imposed if a proper inquiry has been done on means of income;
- Hand down a custodial sentence for the shortest term that is conceivably commensurate with the offences in question if a custodial sentence is absolutely necessary; and
- Order that the convicted care-giver be placed in a prison near her home.

Finally, Goal 16 of the SDGs recognises that justice is essential for a peaceful society. Failure to recognise the rights of children in sentencing processes may have a negative effect on their rights to food, health, well-being, and education, thus affecting related SDGs such as Goals 2 to 4. This is detrimental to building peaceful and inclusive societies.

57 *Id* para. 16.
58 Target 16.10.

SOME THOUGHTS ON EFFECTIVE STRATEGIES FOR COMBATTING CORRUPTION IN THE MALAWI JUDICIARY[1]

Rizine R. Mzikamanda SC JA[2]

Introduction

Corruption as a universal phenomenon can be a major impediment to achievement of the newly adopted UN Sustainable Development Goals as it was to the predecessor Millennium Development Goals.[3] Corruption is a social evil permeating every aspect of human existence, with debilitating consequences. An obstacle to accessing basic services, it undermines human development. Corrosive and devastating, corruption remains the most daunting challenge to democracy, rule of law, social development, economic growth, peace and stability. It undermines respect for human rights, accountability and transparency.

The justice sector is particularly vulnerable to corruption and judicial corruption is potentially more devastating than corruption elsewhere.[4] Combatting corruption requires a robust and independent judiciary of impeccable integrity as guardian of democracy and rule of law. Judicial integrity has overarching importance to development, security and well-being of people everywhere.[5] Surveys and indices show that judicial corruption is present in most world judiciaries,[6] exhibiting unimaginable experiences and perceptions. Some reports further show that where the executive engages in corruption and mismanagement of funds, the judiciary does not always have sufficient independence to act decisively against the executive.[7] Allegations and investigations of judicial corruption in Ghana,[8] Kenya[9] and Swaziland[10] have been widely reported.

Corruption in the Malawi judiciary is evident, as is the culture of silence in which judges

1 Revised paper presented at the Judicial Colloquium entitled Working towards Just, Peaceful and Inclusive Societies, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 8 and 9 January 2016.

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3 UN General Assembly High-level Plenary Meeting (2010) identified corruption as a major bottleneck to achieving MDGs.

4 UNODC "Anti-Corruption in the Judiciary – Concept note" APRC, 30 March 2015, available at http://www.anti-corruption.org/attachments/article/380/Anti-Corruption%20in%20the%20judiciary%20-%20concept%20note%20APRC%2030%20March%202015.pdf (last accessed: 3 October 2016).

5 Transparency International *Global Corruption Report – Corruption in Judicial Systems* (2007).

6 Transparency International *Global Corruption Barometer* (2013).

7 United Nations Economic Commission for Africa (UNECA) *Africa Governance Report II* (2009).

8 "Two more High Court judges sacked over corruption" *Ghana Business News* (21 April 2016) https://www.ghanabusinessnews.com/2016/04/21/two-more-high-court-judges-sacked-over-corruption/ (last accessed: 7 October 2016).

9 "Kenya judge Phillip Tunoi probed over '$2m bribe'" *BBC* (27 January 2016) http://www.bbc.com/news/world-africa-35417897 (last accessed: 7 October 2016).

10 "Swaziland judiciary and government rocked by arrests" *Mail and Guardian* (21 April 2015) http://mg.co.za/article/2015-04-21-swazilands-chief-justice-ramodibedi-locked-in-sa-residence (last accessed: 12 December 2016).

participate in an effort to protect each other. This paper demonstrates the nature and extent of judicial corruption in Malawi. It explores key concepts, factors that promote judicial corruption, and challenges in combatting it. Concrete and practical proposals for effectively combatting judicial corruption are suggested. Investigating and decisively dealing with alleged acts of judicial corruption as recently done in Ghana is critical.[11] Addressing the problem of judicial corruption in a strategic and comprehensive way has the potential of increasing the justice system's overall efficiency, fairness and effectiveness. Combatting judicial corruption is a complex and long process requiring a comprehensive, integrated and sustained approach that follows a proper diagnosis and analysis of the problem. Central to all anti-corruption strategies is judicial reform.

Nature of Judicial Corruption

Judicial corruption as a global problem

The definition of corruption remains highly contested. The United Nations Convention Against Corruption (UNCAC),[12] a leading global anti-corruption instrument, does not define corruption. Where they exist, corruption definitions take into consideration each country's culture, legal system, social, economic and political levels of development. I will use the term judicial corruption when referencing corruption in the judiciary. Article 11 of the UNCAC recognises the problem of judicial corruption everywhere and provides thus:

> "Bearing in mind the independence of the judiciary and its crucial role in combatting corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary."

The wording of the article emphasises the importance of the independence of the judiciary. It recognises the need to extend the fight against corruption to the judiciary, even though measures for combatting corruption in the judiciary must not prejudice judicial independence.

Judicial corruption and perceptions of it remain widespread.[13] Judicial corruption is diverse and complex, involving much more than judicial officers taking bribes. Gloppen explains that judicial corruption, "includes all forms of inappropriate influence that may damage the impartiality of the courts and the proper administration of justice".[14] This definition would cover corrupt acts by judicial officers, court officials, and lawyers as officers of the court, as well as prosecutors, legal aid advocates and members of the public as court users. Anyone committing some corrupt act in connection with the administration of justice in the court of law engages in judicial corruption. Judicial corruption requires a wide range of strategies in order to respond to corrupt activities among judicial officers as well as those between judicial officers and parties outside the judiciary.

11 Over 20 judges and magistrates were dismissed following a 2015 judicial corruption scandal. "Two more High Court judges sacked over corruption" *Ghana Business News* (21 April 2016) https://www.ghanabusinessnews.com/2016/04/21/two-more-high-court-judges-sacked-over-corruption/ (last accessed: 7 October 2016).

12 General Assembly resolution 58/4 of 31 October 2003.

13 S Gloppen *Courts, Corruption and Judicial Independence* (2014).

14 *Id* section 5.1.

Gloppen notes that judicial corruption "undermines the court's credibility as corruption fighters" and "erodes trust in the court's impartiality".[15] It further harms "the core judicial functions" and the "broader accountability functions that the judiciary is entrusted with in a democratic system". Judicial corruption may be at the individual or institutional level, localised or at the national level. Only a competent and corrupt-free judiciary can uphold citizens' rights and hold the government accountable.

Levels of judicial corruption in Malawi

Governance and corruption surveys and indices rank the judiciary among top 5 most corrupt public institutions in Malawi, with the media carrying numerous negative stories about judicial corruption.[16]

According to a 2013 Governance and Corruption Survey,[17] business owners and households in Malawi noted a perceived escalation of corruption in the judiciary:

> "Among business owners, the perception that court decisions are influenced by corruption has increased from 50% in 2010 to 69% in 2013. Among ordinary citizens, the perception has similarly gone up from 60% in 2010 to 73% in 2013. Not only is the perception that corruption is a major factor in influencing court decisions higher in 2013 compared to 2010, it is also higher even when compared to the base year of 2006, when 60% of households and 60% of businesses held this view. This further underscores the perception of worsening situation with regard to corruption in the country generally and in the judicial sector in particular."[18]

In a 2010 survey some businesses indicated making gratification payments to judges and sheriffs, although the 2013 survey showed that no business owners ever paid out gratification to judges, magistrates, public prosecutors, legal aid officers and court messengers.[19] The 2013 survey showed sharp deterioration in overall integrity of public institutions, while noting that there is a direct correlation between levels of performance and perceived integrity.[20]

In addition to the Governance and Corruption Surveys, the corruption in the Malawi judiciary is further evidenced by both the news and cases brought before the courts. For example, a news story in 2001 ran about a Chikwawa District Magistrate who was arrested for receiving a bribe from a businessman.[21] Similarly, in 2011 a Chief Resident Magistrate was found guilty and convicted on three counts of corruption after he had corruptly solicited and obtained money from an accused person for promising to procure him an acquittal in a criminal trial before a fellow magistrate. Threats and intimidation were used several times as the victim resisted the demand. His appeal

15 *Id.*

16 See F Nawaz "Overview of corruption and anti-corruption in Malawi" (2012) Transparency International (the judiciary was included as one of the four problematic public institutions in Malawi in regards to corruption); "Malawi lost fight against corruption – Cama" *The Daily Times* (December 10, 2015) ("corruption has been entrenched in every sector of the society.… even the ordinary members of society are aware that the top three arms of government are corrupt", Executive Director of Consumers Association of Malawi) .

17 B Chinsinga, B Dulani, P Mvula, and J Chunga *Governance and Corruption Survey* (2013).

18 *Id* 51.

19 *Id.*

20 B Chinsinga, B Dulani, P Mvula, and J Chunga *Governance and Corruption Survey* (2013), 30.

21 "Malawi Magistrate Arrested for Corruption" *PANA* (2 October 2001) http://www.panapress.com/Malawi-Magistrate-arrested-for-corruption--13-572324-18-1an... (last accessed: 11 February 2016).

against the convictions and custodial sentences was dismissed.[22]

The Malawi Judiciary Strategic Plan recognises that persistent perceptions of judicial corruption and political interference in the judiciary undermine public confidence and trust, thus limiting access to justice.[23] Allegations of corruption involving judicial officers continues to increase, especially in lower courts.[24]At the time of writing, at least seven cases of corruption involving judicial officers were before the Judicial Service Commission for disciplinary proceedings.[25] Malawi's former Chief Justice, Anastasia Msosa, publicly acknowledged the serious problem of judicial corruption on several occasions.[26] Likewise, her successor, Chief Justice Andrew Nyirenda, described corruption as being, "visible in every sector of society".[27]

Factors promoting corruption within Malawi judiciary

The 2008 National Anti-Corruption Strategy identifies many factors that promote corruption in Malawi. Some of the key factors identified by the report include: lack of effective supervision; outdated policies, regulations, and procedures; discretionary powers without accountability; living beyond means; poor organisational culture; greed and opportunity; decay of moral values; and lack of effective punitive sanctions.[28]

Further, corrupt activities are rarely reported owing to a culture of silence. The wish to protect each other or fear of reprisals sometimes motivate failure to report corruption. The absence of comprehensive whistle-blower protection regimes and systems compounds the problem. Further still, undue political influence and undue influence within the hierarchy of the judiciary promote judicial corruption.

Key Concepts and Practices Relevant to Judicial Corruption

Judicial independence

The UNCAC recognises that judicial independence has a crucial role in combatting corruption.[29] Measures aimed at strengthening integrity and preventing opportunities for corruption among members of the judiciary must not prejudice judicial independence. Judicial independence is critical for ensuring that the rule of law is upheld; the very notion of rule of law would mean nothing

22 *Kadwa v Republic* Criminal Appeal No 38 of 2011.

23 *Malawi Judiciary Strategic Plan* (2011).

24 Interview with High Court Registrar, Chigona, in April 2016.

25 Interview with Lora, Controller, Human Resources, Malawi Judiciary, on 25 May 2016.

26 A Msosa CJ stated, "We have heard of stories of perceived corruption in the legal profession mainly from the media. It is such perceptions of corruption that will make the public lose trust and confidence in the legal profession and system" as reported by M Nkhoma "Malawi Judiciary warned of corruption: Face disciplinary action" *Nyasa Times* (2 Oct. 2014) http://www.nyasatimes.com/malawi-judiciary-warned-of-corruption-face-disciplinary-action/ (last accessed: 11 October 2016); *see also* G Gondwe "Malawi's Chief Justice bemoans corruption in Judiciary" *BNL* Times (30 April 2014) http://timesmediamw.com/malawis-chief-justice-bemoans-corruption-in-judiciary/ (last accessed: 11 October 2016) (quoting A Msosa CJ, "If I would say that there is no corruption in the Judiciary, then I would be lying because in actual fact one or two people are on interdiction because it is alleged that they received bribes").

27 "Malawi's top judge says corruption is omnipresent" *News24* (12 August 2015) http://www.news24.com/Africa/News/Malawis-top-judge-says-corruption-omnipresent-20150812-4 (last accessed: 11 October 2016).

28 Government of Malawi *National Anti-Corruption Strategy* (2008) 4 to 5.

29 UNCAC General Assembly resolution 58/4 of 31 October 2003, article 11.

without it. Judicial independence creates an environment for impartial decision-making in cases before courts. It is not for the personal benefit of individual judicial officers, but for the proper administration of justice and the protection of society against abuse of power by officials. The pre-eminence of judicial independence therefore has a bearing on combatting judicial corruption, however, it should not be used as a shield against the investigation of judicial corruption. Courts have a duty to ensure that there is no risk to justice manifestly being done.

Judicial accountability

Accountability of public institutions is a constitutional requirement under our democratic dispensation.[30] The Malawi judiciary must be accountable. Judicial accountability is not a contradiction to judicial independence. These two concepts are different sides of the same coin, playing a complementary role to each other. Judicial accountability tempers judicial independence: it helps to eliminate opportunities for judicial corruption.

Judicial transparency

Transparency as a tenet of democratic governance is also provided for under the Malawi Constitution.[31] Judicial transparency entails exposing to public scrutiny the operations of the judicial system. It generally requires public hearings and judicial decisions that are backed by reasons. Hearings in camera are an exception in circumstances specified by law. Lack of judicial transparency can create opportunities for judicial corruption and erode public trust.

Judicial integrity

Judicial integrity ensures public trust and confidence in the administration of justice and is a necessary condition for a fair trial. A positive self-image within the judiciary, built on a belief in the values of individual honesty and professional ethics is fundamental to combatting judicial corruption. This idea was stated poignantly by the Chief Justice of New Zealand, Dame Sian Elias, "[i]ndependent and upright judges cannot exist without an independent and upright legal profession…[t]he independence of the judiciary and the independence of the bar are relationships which are in counterpoise. Each assists the other in maintaining their existence."[32]

The foundation upon which a coherent and justifiable legal system must be built is on a theory of morality. In *R v Howe*[33] Lord Hailsham was able to say "[t]his brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure".[34]

30 Constitution of Malawi, 1994, section 12(iii).

31 *Id*.

32 Address to 50th Anniversary of the Fiji Law Society, held in Sigatoka, Fiji, on 26th-29th May, 2006. She emphasised that interactions between bench and legal profession would foster common ethical culture, vital for proper administration of justice. Erosion of the shared ethical culture should be of concern because the standards and expectations by which the legal system operates with integrity are not matters that can be prescribed by rules alone.

33 [1987] 1 AC 417.

34 *Id* 428; see also *Airedale NHS Trust v Bland* [1993] AC 789 at 877 (Lord Lowry, "[i]t is important... that society's notions of what is the law and what is right should coincide").

It is therefore critical that the judiciary be concerned about issues of high integrity, morality and good professional relationships at all times for the proper discharge of its functions.

Undue political influence

Within the judiciary, undue political influence is that influence which undermines judicial independence and impartiality in the decision-making process of the courts. A judge's political bias and people's perceptions of bias undermine the role of the judiciary under our constitutional order. Political influence is particularly manifested when the political stakes are high such as in matters of electoral fraud and electoral petitions.[35] It can be quite damaging for the courts' political accountability. Undue political influence may come in the form of bribes, threats, violence or even through promises of preferential treatment in the event of a biased and favourable outcome of the case for the promising party. It may also come through the relationship between the judiciary and other arms of government. A legal culture where judges are expected to defer to political authorities may breed judicial corruption.

Undue influence within judicial hierarchy

Undue influence within the judiciary hierarchy may be direct and clear or may take a subtle form. Superiors may pressure lower level judges to make judicial decisions in a certain way. It may also come through subtle incentives based on a judge's anticipation that deciding an important case in a particular way may have consequences on the judge's career. Selective allocation of cases to judges who are expected to decide in a particular manner regardless of the position of the law can be an entry point for judicial corruption. In 2011, a judge friend of mine shared with me an experience where he had been confronted by some senior colleagues for having handled a certain court matter in a particular way. This strange behaviour suggests that personal interactions within the judicial hierarchy could also influence the decision of a judge in a given case.

Challenges in Combatting Judicial Corruption

Denial of the existence of corruption in the judiciary has been the first obstacle to combatting judicial corruption. Sometimes nothing has been done about it on the pretext that judicial corruption is merely a perception based on ill-informed ignorance. Meanwhile, the corrosive effects of judicial corruption continue to take a toll on the judiciary and society. Ignoring perceptions of judicial corruption has come at a great social cost and has infringed on the delivery of justice.

Vigorously and publicly pursuing allegations of judicial corruption sometimes seems to come at the cost of compromising judicial independence. Charges or allegations of judicial corruption can jeopardise the independence of the judiciary, especially where the real motive in the anti-corruption measures is to get rid of bothersome judicial officers.[36] The United Nations was well aware of this dilemma and hence the wording of article 11 of the UNCAC.

35 S Gloppen, R Gargarella and E Skaar *Democratisation and the Judiciary: The Accountability Functions of Courts in New Democracies* (2004).

36 As in the attempted impeachment of three Malawian judges in 2001. MCC Mkandawire "Combatting Judicial Corruption" (2002) MCC, 28 *Commw. L. Bull*, 593-597. http://thomasgguo.world.edoors.com/CoXgeynsUDqc (last accessed: 12 October 2016).

There would be reluctance on the part of the judiciary to investigate one of their own against whom there is an allegation of corruption, while at the same time investigators from outside the judiciary would not always be welcome. It must be accepted that the judiciary may be ill-equipped to carry out an investigation of an alleged judicial corruption, especially when such an allegation should involve a complex and specialised investigation.

There is also the challenge that some allegations of judicial corruption are trumpeted without any scintilla of evidence. Such allegations are only meant to subdue the judiciary and impair its impartial administration of justice. The real challenge sometimes is to isolate allegations that have some substance from those allegations that are without substance. Yet the solution can never be to ignore the allegations completely. Rather, all allegations ought to be thoroughly investigated.

Strategies for Combatting Judicial Corruption

The problem of judicial corruption must be addressed in a strategic and comprehensive manner. Anti-corruption measures in the judiciary can potentially increase the justice system's overall efficiency, fairness and effectiveness. Below are some strategies that may be effective in combatting judicial corruption in Malawi.

Diagnosis and analysis of the problem

The starting point for combatting judicial corruption effectively is to conduct a thorough diagnosis and analysis of the problem and the environment in which the judiciary operates. This will reveal the exact nature and extent of the problem of judicial corruption in Malawi. The legal, political, social, economic and cultural context in which the judiciary operates must be taken into account in designing responses to judicial corruption.

Promote judicial accountability and transparency

Judicial accountability and transparency are part of the tenets for democracy as provided for under the Constitution of the Republic of Malawi.[37] All institutions of government must be accountable and transparent in the manner they carry out public functions. Judicial accountability and transparency must be done without compromising judicial independence. Introducing systems of anonymous reporting and suggestion boxes at strategic points, coupled with a comprehensive regime of whistle-blower and witness protection, would encourage stakeholders, especially the public, to report judicial corruption.

Judicial integrity system reinforced

Addressing judicial corruption requires that attention be given to the broader context of corruption in the entire justice system, including the society as a whole. Strategies for combatting judicial corruption must necessarily be linked to the National Anti-Corruption Strategy. The entire judicial system must adhere to high standards of independence, impartiality, integrity, accountability and transparency in order to minimise the opportunities for corruption, while exercising vigilance

37 Constitution of Malawi, 1994, section 12(iii).

against risks of corruption. The Malawi judiciary's Judicial Integrity Committee, chaired by a High Court judge, has a critical role in the development of a robust judicial integrity system by, among other things, advocating for attitudes intolerant to corruption.

Improved case management system

A case management system that functions well is an important tool for eliminating opportunities for judicial corruption. Judicial reforms that incorporate technology and simplification of court rules of procedure form an important aspect of combatting judicial corruption. Improved case management systems will ensure that accurate court data is collected and safely kept. This has the potential of reducing judge shopping and missing of court records. Improved systems of internal controls and adherence to high standards management will ensure that opportunities for corruption are reduced. The assignment of cases remains an internal matter of the judiciary, not dictated by outsiders. A random allocation of cases ought to be encouraged to ensure equitable distribution of workload and to avoid assigning cases to particular judicial officers in anticipation of particular results. Current efforts to automate the case management system in the Malawi judiciary ought to be accelerated.

Performance management systems in place

Performance of staff in the judiciary needs to be systematically measured, with performance appraisals being done on a regular basis. Setting up systems that ensure objective performance standards and measurement is important for, not only rewarding good performers and helping below-standard performers improve, but also for combatting judicial corruption. Knowledge of the existence of such a system is likely to encourage officials to refrain from corrupt activities.

Promote professionalism and ethical behaviour

Vigorous ethical and disciplinary programmes are critical for combatting judicial corruption. The Bangalore Principles of Judicial Conduct[38] serve as an international reference point for countries. Malawi's code of conduct for judicial officers is hardly enforced. A client service charter for the judiciary once adopted would help to improve judicial services and help stakeholders assess the performance of the judiciary.

Financial independence

Financial independence of the judiciary entails adequate financing and freeing the judiciary budget from outside control. This does not suggest that the judiciary should be immune from accountability for the public resources made available to it, or that the judiciary should be free from the constitutionally established system of checks and balances. Judiciary expenditure shall remain subject to the laws and procedures applicable in public finance management, including public auditing of judiciary accounts. It has been observed that:

> "Control over the purse strings gives many governments a stronghold – if not a stranglehold –over courts, by enabling them to strategically regulate not only the judges' salaries and benefits, but also

38 ECOSOC 2006/23.

> the running costs of the judiciary. This may lead to (perceptions of) bias, as illustrated in Zambia and Malawi, where the timing of hikes in judges' salaries and benefits repeatedly coincided with pending court cases involving high stakes for the executive, most notably presidential election petitions".[39]

Adequately financing the judiciary and eliminating undue influence on judicial budgets and administration is an important aspect of the judiciary's anti-corruption strategies.

Improving judiciary terms and conditions of service

According to Malawi's Governance and Corruption Survey 2013, low salaries of public officials also fuels corruption in the public service. Any interventions to fight public sector corruption should pay particular attention to issues of salaries. Judicial officers should have reasonable and secured terms and conditions of service. Improved conditions of service must necessarily be accompanied by attitude change on the part of judicial officers. Improved terms and conditions of service are a critical aspect of judicial independence and the preservation of the rule of law. There ought to be some honourable way of determining benefits for the judiciary without the perennial controversies that the current procedures attract.

Meritorious judicial appointments that follow comprehensive integrity check

The law requires that only fit and proper persons be appointed to a judicial position.[40] Transparent and meritorious selection of judicial officers is a necessity so that only candidates most suited for the job get appointed. Political influence on judicial selection and the determination of terms and conditions of service must be eliminated. Reforming the composition and the procedures of the Judicial Service Commission would significantly aid the fight against judicial corruption.

Investigate and decisively deal with alleged acts of judicial corruption

Allegations of judicial corruption must be investigated. Initial inquiries should be done internally for purposes of preserving judicial independence. Any allegation found to be without substance will not be pursued. However, where preliminary inquiries into an allegation of judicial corruption reveal some substance, such an allegation must be investigated in full by appropriate law enforcement agencies and punishment should follow for any proven act of judicial corruption. The judicial system must respond decisively whenever corruption is detected. Decisively disciplining and dismissing corrupt judicial officers, as was recently done in Ghana, is an important intervention for effectively combatting judicial corruption.

Integrate judiciary anti-corruption measures

Anti-corruption interventions in the Malawi Judiciary can work more effectively if they are integrated with efforts applicable elsewhere under the National Anti-Corruption Strategy framework, more particularly because of the complex nature of judicial corruption.

39 S Gloppen Courts, *Corruption and Judicial Independence* (2014), section 5.1.2.

40 See Cap 3:02 of the Laws of Malawi, section 34(a) "the court of a Resident Magistrate shall consist of a fit and proper person appointed by the President to be a Resident Magistrate".

Training

Judicial skills and competences enable the judicial officers to resist undue and improper influence of whatever form, and from whatever source, which is intended to pervert the course of justice. The resilience of the judicial officers must be enhanced by strengthening their skills and competencies. Training also helps in building judicial officers' attitudes against corruption.

Monitoring and evaluation of anti-corruption interventions

Public access to information and stakeholder monitoring and evaluation of anti-corruption intervention help in combatting judicial corruption as part of accountability. Further, the effectiveness of any anti-corruption strategies should be measured. Lessons learnt would be utilised in formulating better strategies, or improving existing ones, for combatting judicial corruption.

Conclusion

Judicial corruption is a global phenomenon that has badly dented the image of the judiciary in many countries. The problem of judicial corruption in Malawi is real, and not imaginary. The first step towards effectively combatting it is a comprehensive diagnosis and analysis of the problem for a clear understanding of the nature and extent of the problem. That will provide the necessary basis for the formulation of most appropriate and effective interventions to rid the judiciary of corruption. Combatting judicial corruption is a complex and long term process.

This paper highlighted some known facts about the existence and extent of judicial corruption in Malawi in the absence of a comprehensive diagnosis and analysis. Concepts that have a bearing on judicial corruption and challenges in combatting judicial corruption have been discussed. Some suggestions for effectively combatting judicial corruption in Malawi have been made. Reinforcement of judicial integrity, moral values, professional and ethical standards remain key to combatting judicial corruption in Malawi. There is a need to work on the attitudes of officers regarding the evils of judicial corruption so that they see it as intolerable, something that must be fought at both individual and institutional levels. Further, an integrated approach to combatting corruption in the judiciary is critical, there being many players in the justice system. Anti-corruption efforts should not be free-standing but should be integrated into coherent programmes to strengthen the capacity and effectiveness of the judiciary. A strong clean and corrupt-free judiciary can positively contribute to a successful fight against corruption.

THE COURT'S ROLE IN CONTRIBUTING TO A CULTURE OF ACCOUNTABILITY FOR CORRUPTION

Caroline James[1]

Introduction

Early in 2016, Sonny Serite, a freelance journalist in Botswana was arrested and detained after he published a story about corruption at a State-owned entity. After being denied access to his lawyer, Serite was questioned about revealing the sources for his information and told that refusing to do so was in violation of the National Security Act of 1986.[2] That Act requires that if there is a reasonable suspicion that information indicating the commission of an offence under the Act is in the possession of an individual that information must be given to a police officer. The charges were later dropped, but many commentators argued that the mere fact of the arrest and detention contributed to a culture of fear pervading journalism in Botswana.

Serite's case is not the only one in Botswana where journalists have been harassed and charged with criminal offences, nor is Botswana the only country in Southern Africa where this is becoming increasingly common. In just the last two years, journalists have been charged with sedition in Botswana, publishing false news in Zimbabwe and criminal defamation in Lesotho. In many cases, criminal charges are instituted soon after the journalists published stories involving misconduct by high profile individuals, and very often the charges appeared to be an attempt to muzzle the journalists or bury the story. Corruption is a threat to effective and sustained development in any society, and the lack of ventilation of allegations prevents accountable public institutions. Sustainable Development Goal 16 seeks to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels", and target 16.5 specifically calls on countries to "[s]ubstantially reduce corruption and bribery in all their forms".[3]

Freedom of expression – including the freedom of the media – is not absolute, and there are perfectly rational reasons for seeking to limit the right in certain circumstances. The rationale behind criminalising certain forms of expression is to provide protection for other important rights and interests. Many formulations of the right in international or domestic treaties or constitutions contain internal limitations. For example, most nations explicitly exclude speech that damages others' reputations or threatens public safety. These limitations serve an important purpose as they enable individuals to fend off unwarranted attacks on their dignity and provide law enforcement officials with the tools to prevent incitement to violence and hatred.

1 Freedom of Expression Programme Lawyer, Southern Africa Litigation Centre; B.A. (Hons.), LL.B (University of the Witwatersrand).

2 Cap. 23:01 of the Laws of Botswana.

3 A/RES/70/1 (21 October 2015) para. 59.

The problem with justifiable limitations is that they can be abused and used as a convenient mechanism to silence political opponents or other unpopular voices. While laws and principles that limit the freedom of the media to publish confidential or private information serve to protect privacy, they can also be used to hide information about wrongdoing. Corruption is often performed by those in powerful positions. These individuals can use those positions of power to suppress evidence of that corruption. This is why it is so important to make information about corruption public, and also why accountability for corruption is so hard to achieve.

In environments where laws limiting expression are being abused, courts are often an important avenue that can be used to protect journalists. This paper will examine two recent South African judgments which demonstrate how courts can protect the right to freedom of expression and ensure that the media is given space to uphold its obligation to keep the public informed. These judgments provide examples of how courts can contribute to achieving Goal 16.

The Relationship between Freedom of Expression, Media Freedom, Accountability and Transparency

Freedom of expression is a fundamental human right in and of itself: being able to express oneself freely is beneficial for the personal development of individuals. However, the right is chiefly important because of the role it plays in enabling the democratic process. Without freedom of expression, citizens' ability to form opinions about public officials and their conduct is hindered. This, in turn, impacts on their ability to mobilise around issues of concern to them and then vote for their public officials of choice. A free and independent media is an essential component of democracy because it enables information to be uncovered and disseminated to the public. Without that, individuals' opinions and participation in democracy is circumscribed.

A South African High Court provided a powerful description of how the media contributes to democracy through ensuring accountability of those who serve as public officials:

> "The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed."[4]

The South African Supreme Court of Appeal explained exactly how the press plays this role:

> "[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their

4 *Government of the Republic of South Africa v Sunday Times Newspaper and Another* (1995) 2 SA 221 (T) 227H - 228A.

> fellow citizens, to officialdom and to government."[5]

The African Commission has recognised the importance of the right to freedom of expression and the role the media should play in African societies. In the African Commission's Declaration of Principles of Freedom of Expression in Africa of 2002, the preamble states that it is "[r]eaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms". Furthermore, the Declaration highlights the central role the media plays in giving effect to the right, and providing the foundation for citizens' informed participation in the democratic process. The Declaration was made:

> "[c]onsidering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy".[6]

As already mentioned, in many societies beset by corruption it is the media that provides citizens with the information required to make those informed decisions referred to in the Declaration. Although a handbook to the United Nations (UN) Convention Against Corruption identifies that there is no internationally accepted definition of corruption because of the diverse legal, criminological and political systems, it does comment that all working definitions of corruption are variations of this general formulation: corruption is "the misuse of a public or private position for direct or indirect personal gain."[7]

Whatever definition we use, it is widely accepted that corruption is a threat to good governance, political stability and economic and social development. The UN Secretary General remarked that corruption "undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish."[8] The African Union's (AU) Convention on Preventing and Combating Corruption also recognises "the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples".[9] In addition the AU acknowledged that "corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent".[10]

The Convention also recognises the important role the media plays in the fight against corruption. Article 9 states that "[e]ach State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences." Article 12(4) requires States to "[e]nsure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of

5 *National Media Ltd and Others v Bogoshi* (1998) 4 SA 1196 (SCA) paras. 23-24 (citations omitted).

6 African Commission Declaration of Principles of Freedom of Expression in Africa (2002) Preamble.

7 "United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators" (September 2004) 23 available at https://www.unodc.org/pdf/crime/corruption/Handbook.pdf (last accessed: 20 November 2016).

8 KA Annan, Foreword to "United Nations Convention against Corruption" UN (2004) iv.

9 African Union Convention on Preventing and Combatting Corruption (2003) Preamble.

10 *Id.*

such information does not adversely affect the investigation process and the right to a fair trial."

Investigative journalists like Serite seek to play that important role of uncovering corruption and making citizens aware of that corruption so as to hold their public officials accountable. But, uncovering corruption is one of a journalist's most dangerous jobs. The Committee to Protect Journalists (CPJ) analysed all the deaths of journalists between 1992 and 2016, and 20 percent of the victims had reported on corruption.

Journalists who seek to report on stories of corruption face considerable risks. When it comes to corruption, the balance between rights too often falls against freedom of expression. The individuals engaged in corruption also tend to be in charge of law enforcement and will use that power to shield themselves from accountability. Courts have the tools to reverse this.

Some South African Examples

Two recent judgments from South Africa have demonstrated a strong commitment to uphold the right to freedom of expression.

In the first, *M and G Centre for Investigative Journalism and Others v National Director of Public Prosecutions and Others*,[11] the North Gauteng High Court reviewed the decision by the National Director of Public Prosecutions (NDPP) to refuse a request from a media house that sought to gain permission to publish information related to a corruption investigation. In 2011, the Mail and Guardian's investigative journalism centre had learnt about an investigation into Mr Mac Maharaj – at that time the Minister of Transport – and his wife, and had obtained copies of the record of the investigation. The investigation related to the "Strategic Defence Package" (colloquially known as the "Arms Deal") and allegations of widespread corruption in the South African government's acquisition of military equipment. The transcripts the Mail and Guardian had obtained contained interviews from 2003 with Mr Maharaj about his relationship with Mr Schabir Schaik, an individual who had since been convicted of corruption and who had close ties with President Jacob Zuma. The Mail and Guardian believed that the content of the transcripts contradicted what had actually happened and that the discrepancies indicated that a criminal offence may have been committed, an offence which had not been prosecuted. The newspaper submitted that this meant that their publication of the information would provide the public with information about wrongdoing by Mr Maharaj and the National Prosecuting Authority.

The high profile of the individuals involved in the investigation meant that it was of significant public interest. However, section 41(6) of the National Prosecuting Authority Act[12] makes it an offence to disclose the record of an investigation, unless permission has been granted by the NDPP. The sanction for infringing section 41(6) is a fine or imprisonment for a period up to fifteen years.[13] The purpose behind the legislative requirement of seeking permission from the NDPP is to preserve confidentiality, but because the NDPP retains discretion on whether the information can be published the confidentiality is not absolute. After being warned by Mr Maharaj's lawyers

11 (37510/2012) (2016) ZAGPPHC 613.

12 Act 32 of 1998.

13 *Id* at section 41(7).

that publishing the information amounted to a criminal offence under the National Prosecuting Authority Act, the Mail and Guardian sought permission from the NDPP to publish the information. The newspaper argued that not only was the information in the public interest, it was also already in the public domain; its confidentiality had already been breached.

The NDPP refused the request, stating that the legislation requires a "general policy of non-disclosure" and that any disclosure could negatively affect the inquiry into the arms deal.[14] This decision served to shield the information from public scrutiny and prevented the public – and therefore voters – from learning about the connections between a cabinet minister and a convicted fraudster. The Mail and Guardian then submitted the NDPP's decision for review, arguing, in part, that the NDPP had failed to consider that it would be in the public interest to publish the information and that she had safeguarded the interests of those mentioned in the investigations.[15]

The NDPP and Mr Maharaj and his wife argued that if the NDPP had given permission to the Mail and Guardian to publish the information, it would have put future investigations at risk as individuals who may be questioned under the legislation may refuse to cooperate knowing that their confidentiality may not be preserved.

In its judgment the High Court recognised the manner in which the legislation infringes the right to freedom of expression, but also how, in this case, the NDPP had a responsibility to ensure that the right is not disproportionately limited:

> "The provisions of section 28(1) is a drastic interference with freedom of expression, which requires the NDPP to strike the correct balance between securing the integrity of the criminal justice system and upholding freedom of expression."[16]

The Court characterised the National Prosecuting Authority Act's prohibition on publication as a "prior restraint" on publication and refers to South African jurisprudence which held that prior restraints can only be justifiable when there is a "real risk" that prejudice or injustice would result.[17] This position is a powerful one: it means that a party arguing that the publication of information is detrimental to them must demonstrate the extent of that harm. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*, the Supreme Court of Appeal explicitly noted that "it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information."[18]

In coming to its decision, the Court in *Mail and Guardian* also made reference to the quote mentioned above that the duty of the media was to "ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators."[19] Although the deciding factor in determining that the NDPP had acted irrationally in refusing to permit the publication was that the information was already in the public domain, the Court made it very clear that it was in the

14 *M and G Centre for Investigative Journalism* (37510/2012) (2016) ZAGPPHC 613, paras. 9 and 10.

15 *Id* para 11.

16 *Id* para 69.

17 See *Print Media South Africa v Minister of Home Affairs* (2012) 6 SA 443 (CC); *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (2007) ZASCA 56.

18 *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (2007) ZASCA 56, para 19.

19 *Government of the Republic of South Africa v Sunday Times Newspaper and Another* (1995) 2 SA 221 (T) 227I.

public interest that the information be published, and that the NDPP was wrong in not taking that public interest into account when she refused the request to publish.

The High Court took its lead from the Johannesburg High Court in *Tshabalala-Msimang and Another v Makhanya and Others*[20] which had stated that "the publication of…unlawfully obtained, controversial information was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions."[21]

In another South African High Court case, *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others*,[22] the Johannesburg High Court looked at the question of whether public interest could override conditions of legal privilege. As the High Court noted, the financial affairs of South African Airways (SAA), the South African national airline, had been of great public interest and concern. In this case, the particular controversy centred around the purchase of new aircraft by SAA and where the funds for this purchase had come from.[23] The general manager of SAA's legal risk department had provided a legal memorandum to SAA's chief executive officer setting out, among other things, the legal position of SAA not paying Airbus, and whether such non-payment would constitute a breach of South African legislation. As a legal memorandum, this document was confidential and covered by attorney-client privilege. However, the contents of this document were made public, and various media houses published stories in connection with it.

The main issue in Court was whether SAA, through various actions, had waived the legal privilege attached to the memo, and whether publication could be prohibited when the relevant information was already in the public domain. The Court held that it would be futile to find that SAA should be protected by legal privilege because the confidentiality of the information had already been breached. However, the Court took the opportunity to discuss the relationship between freedom of expression, the public interest and legal privilege. The Court commented that even if it had found that a prohibition would not be futile, the public interest would require that it be published:

> "[T]he controversy about SAA and its dependence on taxpayer funds seems to me to be a demonstrably obvious topic about which every citizen has a tangible interest to be informed. If the constitutional promise of transparency in public administration is to mean anything, then awareness of what public bodies do with the nation's money is a low threshold to demand. When an existing controversy is raging, this is all the more so. Accordingly, the public interest in being informed outweighs the right of SAA to confidentiality in the contents of the document."[24]

In both these cases the courts considered the nature of the institutions and individuals involved, and gave weight to their high profile and political connections. The High Court then held that because of this, the public had a right to be informed about misconduct. In this case, the right to freedom of expression outweighed the individuals' or institutions' rights to confidentiality. These cases demonstrate that the courts have the power to apply a rights based analysis that can give effect to accountability and that provides the media with the legal space to pursue stories with potentially serious political ramifications.

20 *Tshabalala-Msimang and Another v Makhanya and Others* (2008) 6 SA 102 (W).

21 *Id* para. 46.

22 *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* (2016) 2 SA 561 (GJ).

23 *Id* para 4.

24 *Id* para 65.

A Cautionary Tale

The misconduct in the two cases mentioned above was predominantly professional, and the private affairs of public officials were not at issue. Another South African case, *Tshabalala-Msimang v Makhanya*,[25] is an example of how difficult balancing the rights to freedom of expression and privacy can be when private lives are affected.

In that case, the personal medical results of Manto Tshabalala-Msimang, the then-Minister of Health, were published in the Sunday Times newspaper. The report created an inference that the Minister was an alcoholic and that she should have been disqualified from receiving a liver transplant as a result. The Minister's conduct appeared to be in direct conflict with conduct she, as Health Minister, was recommending as medical guidelines. The Johannesburg High Court found that a law prohibiting the sharing of medical records *had* been contravened making the publication of the medical information unlawful. However, the Court stated that the public "has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials."[26]

The effect of this judgment is that, while recognising the right of public persons to privacy, sometimes the public interest in private information may well override that privacy. The Court characterised this case as one "where the need for truth, is in fact overwhelming."[27]

But, the judge expressed his discomfort with the ruling and the impact the violation of confidentiality had on Ms Tshabalala-Msimang and her family. The judgment ends with a lengthy comment on the conduct of the journalists in publishing information that has not been legally obtained. The Court stated that even though it might be in the public interest to have published that information it still may not have been the correct decision. The Court mused that the Press Ombudsman (to determine the journalistic ethics) and the National Prosecuting Authority (to determine the criminal responsibility) may be required to look into the journalists' conduct.

Misconduct by public officials is a serious threat to democracy, accountability and transparency and should generally be exposed. However, the officials' rights to privacy, reputation and dignity may well be severely infringed in the process. The judgment in the *Tshabalala-Msimang* case demonstrates that the true public interest of the information may be the defining factor in determining whether it should be published – but that this often remains a difficult decision.

Conclusion

The recognition of the need to substantially reduce bribery and corruption as a means to achieve SDG 16's goal of peaceful and inclusive societies for sustainable development and accountable institutions is instructive. The SDGs therefore, as the UN and AU have before, acknowledge the threat corruption poses to development and the need for action to curb it. This paper seeks to stimulate a debate on how judges, by creating the conditions for free reporting on corruption, can contribute to creating more accountable institutions. It acknowledges that the rights to privacy and

25 *Tshabalala-Msimang and Another v Makhanya and Others* (2008) 6 SA 102 (W).

26 *Id* para 38.

27 *Id* para 50.

confidentiality may be infringed – sometimes harshly – but that in order to truly fight corruption, the media needs to be given the tools to expose it. The South African courts have recognised that as long as information is of sufficient importance, the public interest in publishing it may override competing considerations of confidentiality.

LEGAL IDENTITY FOR ALL - ENDING STATELESSNESS IN SADC

Liesl H. Muller[1]

Introduction

In the past year significant progress has been made towards ending statelessness in the Southern African Development Community (SADC) region. Most notably, parliamentarians, who ultimately make the laws which prevent or aggravate statelessness, have committed to addressing statelessness in SADC. On 13 November 2016 SADC parliamentarians at the 40th plenary assembly of the SADC Parliamentary Forum adopted a resolution towards this end. This development, along with other similar resolutions and developing jurisprudence, will go a long way towards ensuring legal identity for all by 2030 as set out in Goal 16 of the United Nations Development Programme (UNDP) Sustainable Development Goals.[2]

According to a study done by the African Commission on Human and Peoples' Rights (ACHPR) hundreds of thousands, possibly millions, of Africans do not have access to a nationality and may be stateless.[3] Being stateless means that a person's legal identity is compromised. It causes barriers to many other human rights such as the right to education, the right to healthcare and public services, as well as the right to vote and the right to freedom of movement. Basically, citizenship is the right to have other rights. Often, stateless persons cannot transfer nationality to their spouses and children, nor register the births of their children causing generational statelessness.[4]

Statelessness in Africa can be linked to a State's colonial history as well as migration, changes in State borders and discrimination based on gender, ethnicity or religion. Withdrawal of nationality or refusal to grant nationality has led to conflicts which have caused severe human rights violations on the continent.[5]

In the SADC region statelessness can be ascribed to large scale labour migration over generations; protracted displacement caused by conflict; the migration of unaccompanied minors; systematic discrimination against certain population groups; modernisation of the civil registry systems without proper access to administrative justice and poverty. One of the most prominent causes of statelessness in the SADC region is the lack of birth registration. UNDP notes that the birth registration in the SADC region is disappointingly low and more than half of children are still unregistered by the age of five.[6] Without a birth certificate it is impossible to prove one's claim to nationality.

1 Head of the Statelessness Project, Lawyers for Human Rights; LL.B (University of Pretoria).

2 Target 16.9. "Goal 16: Promote just, peaceful and inclusive societies" *United Nations* (2016) available at http://www.un.org/sustainabledevelopment/peace-justice/ (last accessed: 19 November 2016).

3 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa* (2015) 5.

4 *Id.*

5 *Id.*

6 Sustainable Development Knowledge Platform, "Sustainable Development Goal 16", available at https://sustainabledevelopment.un.org/sdg16 (last accessed: 13 December 2016).

The right to a nationality is implicit in the African Charter (the Charter) even though it was not included in the list of rights specifically protected under the Charter. This is evident from the interpretation of the Charter by the African Commission when deciding cases related to the right to nationality. The African Commission has linked the right to nationality to specific principles enshrined in the Charter, such as the prohibition of discrimination (article 2); equality before the law (article 3); respect for human dignity (article 5); the right to a fair trial (article 7); the right to freedom of movement (article 12); the right to participate in the government of the country (article 13); and the protection of the family and of the rights of women and children (article 18).[7]

African leaders have sought to address the lack of a specific provision on nationality through the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on the Rights of Women in Africa (the Protocol on the Rights of Women). The ACRWC specifically includes the child's right to a nationality.[8] African States have been urged to ensure that children acquire the nationality of the State in which they are born if they are not granted nationality by any other State.[9] The Protocol on the Rights of Women confirms that women in Africa have the right to acquire a nationality and to acquire their husband's nationality.[10] These measures confirm the determination of African leaders to ensure that Africans have access to the right to nationality in Africa.[11]

The African Commission study finds that despite these initiatives, the impact of these provisions is limited by the lack of infusion of these treaties into national legislation and their limited application in national and regional courts. The complexity of the right to a nationality in Africa is further complicated by factors such as the practice of African pastoralism, borders inherited from the colonial period and the African diaspora.[12]

Accordingly, parliamentarians have a fundamental role to play in ending statelessness through legislative reform. There is a need to redesign laws to allow individuals to access their right to a nationality. These laws should meet the existing international law standards for access to nationality in international treaties to which many SADC States are signatories. These include, amongst others, the African Charter on Human and Peoples' Rights (ACHPR); the African Charter on the Rights and Welfare of the Child (ACRWC); the UN Convention on the Rights of the Child (UNCRC); the Universal Declaration of Human Rights (UDHR); and the International Covenant on Civil and Political Rights (ICCPR).

Ideally all SADC States should also accede to the 1954 UN Convention on the Status of Stateless Persons (the 1951 convention)[13] and the 1961 UN Convention on the Reduction of Statelessness (the 1961 convention)[14] which set out the definition of statelessness, protects the basic rights of

7 African Commission on Human and Peoples' *Rights The Right to a Nationality in Africa*, (2015) 5 and 6.

8 Article 6(3) of the African Charter on the Rights and Welfare of the Child.

9 *Id* article 6(4).

10 Article 6(g) of the Protocol on the Rights of Women in Africa, available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (last accessed: 15 December 2016).

11 *Id* 6 and 7.

12 *Id* 7.

13 Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 in pursuance of Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatelessPersons.aspx (last accessed: 15 December 2016).

14 Convention on the Reduction of Statelessness, adopted on 30 August 1961 in pursuance of General Assembly resolution 896

stateless persons and provides legislative standards for the prevention and reduction of statelessness. Unfortunately, only seven SADC States have acceded to the 1954 convention (Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe) and only three SADC States have acceded to the 1961 convention (Lesotho, Swaziland and Mozambique). In order to ensure full protection of the right to a nationality in SADC laws, all SADC states should sign these two treaties to ensure that loopholes in legislation which lead to statelessness are avoided and that countries do not create statelessness in their neighbouring States. It is a problem which can only be effectively solved with the cooperation of all States in the region.

Policy Developments at SADC Level

Recent policy developments in the SADC region seek to address statelessness and change the fate of its stateless inhabitants. These include resolutions by the SADC Parliamentary Forum, the SADC Migration Dialogue for Southern Africa (MIDSA) and the International Parliamentary Union (IPU).

On 13 November 2016, the plenary assembly of the SADC Parliamentary Forum called upon national parliaments and governments in the SADC Region to:

i. "Resolve any existing situations of statelessness within our own countries;
ii. Review the legislative frameworks and administrative practices in nationality matters with a view to ensure their consistency with international standards on the prevention and resolution of statelessness, as well as on protection of stateless persons;
iii. Initiate legislative reforms that addresses any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness;
iv. Ensure gender equality as regards the equal right of men and women to pass on their nationality to their children and spouses, and to change or retain their nationality;
v. Expedite the implementation of article 6(4) of the African Charter on the Rights and Welfare of the Child, thereby preventing childhood statelessness;
vi. Establish and maintain comprehensive birth registration and civil registration systems within Member States with a view to prevent statelessness;
vii. Accede to the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the Rights of all Migrant Workers and Members of their Families;
viii. Support the drafting, adoption and ratification of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality and the Eradication of Statelessness in Africa; and
ix. Work towards the development and adoption of a SADC Ministerial Declaration and Action Plan on Statelessness."[15]

(IX) of 4 December 1954, entry into force: 13 December 1975, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Statelessness.aspx (last accessed: 15 December 2016).

15 SADC Parliamentary Forum 40th Plenary Assembly Session, 3-15 November 2016, Harare, Zimbabwe.

Leading up to this event, parliamentarians in the SADC region attended an event in Cape Town in November 2015, hosted by the Parliament of South Africa, the International Parliamentary Union (IPU) and the United Nations High Commissioner for Refugees (UNHCR). At this event the members of parliaments agreed to advocate for the resolution of existing situations of statelessness and the prevention of statelessness through legislative reform and strengthened parliamentary oversight of implementation. They also committed to raising awareness and encouraging States to accede to the two UN conventions on statelessness.

In August 2016, the SADC Migration Dialogue for Southern Africa (MIDSA) produced conclusions and recommendations on statelessness including the following:

1. "Continue to advocate for the adoption and ratification of the African Charter on the Rights and Welfare of the Child, the domestication and implementation of, and adherence to the reporting obligations of the UN Convention on the Rights of the Child by SADC Member States.
2. Member States are encouraged to strengthen their capacity to enhance birth registrations and national identification systems, as well as to develop and maintain a well-functioning Population Register.
3. Ensure equality between men and women to pass on their nationality to their spouse and children.
4. Work towards the development and adoption of a SADC Ministerial Declaration/Action Plan on Statelessness.
5. Member States are encouraged to ratify and domesticate the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the rights of all Migrant Workers and Members of their Families."[16]

A follow up to these recommendations such as a MIDSA resolution at ministerial level in 2017 to end statelessness in SADC would further strengthen these commitments.

Three follow up workshops at national level have been conducted to explore ways that parliamentarians and other branches of government can prevent statelessness through legislative reform and establishment of statelessness determination procedures. Such workshops were held in Malawi, Swaziland and Mozambique during 2016 hosted jointly by UNHCR and Lawyers for Human Rights. In all three of these countries gender parity in nationality laws is still not a reality. Despite having signed both the statelessness conventions, Swaziland does not allow married mothers to pass their nationality to their children nor to their foreign spouses. In Malawi women cannot pass their nationality to their foreign spouses and there are discriminatory requirements for foreign spouses to acquire citizenship from their spouses.[17] In all three of these countries birth registration is still worryingly low despite efforts to increase it. Hopefully, their recent commitments to meet international standards will reform these laws and practices.

16 International Organisation for Migration, "Conclusions and Recommendations" Technical Migration Dialogue for Southern Africa Addressing Mixed Migration in Southern Africa: Linking Protection, Immigration, Border Management and Labour Migration, Gaborone, Botswana, 16-18 August 2016, available at https://ropretoria.iom.int/news/technical-migration-dialogue-southern-africa-addressing-mixed-migration-southern-africa-linking (last accessed: 15 December 2016).

17 Bronwen Manby for Open Society Foundations *Citizenship Law in Africa: A comparative Study* 2nd ed (2010) 5.

Goal 16 of the Sustainable Development Goals

Sustainable Development Goal 16 stresses the importance of birth registration of children concerning legal identity and ensuring access to individual rights.[18] Birth registration is a crucial step in preventing statelessness as most States require proof of place of birth and identity of the parent(s) to establish nationality. Ensuring birth registration is therefore crucial toward ending statelessness in SADC. Lawyers for Human Rights has conducted an in-depth study[19] of the legislative framework in South Africa which creates barriers to birth registration and may lead to childhood statelessness and have made recommendations toward legal reform. Research of this kind is rare in the SADC region and more needs to be done to provide the necessary data which will guide policy reform.

Other initiatives which support the Sustainable Development Goals with regard to legal identity include Aspiration 3[20] of Africa's Agenda for Children which aims to have every child's birth registered by 2040; and the recently formed coalition[21] on every child's right to a nationality led by UNHCR and UNICEF. The coalition seeks to:

- "Ensure that no child is born stateless
- Eliminate laws and practices that deny children nationality because of religion
- Remove gender discrimination from nationality laws
- Improve birth registration to prevent statelessness
- Encourage States to accede to the UN Statelessness Conventions".[22]

The judiciary also plays an important role in developing the law and will be instrumental in ensuring that laws are interpreted and applied in line with international standards. A 2014 judgment of the High Court of South Africa declared a stateless child born in South Africa to be a South African citizen.[23] This judgment interprets and implements a 20 year old unknown provision which provides nationality to stateless children born in the territory. The South African system is one of few which has incorporated the international law principle that stateless children should acquire the nationality of the country where they are born.[24] This section was previously inaccessible to children and necessitated the intervention of the judiciary. The Court directed the State to provide regulations and forms to this provision in order to make it accessible to the public.[25] Without this

18 Target 16.9 of the Sustainable Development Goals.

19 Lawyers for Human Rights *Childhood Statelessness in South Africa* (2016) available at http://www.lhr.org.za/publications/childhood-statelessness-south-africa (last accessed: 13 December 2016).

20 African Committee of Experts on the Rights and Welfare of the Child, "Africa's Agenda for Children 2040" available at http://www.acerwc.org/ourevents/africas-agenda-for-children-2040/ (last accessed: 13 December 2016).

21 UN Refugee Agency, "Coalition on Every Child's Right to a Nationality" available at http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/ (last accessed: 13 December 2016).

22 *Id.*

23 *DGLR and Another v Minister of Home Affairs and Others*, Case No. 38429/13, North Gauteng High Court. In that case, a Cuban mother approached the court after her 5-year old child was refused citizenship in South Africa. The child's parents had lost their Cuban citizenship prior to the child's birth as they had been out of Cuba for more than 11 months. With both the South African and Cuban governments refusing the child citizenship, the child was stateless. See also Lawyers for Human Rights Press Release, July 2014, available at http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen (last accessed: 15 December 2016).

24 Article 7 of the UN Convention on the Rights of the Child and article 6 of the African Charter on the Rights and Welfare of the Child states that a child has the right to birth registration and a name and a nationality from birth and shall acquire the nationality of the country of birth where the child would otherwise be stateless.

25 The High Court declared the child a South African citizen and directed the Minister of Home Affairs to issue her with a South African ID number and birth certificate. The Court further directed the Minister to draft regulations to make the protection

judicial intervention the provision would remain obsolete.[26]

The South African judgment is in line with the findings of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in the hallmark case of *IHRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya.*[27] Children of Nubian descent in Kenya were often left stateless, because they were unable to be registered at birth which prevented them from accessing nationality. Nubians in Kenya are regarded as foreigners even though they have been residing in the country for generations as a result of forced displacement. Even when birth certificates were issued, they did not confer nationality. Children of Nubian descent were often left to wait until they turned 18 to apply to acquire nationality. The African Committee found this to be a violation of article 6 of the African Children's Charter.[28] They held that "a purposive reading and interpretation of [article 6.1] strongly suggests that, as much as possible, children should have a nationality beginning from birth".[29]

The African Committee added that "although States maintain the sovereign right to regulate nationality… States are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness".[30] There is an opportunity and a need to further develop the jurisprudence on nationality in Africa and in SADC specifically.

However encouraging the legal and policy developments in SADC may be there is a need to urgently act and finally end statelessness in SADC. The African Commission study found that "the right to a nationality is still not fully recognised as a fundamental human right on the African continent, as the current legal framework does not allow individuals to effectively protect themselves in the exercise of their right to a nationality".[31] The African Commission has been tasked with drafting a protocol to the African Charter to address the right to nationality in Africa. The effect of such an instrument will depend largely on the support of African States. SADC States are in a position to truly make a difference to the lives of stateless people by pledging to sign this crucial protocol.

Statelessness remains a problem in Southern Africa and continues to increase because of the lack of an appropriate legal framework to address the issue. Ending statelessness in SADC will require both legal and practical solutions to the problems faced by millions of Africans in their fight to gain access to the right to nationality and thereby access to all other rights, particularly the right to human dignity.

of stateless children achievable. See Lawyers for Human Rights Press Release, July 2014, available at http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen (last accessed: 15 December 2016).

26 Sadly the South African government did not implement the Court's ruling. The Department of Home Affairs instead appealed the High Court ruling. Two years later, the Department withdrew its appeal a day before the hearing, and agreed to comply with the High Court order. LegalBrief, 7 September 2016, *Minister of Home Affairs and Others v DGLR and Another*, SCA Case No. 1051/2015.

27 *IHRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009.

28 *Id* para. 42.

29 *Id*.

30 I*HRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009, para. 48.

31 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 50.

FREE ACCESS TO THE LAW IN AFRICA

Mariya Badeva-Bright[1] *and Dr Oluwatoyin Badejogbin*[2]

Rule of Law and the Sustainable Development Goals

In the words of Geraldine Fraser-Moleketi:

> "Law, legal and judicial institutions are crucial to reducing poverty, strengthening social and economic equality, and achieving human security and development, and they should therefore be people centred. In that regard, rule of law, accessible legal and judicial institutions, and a legally empowered citizenry facilitate the enjoyment of social, economic and political justice and its benefits should be all inclusive and sustainable. Such an understanding helps to ground law and justice considerations in a sustainable human development agenda."[3]

In September 2015 the world agreed on a new sustainable development agenda. Countries, including many African countries, adopted the Sustainable Development Goals - a set of goals to end poverty, protect the planet, and ensure prosperity for all.[4] The Sustainable Development Goal 16 seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. The United Nations introduced Goal 16 in recognition of the fact that the rule of law and development "have a significant interrelation and are mutually reinforcing, making it essential for sustainable development at the national and international level."[5] Yet, the rule of law is hardly achievable if one does not have access to the law of the land. If the justice sector is not equipped to gather, critically analyse, apply and provide feedback on public policy and law, SDG16 cannot be attained.

In this regard, free access to law is vital to achieving the Sustainable Development Goals. It can provide for greater economic opportunity, ensure equality before and during the legal process, and reinforce the rule of law. We need to do a lot more to secure free access to law in Africa.

Access to the Law Affects the Justice Sector and Development

The arguments for free access to law have always been strong. The State needs access to its laws to function, the citizens - to know their rights and obligations, the lawyers - to advise their clients, and the media - to scrutinise the actions of those that govern. Accessing national laws should not be difficult, but in many African countries this is not the case. Resource constraints have left large gaps in the published law of many African nations. Judges, government officials, private lawyers, academics and students often do not have any access, even commercial, to the law of their land.

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3 G Fraser-Moelekti "Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices" *UNDP* (April 2013) iv.

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

5 "Goal 16: Promote just, peaceful and inclusive societies" *United Nations* (2016) available at http://www.un.org/sustainabledevelopment/peace-justice/ (last accessed: 19 November 2016).

Lack of access to the law disempowers citizens. Without public access to information it is difficult for citizens to know and protect their fundamental rights. Furthermore, it defeats transparency in judicial and government business. Without checks and balances on public power, a country cannot have effective institutions, thus threatening access to justice.

When the legal sector is unable to access and apply the relevant law to civil, criminal or commercial disputes, the rule of law is fundamentally undermined. When judges, magistrates, lawyers and government officials are restricted in their ability to access the consolidated statutes or relevant neighbouring countries' laws, one cannot claim to have a responsive justice sector.

A responsive justice sector is also a predicate for sustainable economic development. In 2016, the World Bank drew links between social and economic progress on one hand, and the rule of law and the effective protection of rights on the other. According to its Doing Business 2016[6] report, efficient and timely judicial systems are crucial for enforcing contractual obligations, which enhances the efficiency of market systems. Countries with better regulatory and enforcement systems are countries that have better developed credit markers, rank higher in overall development indices, and foster climates that facilitate the rapid growth of small firms. They are also able to attract foreign investments and secure tax revenues.[7]

Efficient legal institutions and a transparent judicial process are absolutely necessary to the efficiency of markets. While different elements may account for the transparency of any judicial system, it is noteworthy that the report, writing in the context of commercial disputes, observed that when countries make court judgments publicly available, citizens are encouraged to rely on existing case law and judges can develop the law consistently. This in turn enhances the "transparency and predictability" of the legal system.[8] Businesses are incentivised to invest because they are able to ascertain the scope of their rights by accessing publicly available court judgments. The report cites two examples to drive the point home. Singapore and South Korea have developed two of the most automated and efficient court systems in the world. Appositely, the report notes that both countries promote "judicial transparency and the development of consistent case law through the online publication of judgments rendered at all levels".[9] Unfortunately, it could only find two countries in sub-Saharan Africa that do this, out of 42 of the world's economies that do so through online publications or by publicly available gazettes.[10] These observations emphasise the importance of access to legal information in today's globalising market.

The World Bank Group is not the only entity to highlight the connection between having an accessible and predictable legal system and growing a healthy economy. There is also a salient political dimension to the growing awareness around the importance of accessible legal systems. Political actors should see the economic benefits of a well-documented legal system, and use it to garner the necessary political will and economic resources to make it happen. This would, in turn, be an important step within the broader context of sustainable development and building stable, inclusive societies.

6 "Doing Business 2016: Measuring Regulatory Quality and Efficiency" *World Bank* (2016).
7 *Id*.
8 *Id* 95.
9 *Id* 96.
10 *Id* 95.

Investors avoid investing in countries that lack a transparent judiciary or clear legislative framework. They prefer operating in jurisdictions with effective and transparent legal systems that can easily deal with issues like enforcing contracts or securing property rights. Goal 16 clearly expects effective, accountable and transparent governance, compliance with laws and regulations, no corruption and public access to information in a country.

Public access to legal information should be prioritised as legal information provides the critical infrastructure needed to successfully implement many of the Sustainable Development Goals.

State of Access to the Law in Africa

It is difficult to access basic legal materials in the majority of African countries. Judgments, even those of the highest courts, are not regularly published. If cases are published, it is usually through hard copy law reports which are only available at court libraries in the major cities. These can be difficult to reach by both lawyers and judges. Where available, purchasing a full set of law reports is prohibitively expensive for many young lawyers. Bound law reports tend to be significantly out of date; sometimes by many years. Lawyers and judges find it hard to confirm that the cases in them are still good law.

The situation is even worse in respect of statutory materials. Gazettes are almost never published online and the print circulation is often so low that even government libraries are unable to purchase copies and maintain comprehensive collections. Collections of consolidated statutes tend to be very far out of date, except for countries like South Africa, Kenya and the Seychelles. Even if a lawyer or judge does have access to a physical edition of collected statutes, she will have no easy way of knowing which sections of the statutes have been repealed or amended.

The difficulty in accessing law is illustrated by real cases. Precedent is the cornerstone of every common law jurisdiction, yet precedents are unlikely to be available in their original form. In a 2009 case, *Masangano v Attorney General and Others*,[11] the Malawi High Court refers to a landmark case (*Moyo*) decided earlier the same year in the same Division. The *Moyo* judgment was never published; the public law reporting in Malawi had been stalled for years and the electronic reporting of judgments was in its infancy.[12] Judge Mzikamanda resorted to an unorthodox method of supporting his judicial reasoning: he referred to the Southern Africa Litigation Centre's blog as a source of information on the *Moyo* judgment. Although unorthodox, the report was an accurate one. The judge, in this instance, was able to source supporting legal precedent, but he should not have needed to depend on an advocate's publication to reference important precedent. This story illustrates how adjudication in Africa is compromised and diminished by the absence of a credible, current and comprehensive publication of court judgments.

Judges, legal practitioners and government lawyers are required at all times to be aware of new developments in law. Yet this is not always possible. An AfriMAP research cites a senior Zambian

11 *Masangano v Attorney General and Others* (15 of 2007) [2009] MWHC 3 (an important Malawi prisoners' rights case).

12 Today the Malawi judiciary, with significant help from development partners, has resumed publication of printed law reports, which now appear with satisfactory regularity. Additionally, the MalawiLII website provides electronic law reporting, thanks to a joint effort of the Malawi judiciary and the Malawi Law Society. This is available at http://www.malawilii.org (last accessed: 19 November 2016).

legal practitioner, who has been at the Bar for 36 years, who stated that even adjudicators are sometimes unaware of new legislation. She described a time when a court had to adjourn proceedings in order to enable her to acquire, for the judge, a copy of the Anti-Gender Based Violence Act enacted in April 2011. The problem also affects magistrates in rural provinces, who at the time did not have copies of the Penal Code and the Anti-Gender Based Violence Act.

In Ghana, the Supreme Court ruled on the important matter of elections.[13] It did so without the benefit of being able to obtain a piece of legislation which regulates the district elections in Ghana. The Supreme Court in its judgment said:

> "...there was reference to a C. I. 78 which, it was contended, could, before the coming into force of C. I. 85, govern the commencement of the upcoming District Level Elections, slated for 3/3/2015. The reference to the said C. I. 78 proved illusory as its existence cannot be fathomed. This mysterious legislation is not even listed in the manual of the Electoral Commission entitled Electoral Laws."[14]

Constitutional Instrument 78[15] has a Gazette notification date of 4 September 2012 and date of entry into force of 3 October 2012. This case outlines the extent of the problem in Ghana: the Supreme Court did not have access to a statute that could be dispositive on the outcome of an election.

While access to the law is important for an efficient, fair and progressive judicial system, and all the benefits that this entails for citizens and business, it is also important for informing citizens about the work of courts, parliament and other government departments. Transparency ensures quality. To draw an academic parallel, writing improves when it is closely scrutinised and the quality of the opinion analysed critically. In addition, the legal community has a duty to elucidate the meaning of legal developments for intermediaries and the general public. Journalists are some of the most important intermediaries between legal institutions and the general public.

In the early days of free access to law in South Africa, an interesting case involving a high profile judge was unfolding in the Gauteng High Court.[16] Media, while allowed to hear the ruling delivered in open court, were denied access to the actual judgment and court documents relating to the case. This resulted in incorrect media reports of the outcome of the case. The public did not know the actual outcome until the Southern African Legal Information Institute (SAFLII), obtained and published a copy of the judgment. SAFLII alerted its users and the media to the availability of the judgment. At the time, this was the only place where members of the public could obtain and read it. The Independent Online newspaper later that day wrote:

> "The case has been shrouded in secrecy and Judge Mojapelo removed the court file - a public document - from the court registry for weeks, blocking media access to the file. After repeated requests by the Saturday Star and its lawyers, court officials finally allowed brief access - but only after the hearing was over. A court official allowed access for only '20 to 30 minutes', and refused permission to photocopy any documents in the thick file.

13 *Mensah v Chairman, Electoral Commission and Others* (Writ No.JI/11/2015) (27 February 2015).

14 *Id.*

15 Representation of the People (Parliamentary Constituencies) Instrument (2012).

16 The case in question was *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289.

> Read the full judgment of *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289 (26 September 2008) at the Southern African Legal Information Institute".[17]

A young online law reporting facility was able to inform the media efficiently. More importantly, the availability of this information provided an opportunity for people to engage with and critically examine the reasoning of judges.

Civil society also needs access to legal information. A recent study on the legal information needs of civil society in Zambia, found that civil society organisations, labour unions, and legal practitioners face severe limitations both in terms of access to legal documents (laws, statutory instruments, court judgements, etc.) and the capacity to understand those documents.[18] The authors point out that in Zambia, sometimes the only source of legal information are government institutions. Accessing legal information through this avenue requires physically retrieving it or receiving a paid subscription. The study found that obtaining information in person was a time-consuming bureaucratic task, even for those with legal training who knew exactly what they were looking for. For many others, retrieving legal information can be nearly impossible.[19] Where information was available, such as newly enacted legislation on the Parliament's website, it was not sufficiently well-presented to allow citizens to find the legal information their context required.[20]

Citizens in African countries require consistent, up-to-date, contextually relevant access to the law of their land. The solution requires a concerted effort and commitment from justice sector stakeholders in each country, to institute processes and policies that contribute to better access to their internal legal information. Because of these needs, Legal Information Institutes (LIIs) in Africa began to work with judiciaries and the Southern African Chief Justices Forum a decade ago to open up access to court judgments from the continent.

The Solution

Provision of free access to the law using the Internet has a history nearly as long as the history of the Internet itself, with the first project (named Legal Information Institute) launched at Cornell Law School in 1992. Today the Free Access to Law Movement (FALM)[21] is a collective of free legal access projects from across the world, spanning over fifty members. A quarter of these members operate in Africa.

Legal Information Institutes, commonly known as LIIs, directly publish or facilitate others' efforts to publish freely accessible legal information online. This includes information such as case law, legislation, treaties, law reform proposals and legal scholarship. The Montreal Declaration outlines the defining features of a LII. These institutes:

17 L Flanagan "Hlophe wins one case, but still on trial" IOL (27 September 2008) available at http://www.iol.co.za/news/south-africa/hlophe-wins-one-case-but-still-on-trial-417999 (last accessed: 19 November 2016).

18 M Masson and O Tahir "The Legal Information Needs of Civil Society in Zambia" (2016) 4(1) *Journal of Open Access to Law*.

19 *Id* 19.

20 See M Mason "The Legal Information Needs of Civil Society in Zambia" *AfricanLII* (2016) available at http://www.africanlii.org/blogs/marc-masson/legal-information-needs-civil-society-zambia (last accessed: 19 November 2016).

21 See FALM's website available at http://fatlm.org/ (last accessed: 19 November 2016).

> "Publish via the internet public legal information originating from more than one public body;
> Provide free and anonymous public access to that information;
> Do not impede others from obtaining public legal information from its sources and publishing it".[22]

The Montreal Declaration defines public legal information as "legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding."[23]

Legal Information Institutes have been operational in Africa for over a decade, with pioneering efforts in Zambia, South Africa and Kenya. During that time LIIs have overcome challenges and provided:

a) Current legal material – this means judgments handed down within the past week as well as the most recent legislation passed by parliaments;
b) Integrity – any user accessing information from the LII must be assured of its completeness and accuracy, as that information is usually sourced directly from courts or Government Gazettes; and
c) Level of comprehensiveness of legal information that makes the collections useful to researchers in-country and regionally.

The Southern African Legal Information Institute (SAFLII) started off as a pilot project at the University of the Witwatersrand in 2003.[24] In 2006, SAFLII moved to the Constitutional Court of South Africa. The Court and the Southern African Chief Justices Forum sought to develop SAFLII into a regional website that would publish courts' decisions and assist in regional legal research.[25] With the firm support of the Chief Justices, the SAFLII team went in-country in several jurisdictions and scanned archives of judgments, placing them immediately on the Internet to be accessible without any restrictions. What started as a centralised operation, later transformed into a capacity-building initiative called the African Legal Information Institute (AfricanLII).[26] It helped courts create a standard-compliant collection of materials that were then made publicly available. Today, LIIs operate in Namibia, Swaziland, Lesotho, South Africa, Zambia, Zimbabwe, Malawi, Uganda, Seychelles, Sierra Leone, Liberia, Ghana and Nigeria. Although they are at different stages of operation, they all affirm the principle that legal information should be accessible.

22 *Montreal Declaration on Free Access to Law* (2002) available at http://fatlm.org/declaration/ (last accessed 19 November 2016).

23 *Id.*

24 "About SAFLII" Southern African Legal Information Institute, available at http://www.saflii.org/content/about-saflii-0 (last accessed 19 November 2016).

25 See BJ Odoki CJ *Speech at the Opening of the Conference of the Southern African Judges Commission* Entebbe, Uganda (4 February 2005) available at http://www.venice.coe.int/SACJF/2005_02_UGA_Entebbe/rep_odoki.htm (last accessed: 19 November 2016); see also Constitution of the SAJC (2005) available at http://www.venice.coe.int/SACJF/Basic_texts/SACJF_Constitution.pdf (last accessed: 19 November 2016).

26 See website available at www.africanlii.org (last accessed: 19 November 2016).

Policy and Standard Issues of Access to Legal Information

The requirement that all laws must be made public pre-dates printing. Town criers ensured that the word of government reaches the common people. Similarly, the open court principle recognises the right of citizens to attend court hearings and obtain records of court cases. Modern access to information legislation mandates that government should generally make information available to citizens. In addition, copyright regimes usually exclude legislative, policy and judicial documents, proclaiming them free of copyright. The law is unequivocal: access to the law should be open. But, there may be restrictions.

Standards

Electronic access to legal information should conform to the universal standards which protect access to information. In addition, this access should take into account the peculiarities of legal research and the information necessary to properly conduct it. Judicial institutions around the world have strategically pursued these standards.[27] Our view is that courts in Africa, where they have not, should adopt and apply the below standards in their dissemination strategies.

Comprehensiveness

Legal Information Institutes have employed the vast powers of Information Technology to publish law in Africa. This has meant that, unlike print operations, LIIs are not constrained by capacity restrictions. LIIs can publish comprehensive legal information; reportable and non-reportable judgments. They can all be published online, irrespective of their research value. This ensures that LIIs serve not only research, but also transparency purposes. Where possible, LIIs publish judgments from the lower courts, to allow the full history of a case to be accessible: from the lowest court, to the final, appellate jurisdiction. This ensures that the public is presented with a full record of the case, and allows lawyers to understand and scrutinise the reasoning in overturned lower court cases.

Authoritativeness

LIIs source materials directly from the court, tribunal or legislative body producing the information whenever possible. Scanned copies of the printed material are provided online, alongside the web version, to assure the users that the information is complete and untampered. Furthermore, judgments are posted in their original language. Whenever a translation is made available, it is clearly indicated in the text of the posting.[28] Should the court issue subsequent corrections of a judgment, this is usually indicated in the body of the document to ensure users can track changes over the course of the life of the document.

27 For example, the Canadian Judicial Council includes an active Information Technology Advisory Committee, see website available at http://www.courts.ca.gov/itac.htm (last accessed 19 November 2016).

28 See for example the SAFLII collection of translated Afrikaans judgments, available at http://saflii.org/za/other/ZAENGTR/ (last accessed: 19 November 2016).

Currency

LIIs in Africa work with government departments to ensure that the most current legal information is published online. Because legal documents today are mostly produced in word processing software, it is usually possible to quickly and cheaply disseminate the information. Some LIIs, such as SAFLII, have achieved a standard whereby judgments from the top courts are processed and posted on the website within two hours of receipt from the courts.

Citation in the electronic environment

The legal profession relies on authority (case-law and legislation) and persuasive secondary legal literature (scholarly works, preparatory works, dictionaries, etc.) to build and present legal arguments. The core purpose of case law citation is to accurately identify a judicial opinion or a part thereof.

In traditional law reporting, case citations do not reflect information about the case itself, but rather identify the year, volume and page number of the law report that contains the judicial opinion. References to specific parts of a judicial opinion (pinpoint referencing) are also in general based on the page number and the paragraph letter.

The digitisation of the judicial opinions allows courts to make judgments available immediately through the Internet or other media, in comparison to commercial publishers who may take months or years to publish a judgment in the law reports. While the greater accessibility of judicial opinions is a positive development, the legal profession and the media still need a reliable method for referencing such electronic decisions. Substitutes for the commercial publishers assigned citations and for page numbers must accompany such judgments.

A survey of international practices in this regard shows that courts have taken steps to address these issues by introducing Medium Neutral Citations (MNC) and paragraph numbering within the final versions of judgments.

MNC allow a resource such as a judgment to be cited irrespective of its publishing medium. The MNC serves as a permanent unique identifier assigned by the author of the judgment and should remain associated with the judgment wherever it is published in various media or publications. The MNC standard, together with paragraphing of judgments, has now been officially adopted by many courts in Southern Africa. The availability of judgments on the Internet has spurred this development. This citation standard is also rapidly being adopted by judges, who use MNC interchangeably with print citations.

Privacy of personal information in judgments

Judgments should be accessible to the public. Justice Spigelman AC, Chief Justice of New South Wales, stated:

> "The fundamental rule is that judicial proceedings must be conducted in an open court to which the public and the press have access. A court cannot agree to sit in camera, even if that is by the consent of the parties. The exceptions to the fundamental rule are few and are strictly defined."[29]

29 JJ Spigelman "The Principle of Open Justice: A Comparative Perspective" (2006) 29 (2) *UNSW Law Journal* 147, 151.

Many rules of procedure have arisen from this requirement of open and public justice. One in particular has highlighted the conflict between open justice and privacy: the principle that judicial accountability requires publication of the reasons for a decision. The rule requires publication not only to the parties but to the public.

In *S v Mamabolo*,[30] the South African Constitutional Court noted:

> "Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately such free and frank debate about judicial proceedings serve more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the more important aspirational attributes prescribed for the judiciary by the Constitution."[31]

This affirms the view that the public's access to court proceedings is vital for democracy and a vital check on the public powers of the judiciary. However, the right to know is limited in certain circumstances. As Van der Westhuizen J (as he then was) drew the line at information that is private:

> "It is a well-known principle in our law and public life that, proceedings before this court should take place in public. [...] The principle and the ideal of a public hearing should not lightly be departed from. The Prinsloos' case is by no means special, as argued by counsel for the applicant. Intimate personal details are often disclosed out in courtrooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done. It is not uncommon for a nervous, embarrassed and emotionally fragile plaintiff in a divorce court to have to explain under oath in a courtroom filled with a large number of onlookers, how a spouse committed adultery or how alcoholism, drug abuse, family violence, or even incest wrecked a marriage, and for the victims of violent crime to have to explain in front of the public and the media how the death, rape or mutilation of oneself or a loved one, such as a child, was experienced and how it may have ruined people's lives. In this case aspects of the private lives of the Prinsloos - and of course the previous litigation - have already been the topic of sensational reporting for a considerable time." [32]

With the advent of electronic law reporting, private facts and personal data are no longer protected by the practical obscurity the archive of the court's registry provides. The law places obligations on judges, publishers and lawyers with respect to personal, confidential, secret or sensitive information. Although regulations differ from jurisdiction to jurisdiction, it is clear that judges, lawyers and litigating parties should all exercise care in allowing certain details into the public domain. The first line of defence is drawn by judges, who write judgments and detail only the information that is absolutely necessary to deliver a properly reasoned judgment. It has also

30 *S v Mamabolo* (CCT 44/00) [2001] ZACC 17.

31 *Id* para. 29.

32 *Prinsloo v RCP Media Ltd t/a Rapport*, 2003 (4) SA 456 (T) 462.

meant that courts participating in the LII programme have had to develop privacy protocols and circulate redacted judgments for use beyond the court's system and for publication purposes. This is the practice at the Supreme Court of Appeal in South Africa, the Constitutional Court of South Africa, as well as many courts in non-African foreign jurisdictions with established electronic law reporting facilities.[33]

Practice has shown that electronic law reporting is usually welcomed by African judiciaries. However, the use of the technology needs to be properly regulated. It is counterproductive and contrary to the public benefit, the principles of open justice and the rule of law, to use privacy and secrecy concerns as a pretext to suppress information. AfricanLII has recommended that judiciaries and law publishing operations in Africa continue to update their privacy protocols to ensure the ethical and legal dissemination of legal information, in a way that protects the rights and freedoms of the very African citizens it aims to inform.

Conclusion

Government, development partners, NGOs and business are all coordinating and participating in various actions leading to the promotion and achievement of the targets of Goal 16. Chief among those is the need to strengthen relevant national institutions in the justice sector - the judiciary, law society, and legal academia. This can be accomplished through international cooperation to build capacity at all levels to sustain the rule of law. All of these programmes require clear, accessible and widely available legal information. Legal information is a critical piece of infrastructure required by the justice sector to function according to the tenets of democratic governance and the rule of law. Legal Information Institutes provide a tested and proven method for public free access to legal information in Africa.

33 See "Use of Personal Information in Judgments and Recommended Protocol" *Judges' Technology Advisory Committee, Canada* (2005).

ACCESS TO INFORMATION IN MALAWI: THE JOURNEY TO DATE AND A QUICK SURVEY OF THE ATI BILL[1] OF 2016[2]

Mandala Mambulasa[3]

Introduction

Goal 16 of the Sustainable Development Goals seeks to ensure public access to information.[4] In Malawi, the right to access to information is enshrined in the Constitution but no national legislation supports the right's enforcement.[5]

The struggle for access to information (ATI) in Malawi cannot be complete without mentioning the Media Institute for Southern Africa-Malawi Chapter (MISA-Malawi). After the adoption of the new Malawian Republican Constitution of 1994[6] (Malawi Constitution) a statute was required to give effect to the right of access to public information entrenched in sections 36 and 37. Nearly ten years since the reintroduction of multiparty politics of government,[7] no legislative measures were taken to concretise the right of access to public information by the people of Malawi.[8] MISA-Malawi noted this gap and seized the opportunity around 2003 and spearheaded the campaign for the development of ATI legislation.[9] It was a media professional body therefore that initiated the original ATI Bill.[10] Likely because of this, most people in Malawi, including politicians, had been expressing sentiments that the ATI Bill was for the media.[11] It is not. The ATI Bill may be invoked by every person, legal or juristic, in Malawi.[12] The ATI Bill was subsequently passed on to the Malawi Government.

1 **Editor's note:** Just before this publication went to print, the Access to Information Bill discussed in this paper was formally passed in the Malawi parliament on 14 December 2016. Many of the recommendations in this paper were incorporated in the amended version of the Bill which was passed. See "Parliament passes ATI Bill" Malawi Nation (15 December 2016) available at http://mwnation.com/malawi-parliament-passes-ati-bill/ (last accessed: 15 December 2016).
At the time of publication the President has not yet assented to the Bill.

2 Paper presented at the Judicial Colloquium entitled Working towards Just, Peaceful and Inclusive Societies, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 8 and 9 January 2016.

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4 Target 16.10 of Goal 16.

5 Constitution of Malawi, section 37.

6 Act No. 20 of 1994.

7 D Posner "Malawi's New Dawn" (1995) 6(1) *Journal of Democracy* 131.

8 The expression, "the people of Malawi" is being used advisedly because the rights and freedoms contained in the Constitution of Malawi are supposed to be enjoyed by all persons who are in Malawi's territory lawfully. See Constitution of Malawi, preamble, sections 4 and 8. However, there are other rights which may only be enjoyed or exercised by Malawi citizens. See Constitution of Malawi, sections 51(1)(a), 63(1)(c), and 80(6)(a).

9 There have been different versions of the Bill since then.

10 AfriMAP and Open Society Initiative for Southern Africa *Malawi Democracy and Political Participation* (2014) 87.

11 See "Fury over government's Information Bill Stance" *Sunday Times* (22 November 2015).

12 This is unlike Uganda where the ATI legislation is only used, and the right exercised, by citizens. That is the case because of the manner in which article 41 of the Ugandan Constitution was drafted.

The people of Malawi still do not have a one-stop-shop statute that specifically gives effect to or operationalises the right of access to information contained in the Malawi Constitution. Nevertheless, the right of access to information is provided for in other pieces of legislation and policies.[13]

Many statutes in Malawi dating back to colonial times promote government secrecy and withholding of public information, and yet the information properly belongs to the people. Those who work in the government are merely custodians of the information. This is true even though some information should remain classified due to concerns of national security or other justified reasons for State secrecy. Some of the old statutes are now progressively being reviewed by the Law Commission[14] for conformity with the Malawi Constitution and international law.[15] However, the pace at which the reviews are done is not encouraging. This is somewhat related to staffing levels, funding, and inaction by the executive. The executive has not pushed the many reports containing various good recommendations to be enacted into law.[16] Surprisingly, there are also other pieces of legislation passed after the Malawi Constitution was adopted that criminalise outright disclosure of information to any member of the public and in some cases, criminalise disclosure without consent from some authority even if it is in good faith.[17]

There are almost insurmountable hurdles for those persons who try to use the Malawi Constitution or other pieces of legislation to try and access information held by the government. The acts that do provide for some protection of the right to access information do not contain clear procedures on how information may be accessed, what to do in the event of refusal to grant you access by the public body, or the timeframe within which the information holder should provide the information. In addition, they also lack clearly defined oversight mechanisms. These challenges highlight the need for a one-stop-shop statute that comprehensively deals with all these shortfalls. All persons in Malawi should have their fundamental right of access to information protected. Any person who is unable to exercise any right or rights as a result of a refusal can seek the assistance of the courts, the office of the Ombudsman and indeed the Human Rights Commission for the promotion, protection and enforcement of their rights generally.[18]

Thirteen years have passed since the start of the campaign for ATI legislation. Questions remain on why there is still no law in place in Malawi. The reasons for this state of affairs are many and varied, but one reason for the delay was the lack of an ATI Policy. Although policy is not required for the

13 See section 52(1) of the Environmental Management Act, Cap.60:02 of the Laws of Malawi. Similarly, in the context of elections, under section 109(f) of the Parliamentary and Presidential Elections Act, No. 31 of 1993, observers have the right to have access to information transmitted by or to the Commission or its officers. See also section 50 of the Monuments and Relics Act, Cap.29:01 of the Laws of Malawi. The Malawi Government also adopted an ATI Policy in 2014 as well as the National Anti-Corruption Strategy in 2008. In its action plan, it clearly provided that Malawi needed to pass the Access to Information legislation if it was going to deal with corruption in the country (section 4.2.1). Nine years later, Malawi has not followed its own recommendation for ATI legislation.

14 The Law Commission is a constitutional body established under Chapter XII, section 132 of the Malawi Constitution as well as the Law Commission Act, Cap. 3:09 of the Laws of Malawi.

15 Section 6(a)(i) of the Law Commission Act, Cap. 3:09 of the Laws of Malawi.

16 For example, there has been no debate or legislation based on the nine year old recommendations of the *Report of the Law Commission on the Review of the Constitution* (2007).

17 See section 143 of the Police Act (12 of 2010).

18 Constitution of Malawi, section 15(2).

passage of a bill into law and sometimes comes subsequent to the legislation,[19] it was said that the Malawi Government could not even consider tabling the ATI Bill in the National Assembly for debate because there was no policy in place. This argument was not strongly challenged, instead, MISA-Malawi engaged a consultant to develop an ATI Policy.[20] Following the consultancy, the Joyce Banda administration adopted the ATI Policy in January of 2014. The long absence of the ATI Policy is one of the reasons why Malawi has a confusing legislative landscape with regards to the right of access to information. Presently, Malawi has some pieces of legislation that hinder the access to information while others support it. With the adoption of the ATI Policy in January 2014, policy direction is now clearly defined and hopefully new legislation in Malawi will better respect the right of access to information.[21] This would be in line with Goal 16 of the new Sustainable Development Goals (SDGs) as well as the processes of the African Peer Review Mechanism.[22] Access to information legislation enhances inclusiveness, participation by the people in their governance, accountability, transparency and openness. It arguably therefore plays a critical role in the creation and recreation of just societies for all.

The Malawi Government finally gazetted the Access to Information Bill on 19 February 2016. The Bill is pending debate in the National Assembly. The aim of this paper is to identify gaps and weaknesses in the 2016 Bill and to make recommendations on how it can be improved before being passed into law.

The Conceptual and Analytical Framework

International Covenant on Civil and Political Rights

The right to access information held by public bodies or authorities is a fundamental human right recognised and protected by international law.[23] Malawi is a State Party to the International Covenant on Civil and Political Rights (ICCPR).[24] In 2011 the Human Rights Committee interpreted article 19 as follows:

> "Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production."[25]

19 A good example is the Non-Governmental Organisations Act, Cap. 5:05 of the Laws of Malawi. It was enacted without a policy. The NGO policy is currently being developed.

20 This initiative was supported by Open Society Initiative for Southern Africa (OSISA) and other partners.

21 See sections 27 and 32 of the Political Parties Bill (2015).

22 See M Hansungule "Malawi and the African Peer Review Mechanism: A Bold Step towards Good Governance?" (2008) 2 (1) *Malawi Law Journal* 3.

23 See Universal Declaration of Human Rights, article 19; International Covenant on Civil and Political Rights, article 19(2).

24 Malawi ratified the ICCPR on 22 December 1993.

25 Human Rights Committee, General Comment No. 34 (2011) para. 18.

Model Law on Access to Information for Africa

Malawi is also party to the African Charter on Human and Peoples' Rights (ACHPR) which protects the right to access information in article 9.[26] The African Commission on Human and Peoples' Rights formulated the Model Law on Access to Information for Africa[27] (the Model Law) as a guide for the development, adoption or review of access to information legislation by African States. Even though the Model Law is not a legally binding document, and each State Party is allowed to adapt it to suit its Constitution and the structure of its legal system, the document concludes that States should "ensure that in the process of adopting or reviewing national legislation on access to information, **the principles and objectives of the Model Law are observed to the utmost**."[28]

The Model Law gives seven general principles. These principles are internationally recognised and they form the bedrock of modern legislation on the right of access to information:

a) "Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.
b) Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.
c) This Act and any other law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptionally justifiable circumstances as set out in this Act.
d) Information holders must accede to the authority of the oversight mechanism in all matters relating to access to information.
e) Any refusal to disclose information is subject to appeal.
f) Public bodies and relevant private bodies must proactively publish information.
g) No one is subject to any sanction for releasing information under this Act in good faith."[29]

The Model Law has four objectives. It seeks to:

a) "Give effect to the right of access to information as guaranteed by the African Charter on Human and Peoples' Rights, to
(i) any information held by a public body or relevant private body; and
(ii) any information held by a private body that may assist in the exercise or protection of any right;
b) voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information of information holders as swiftly, inexpensively and effortlessly as is reasonably possible;
c) Ensure that in keeping with the duty to promote access to information, information holders create, keep, organise and maintain information in a form and manner that facilitates the right of access to information;
d) Promote transparency, accountability, good governance and development by educating people about their rights under the legislation."[30]

26 Malawi ratified the ACHPR on 17 November 1989.

27 Published in 2013.

28 P Tlakula "Preface" *African Commission on Human and Peoples' Rights: Model Law on Access to Information for Africa* (2013) 12 (emphasis added).

29 African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2013) 17.

30 *Id* 18.

The Malawi Constitution

The Malawi Constitution has two provisions on access to information, namely sections 36 and 37:

> "36. Freedom of the press
> The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.
> 37. Access to information
> Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights."

Section 37 seems to assume that every person who will be making a request to access information will be able to link it to the exercise of a particular right. As Chirwa observes, this requirement seems to have been borrowed from the interim Constitution of South Africa.[31] However, South Africa dropped this requirement in its final Constitution in relation to information held by the State as it was deemed that it was going to render the right of access to information worthless. The term, 'required' is generally understood to mean 'necessary', 'essential' or 'relevant'. A consensus has now emerged that to show that the information is essential or necessary to the exercise of one's right would impose too onerous a burden on the right holder because it is not easy to all requesters to know what specific rights may be implicated by the information they have not yet seen. In *Reyes and Others v Chile*[32] the Inter-American Court of Human Rights (IACHR) stated that:

> "Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it...**The information should be provided without the need to prove direct interest or personal involvement in order to obtain it**".[33]

The other difficulty with linking the exercise of the right of access to information with the exercise of another right is that it is not clear which rights a requester can invoke. Is it rights contained in the Bill of Rights of the Malawi Constitution only? Would legal rights contained in legislation suffice? How about rights in international human rights instruments to which Malawi is a party and has ratified; would a requester invoke these as well? Many people in Malawi are still not aware of their rights. Because of these difficulties, a consensus has emerged that requesters should not need to prove direct interest or personal involvement or justification in order to have access to information.

National Access to Information Policy, 2014

The National Access to Information Policy, 2014 (NAIP) has three objectives. These are:

> "3.3.1. To facilitate provision of public information by Government and other institutions;
> 3.3.2. To ensure statutory and regulatory compliance of the relevant sections of the Constitution;

31 DM Chirwa *Human Rights under the Malawian Constitution* (2011) 366.

32 Series C. No. 51 (2006).

33 *Id* at para. 77 (emphasis added).

and

3.3.3. To provide a framework for developing the Access to Information Legislation."[34]

There is no doubt that a policy is not a legally binding document. However, at a minimum, the Malawi Government is obliged to follow its own policies when developing legislation.

Analysis and Assessment of the Bill

The first principle in the Model Law is clearly reflected in the Bill. Section 5(1) provides that:

> "A person shall have the right to access information, in so far as that information is required for the exercise of his rights, which is in the custody of, or under the control of a public body or a relevant private body to which this Act applies, in an expeditious and inexpensive manner."

The above section does not contain limitations based on when information is generated or created; it is open-ended. This is significant because a requester can make a request for information dating back to any time. This is in line with General Comment No. 34 which propounded that a requester must be given access to information regardless of the "date of production".[35] The Bill however takes cognisance of the fact that information being requested may not be available; may not be found or may not exist. In that case, the Bill imposes an obligation on the information holder to notify the requester, and give a statement of the details of all steps taken to find the information, or determine whether the information actually exists and if it is later found, determine whether to grant access, notify the applicant of the decision in writing, fees payable if any or indeed grant the applicant access to information.[36]

Furthermore, section 18(2) of the Bill states that the fees payable by an applicant under this Act shall be limited to reasonable, standard charges for document duplication, translation or transcription, where necessary. This provision buttresses the inexpensive manner of accessing information.

The second principle in the Model Law is also reflected in the Bill. Section 2 of the Bill defines "private body" to mean a person or organisation, not being a public body, who or which carries out any business in relation to public interest, or to rights and freedoms of people. Again, section 5(2) states as follows:

> "A private body shall on request, make available information in its custody or control, which it holds on a person who submits a request for that information pursuant to this Act."

Section 37 of the Malawi Constitution only protects the right of access to information held by the State or any of its organs at any level of Government. Therefore, section 5(2) of the Bill offers expanded protection of the right of access to information by including private bodies holding personal information of the requester. This is in line with the dictates of the Model Law. Interestingly, section 5(1) of the Bill includes the phrase "inexpensive manner". Does this mean the private body can afford to charge expensive fees? The answer should clearly be an emphatic no. Section 18(2), referred to above, applies even to private bodies; they are obliged to charge reasonable, standard

34 Malawian Ministry of Information and Civic Education National Access to Information Policy (2014) 8.

35 Human Rights Committee, General Comment No. 34 (2011) para. 18.

36 Access to Information Bill (2016) section 20.

fees for document duplication, translation or transcription, where necessary.

The third principle in the Model Law has two limbs: a presumption of non-disclosure, and permission of non-disclosure only in exceptional circumstances. The Bill has complied with the first branch through sections 9 and 10 which require information holders to disclose certain information on their own relating to various matters such as manuals, policies, procedures, rules, the names, designations and other particulars of information officers, particulars of its organisation, functions and duties.

The second limb of the above principle would also appear to have been addressed; non-disclosure is permitted only in exceptionally justifiable circumstances set out in the Bill. Part V deals with "information exempt from disclosure" and covers issues of demonstrable harm;[37] protection of personal information;[38] protection of information that preserves national security or defence; crime prevention or investigation of criminal or other unlawful acts;[39] commercial and confidential information;[40] protection of life, health and safety of a person;[41] protection of information on Malawi's international relations;[42] protection of legally privileged information;[43] protection of information on ongoing academic or professional examinations and recruitment processes;[44] and manifestly malicious, frivolous or vexatious requests.[45] All of these have been lifted from the Model Law. Furthermore, third parties are to be notified of disclosure of exempted information of public interest.[46]

The Bill however has a curious provision. Section 3(2) provides that it shall not apply to the following information:

> "(a) Cabinet records and those of its committees;
> (b) Court records prior to conclusion of a matter;
> (c) Information excluded from publication under the Official Secrets Act; and
> (d) Personal information."

It is generally agreed that Cabinet records and those of its committees are information which is privileged from disclosure.[47] The question however is, should they remain so forever? For instance, why should a person not have access to Cabinet records of 1964 when Malawi had just received her independence from Britain? What harm would that kind of information cause to Malawi now if it was disclosed to some person who may require it to exercise the right to education in terms of research to understand say, the true reasons for the Cabinet crisis of 1964? One must quickly mention that section 22(2) has given powers to the Minister to declassify information exempt from disclosure.

37 *Id* section 32(b).
38 *Id* section 23.
39 *Id* section 24.
40 *Id* section 29.
41 *Id* section 25.
42 *Id* section 28.
43 *Id* section 26.
44 *Id* section 27.
45 *Id* section 30.
46 *Id* section 31.
47 See Australia Freedom of Information Act (3 of 1982) section 34 (Cabinet documents and those of a committee of the Cabinet are exempt documents); see also Uganda Access to Information Act (6 of 2005) section 2(2)(a).

While this power has been given to the Minister, section 3(2)(a) states that the Act does not apply to information relating to Cabinet records and those of its committees, which means, it can never be declassified.

The other curious provision relates to court records prior to the conclusion of a matter. It appears that this provision has been borrowed from Uganda.[48] Why should the would-be Act not apply to court records prior to the conclusion of a case say in a purely criminal or commercial case for example? Does the public not have the right to know and the media the right to report and publish freely within Malawi including on on-going cases? Are court records not public documents?[49] Why does the law require that proceedings be heard in open court where references are made to documents filed by the parties?[50] One would understand if the court record related to a child, for instance. Even in that case, it is not necessary to deal with that matter in the Bill because such issues are either addressed in policies, child-related legislation, or rules and practices of the court. Even in cases where parties do not want the public to attend hearings, there are specific provisions that are invoked for the proceedings to be heard in camera.[51] It is contended that the Malawi Government has gone a little overboard here. The courts have enough tools to deal with the matter of access to court records in the interest of justice or propriety.[52] Unlike the Cabinet records, there is an assumption that court records are universally accessible after the conclusion of the case. However, that is not true in all types of cases. Often, the case file of juvenile cases are sealed on the completion of the trial and certain personal information concerning the parties in adult cases may not be accessible by the public.

The Bill also excludes from disclosure information under the Official Secrets Act.[53] This is an old, but important piece of legislation dating back to 1913 dealing with the security and defence of Malawi. Its inclusion in the exemption clause tracks the legal system of some developed countries whose access to information legislation specifically excludes from disclosure information under official secrecy legislation.[54]

The fourth principle envisaged in the Model Law is that of independent and impartial commissioners for the purposes of promotion, monitoring, and protection of the right of access to information.[55] This principle is not upheld up in the current draft ATI legislation. An Independent Information Commissioner (IIC) was to be established under part VII of the original ATI Bill which was submitted to the Malawi Government in 2003. Later, the IIC was replaced by the Human Rights Commission (HRC) in the version of the Bill which the Cabinet rejected on 17 November 2015. The HRC was a better alternative because it met many of the criteria recommended in the Model Law on issues

48 Uganda Access to Information Act, (6 of 2005) section 2(2)(b).

49 See Authentication of Documents Act, Cap.4:06 of the Laws of Malawi, section 2 (definition of "public document").

50 Courts Act, Cap. 3:02 of the Laws of Malawi, section 60.

51 *Id.*

52 In *Republic v Kumwembe and Two Others* (High Court of Malawi) (Lilongwe District Registry) (Unreported) for the first time ever, the Court allowed its judgment to be televised live on *Times Television*.

53 Cap. 14:01 of the Laws of Malawi.

54 See Australia Freedom of Information Act (3 of 1982) section 38(1)(a) and (b).

55 African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2013), 43-61.

such as independence,[56] holding office for a stipulated term,[57] and being accountable to the National Assembly.[58] This principle has been breached in the 2016 iteration of the Bill, as the entire oversight mechanism has been removed. In this respect, the Malawi Government has also breached its own National ATI Policy which envisaged the establishment of an IIC, without any amendment.

The fifth principle is that "any refusal to disclose information is subject to appeal".[59] This principle in the Model Law is based on the assumption that the requester will already have sought a review of the decision by the information holder to the head of the information holder known as internal review. This concept is incorporated by the Bill in section 21(2) which provides that any refusal by an information holder to disclose information requested by an applicant under the Act shall be subject to review.

In the 2003 Bill which was submitted to the Malawi Government, one of the functions of the IIC was to sit as appellate body against the decision of the head of the information holder. With the removal of the IIC and HRC from the current version, any refusal to disclose information under the Bill will not be subject to appeal at an independent body. Once an internal review mechanism has been exhausted, the only other remedy available to a requester will be to apply to Court for review of a decision of an information holder.[60] The Bill defines 'Court' to mean the High Court of Malawi. The disadvantages of using the High Court system in Malawi are well documented.[61] Both the IIC or the HRC would have dispensed justice more quickly and at a lower cost than forcing the requesters to bring a case in the High Court. Most people will not be able to contest the final decision of the head of an information holder once she decides to uphold a refusal to disclose information. In an appropriate case, where a requester has resources to pursue the matter in Court and the Court determines that information was wrongfully denied, then the officer or institution responsible shall be liable to a fine of two hundred and fifty thousand Kwacha (MWK250,000).[62] Persons who are granted access to information and use it "(a) for unlawful purpose; (b) for reasons other than those for which a request for information was made, without the authority of an information holder; or (c) in such a manner so as to be detrimental to the interests of public officers, information holders or the public interest, commits an offence, and shall on conviction be liable to a fine of two million kwacha (MWK2,000,000) and imprisonment for two years".[63] The disparity between the fines in sections 40 and 41 is very large. Although an offence under section 41 may affect more people than one under section 40, this does not justify the disparity. The Malawi Government is sending the message that wrongfully denying people information is a less onerous offence than the misuse of information, and deserves only a small fine. There is an urgent need to rationalise these fines.

The sixth principle in the Model Law is somewhat similar to the third one. Part III of the Bill covers

56 Human Rights Commission Act, Cap.3:08 of the Laws of Malawi, section 11.

57 *Id* section 5(1).

58 *Id* section 37.

59 African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2013).

60 ATI Bill at section 38(1).

61 See FE Kanyongolo *Malawi Justice Sector and the Rule of Law Report* (2006).

62 ATI Bill at section 40. MWK250 000 (Malawian Kwacha) was equivalent to $347 on 27 September 2016.

63 ATI Bill at section 41. MWK2 000 000 (Malawian Kwacha) was equivalent to $2 773 on 27 September 2016.

proactive publishing of information. Section 6(2) of the Bill also imposes a similar obligation to every information officer.

The seventh principle espoused by the Model Law is generally recognised in the Bill. Section 4(e) provides that one of the objects of the Act is to provide for the protection of persons who release information of public interest in good faith, however, there is no substantive provision effecting this object in the Bill. This is unfortunate. As the Bill stands now, whistle-blowers are not protected. It is difficult to deal with fraud, corruption, or other dishonest or criminal conduct in public bodies or relevant private bodies if persons who bring out such information in the public interest in good faith are not specifically protected by a substantive provision in the Bill. This development is also unfortunate because it contradicts the general policy of the Malawi Government on access to information and its role in the fight against corruption as it appears in the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act which specifically protects whistle-blowers.[64] In this regard, the Bill has gone against the constitutional principles of accountability and transparency and the spirit of the much-talked about public sector reforms. It is recommended that a public interest disclosure based on wrongdoing such as fraud, corruption, miscarriage of justice, etc. be included in the Bill in addition to section 31 as is the case in other jurisdictions such as Uganda.[65] Section 31 of the Bill states that where an information holder has claimed an exemption to be of public interest, the information holder shall notify an affected third party in writing that the information shall be disclosed after the expiry of fifteen working days from receipt of the notice; and "inform the third party of (i) that party's right to have the decision reviewed; (ii) the authority to which an application for review should be lodged; and (iii) the period within which the application for review may be lodged".[66]

Moving on to the objectives, the first one is similar to the first and second principles. The discussion on these two principles applies with equal force to this objective. The Bill reflects the first objective.

The second objective finds expression in section 4(c) of the Bill and Part II of the Bill on "compliance with access to information obligations" which deal exhaustively with voluntary and mandatory mechanisms, processes or procedures to give effect to the right of access to information and effective compliance and implementation of the Act.

The third objective is reflected in Part II of the Bill generally and section 7 in particular. Furthermore, section 9(3)(c) requires every public body to publish information relating to its processes and procedures for creating, keeping, organising, maintaining, preserving and providing information, documents or records.

The fourth and last objective also finds expression in section 4(b) and 4(d) of the Bill, albeit inadequate. The requirement on submission of annual reports on the levels of compliance with

64 Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (2013) sections 20, 21 and 22.

65 Section 3(c) of the Access to Information Act of Uganda states that one of the purposes of that legislation is to protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies. This is followed by a substantive provision in section 34(a)(i) which is to the effect that, notwithstanding any other provision in that Part, an information officer shall grant a request for access to a record of the public body otherwise prohibited under that Part, if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with the law; the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.

66 ATI Bill at section 31(b).

the provisions of the Act by information holders have been totally watered down in the Bill. There is now no sanction for failure by any information holder to which the Act applies, to submit its annual compliance report to the Minister. In the original Bill, such failure attracted a minimum penalty of one million Malawi kwacha (MWK1,000,000) and any additional sanctions as may have been determined by the IIC.[67] Secondly, in the original Bill, the annual compliance report was also supposed to be simultaneously made available publicly, as information holders reported to the IIC and failure to do so was also actionable in the High Court.[68] These provisions helped to ensure the highest levels of public accountability and transparency by public bodies and relevant private bodies. It is now very doubtful whether information holders will take their responsibilities under the Act seriously in their absence.

Conclusion and Recommendations

Malawi has made some progress on the right of access to information. It now has an ATI Policy which was adopted in 2014. Malawi also has a gazetted 2016 ATI Bill which is pending debate in the National Assembly.

The analysis and assessment of the gazetted Bill has shown that out of the seven internationally recognised principles on access to information legislation, the Bill has incorporated five, and left out two. It is extremely weak on the principle dealing with an oversight mechanism which has been removed altogether from the Bill. This goes against international best practice on access to information legislation and Malawi's National ATI Policy. The removal of the oversight mechanism in the Bill has also created a gap; there is no body to handle appeals following decisions on internal review by the head of an information holder. This cannot be justified by cost. To avoid the cost of a newly established IIC, the HRC could have been left intact in the Bill to exercise the role of oversight. The HRC was willing to take on board this added responsibility.

The objective of promoting awareness and civic education of the right to access information has also been affected by the removal of both the IIC and HRC from the Bill. No section in the Bill has given that responsibility to the Minister as alleged.

The section on disclosure of wrongdoing based on public interest which was in the original Bill has also been removed. This means that the Bill is so weak that it cannot be used as a tool in the fight against corruption and fraud and other unlawful activities occurring in public bodies and relevant private bodies. This fails one of the objectives of access to information legislation and is a lost opportunity. The Bill would have strengthened the existing legal framework on the fight against corruption in Malawi.

In an ideal situation, it would also have been better to remove the need for justification on the part of the requester for the access to information as it is also against international best practice now, notwithstanding that the Malawi Constitution is frozen, on that point, in time. The annual compliance requirements by information holders need to be as water-tight as they were in the original Bill.

67 See section 58(3) of the original Bill (on file with the author). MWK1 000 000 (Malawian Kwacha) was equivalent to $1 387 on 27 September 2016.

68 See section 59 of the original Bill (on file with the author).

TOWARDS FREEDOM OF ASSOCIATION AND UNIVERSALITY OF RIGHTS: THE BOTSWANA COURT OF APPEAL DECISION IN ATTORNEY GENERAL V RAMMOGE AND 19 OTHERS[1]

Tashwill Esterhuizen[2] and Brynne Guthrie[3]

Introduction

In any society that is founded on democratic values and ideals, it is essential that the State recognises the rights of citizens to associate with one another and collectively share opinions. Associations and organisations facilitate participation in the democratic process and the dissemination of opinions, even where those opinions are unpopular and shared only by a minority of citizens. Unfortunately, many activists throughout Africa are restricted from accessing their democratic right to freely associate with collectives that share their views and ideals.

For several years, LGBTI[4] activists in Botswana were denied the right to form an organisation called Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), which aimed to promote the interests of members of the LGBTI community. This denial amounted to a restriction of the activists' abilities to participate freely in their democracy and exercise their freedom of association. However, through courage, persistence and the continuous assertion of their rights, LEGABIBO was registered on 29 April 2016 as the first organisation to publicly advocate for the rights of LGBTI persons in Botswana. The registration came after the Botswana Court of Appeal found that the government's refusal to register LEGABIBO for several years was unlawful and violated the activists' constitutional right to freely associate.

On 16 March 2016, the Botswana Court of Appeal unanimously delivered a landmark judgment in which it dismissed the government of Botswana's appeal against a Gaborone High Court decision which allowed for the registration of LEGABIBO. The case is a significant victory for the advancement and recognition of the human rights of gay, lesbian, bisexual and transgender persons, both in Botswana, and throughout Africa. The decision emphasises that fundamental rights and freedoms are universal and that all persons, regardless of their sexual orientation and gender identity, are entitled to protection of their human dignity.

Unfortunately, despite this significant step forwards in the recognition of fundamental rights and tolerance of sexual diversity, many gay, lesbian, bisexual and transgender persons in Africa remain vulnerable to stigma, persecution and discrimination. Several African governments still have laws that criminalise consensual same-sex sexual practices. These laws, in turn, form the basis upon

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4 LGBTI stands for lesbian, gay, bisexual, transgender and intersex.

which governments unjustifiably deny activists the right to form associations.

This paper will explore the importance of the Botswana Court of Appeal's decision in *Attorney General v Rammoge and 19 Others*[5] to the advancement of fundamental rights, such as freedom of association. It will further characterise the decision as a significant step towards the acceptance of sexual diversity. The paper focuses on the Court of Appeal's debunking of the Botswana government's anti-gay rhetoric. This rhetoric was, in many cases, in direct contradiction with the human rights entrenched in the Constitution.

Background

In February 2012, several activists filed an application for the registration of their organisation, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), as a society in terms of the Societies Act.[6] Soon thereafter the "Director of the Department of Civil and National Registration rejected their application for registration on the grounds that Botswana's Constitution does not recognise homosexuals and that the application would violate section 7(2)(a) of the Societies Act."[7]

The activists then submitted an appeal against the administrative decision of the Director to the Ministry of Labour and Home Affairs ("the Minister"). Unsympathetic to the activists' cause, the Minister upheld the decision of the Director rejecting the application for registration. This left the activists with no alternative but to take their case to the High Court of Gaborone, challenging the decisions of the Director and Minister to refuse the registration of LEGABIBO. The challenge was lodged on the basis that the decisions were irrational and violated the activists' constitutional right to freely associate with likeminded individuals in order to protect their interests.

On 14 November 2014, the High Court of Gaborone agreed with the activists and declared that the decision of the Minister to refuse registration of LEGABIBO contravened sections 3, 12 and 13 of the Botswana Constitution.[8] In the decision, Rannowane J further declared that the activists were entitled to have LEGABIBO registered as a society.

Unsatisfied with the Gaborone High Court's decision, the State approached the Court of Appeal and appealed the High Court's decision. The State first argued that lesbian, gay and bisexual individuals were not recognised under the protective rights provisions in the Constitution of Botswana. Secondly, they argued that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Thirdly, the government asserted that LEGABIBO's intended advocacy, which included reforming the Penal Code to decriminalise consensual same-sex sexual conduct, would in effect popularise criminal offences and encourage members of LEGABIBO to break the law. This paper will rebut those arguments and show how the Court of Appeal has contributed significantly to human rights jurisprudence and developing the right to freedom of association. This development, in turn, should be applied across the African continent.

5 Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016).

6 Cap 18:01 of the Laws of Botswana.

7 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 13.2.

8 *Rammoge and 19 Others v Attorney General of Botswana* (2014) MAHGB-000175-13.

Legal Basis of the Right to Freedom of Association

Freedom of association is an essential component of democracy. It provides individuals with invaluable opportunities to express their political opinions and form social bonds with likeminded members of State-recognised organisations. Freedom of association safeguards against the banning of political parties and is used to protect people from persecution on the basis of their political opinions and convictions.[9]

In *Rammoge*,[10] the Botswana Court of Appeal held that all persons, regardless of their sexual orientation, enjoy equal rights to form associations with lawful objectives. This is particularly true when these associations are formed for the express purpose of protecting and advancing the rights and interests of vulnerable groups. The Court of Appeal also observed that the right to freedom of association is protected not only in Botswana's Constitution,[11] but also in the Universal Declaration of Human Rights (UDHR),[12] the International Covenant on Civil and Political Rights (ICCPR)[13] and the African Charter on Human and People's Rights.[14] In addition to protecting freedom of association, the African Charter also provides that "every individual shall have the right to assemble freely with others",[15] and places a duty on States to ensure, through teaching and education, the promotion and respect for all rights and freedoms.[16]

The African Commission has recognised that competent authorities "should not enact provisions which would limit the exercise of [freedom of association]"[17] and "should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards."[18] In addition, the African Commission recognised in *Civil Liberties Organisation v Nigeria*[19] that:

> "Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends."[20]

9 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR); *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR).

10 Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016).

11 Section 13 of the Constitution of Botswana 1966.

12 Article 20(1) of the Universal Declaration of Human Rights, "[e]veryone has the right to freedom of peaceful assembly and association."

13 Article 22(1) of the International Covenant on Civil and Political Rights, "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

14 Article 10(1) of the African Charter of Human and People's Rights, "[e]very individual shall have the right to free association provided that he abides by the law".

15 *Id* at article 11.

16 Article 25 of the African Charter of Human and People's Rights, "State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."

17 ACHPR, Fifth Resolution on the Right to Freedom of Association (1992).

18 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* 2000 AHRLR 186 (ACHPR) at para. 15; see also *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR); L*aw Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR).

19 Communication No. 101/93 (22 March 1995).

20 *Id* at para. 15. See also *Gitari v Non-Governmental Organisations Co-ordination Board and Others* Petition No. 440 of 2013, para. 82.

In the pursuit of fulfilling this public duty, the State cannot take into consideration the fact that some associations might espouse views that are unacceptable to or unpopular with the majority of a country's population. The Uganda Court of Appeal in *Kivumbi v Attorney-General*[21] established a method for evaluating the importance that a society attaches to particular rights and freedoms. The Court of Appeal held that:

> "In every society there is always tension between those who desire to be free from annoyance and disorder on one hand to those who believe to have the freedom to bring to the attention of their fellow citizens matters which they consider important... The way therefore, any legal system strikes a balance between the above mentioned competing interests is an indication of the attitude of that society towards the value it attaches to different sorts of freedom. A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression."[22]

The right to freedom of association is held in high esteem by both local and international legal instruments. The Court of Appeal in LEGABIBO classified the right as a fundamental right that is universally applicable to all people. Furthermore, this declaration was the foundation of a number of other progressive proclamations about the rights and freedoms of members of the LGBTI community.

Debunking the State's Legal Arguments

The State relied on three legal arguments in defending their decision to deny the registration of LEGABIBO. These arguments were dismissed by the Court of Appeal following a thorough examination. The first argument levelled by the State was that members of the LGBTI community were not recognised as persons capable of being protected by the provisions in the Constitution of Botswana.[23] The second argument presented was that the objectives of LEGABIBO were unlawful as the Botswana Penal Code criminalises homosexuality.[24] Lastly, the State asserted that advocating for the decriminalisation of same-sex sexual acts would popularise criminal offences and encourage members of LEGABIBO to break the law.[25] The Botswana Court of Appeal refuted these arguments in the *Rammoge* judgment, holding that fundamental rights are universally applicable, it is not a crime to be LGBTI, and the ability to advocate for changes in the law is a democratic right.

Fundamental rights are universally applicable

A fundamental principle of international human rights law is that all human beings are born free and equal in dignity, and are entitled to all rights with no unjust differentiation on the basis of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property,

21 (2008) UGCC 4.

22 *Id* 15.

23 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) at para. 18.

24 *Id*.

25 *Id* para. 4.

birth, or other status."[26] Likewise, article 1 of the Universal Declaration of Human Rights provides that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

The government of Botswana, however, argued in *Rammoge* that the Constitution of Botswana does not recognise "homosexual persons" and they were therefore excluded from the definition of a "person" in the Constitution.[27] Because of these assertions, the government of Botswana argued that members of the LGBTI community were not entitled to the protections contained in the Constitution.

The Court of Appeal rejected this argument outright as irrational and contrary to the Constitution of Botswana which applies to "every person" in Botswana.[28] The Court further held that "an individual human being, regardless of his or her gender or sexual orientation, is 'a person' for the purposes of the Constitution."[29] It noted that it could not be argued that homosexuals are not recognised by the Constitution, since the Constitution does not make any distinction between heterosexuals and homosexuals. The Court of Appeal referred to section 3 of the Constitution – which provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual" – and said there are "no exclusions whatever."[30]

The Court stated that, "fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others."[31] The Court of Appeal further held that the State can only validly limit the fundamental rights of persons, if it is reasonably justifiable and proportionate to do so within the circumstances.[32]

In a proper move, the Court of Appeal stated that:

> "Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity."[33]

The Court of Appeal approvingly quoted the Kenyan High Court decision in *Gitari v Non-Governmental Organisations Co-ordination Board*,[34] a similar case in which the refusal to register a society formed to promote the interests of gay, lesbian, transgender and intersex persons was successfully challenged. Here the Court held that it was "obvious" that an individual human being is a "person" for the purposes of the Constitution – regardless of their gender or sexual orientation. It further noted that:

26 Article 2 of the Universal Declaration of Human Rights.

27 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 21(4).

28 *Id* paras. 56-60.

29 *Id* para. 58.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id* para. 60.

34 Petition No. 440 of 2013.

> "As a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings … we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity".[35]

This is a significant and crucial observation as once we accept that human rights are universal and apply to all persons, regardless of their sexual orientation and gender identity, an important space is created within which LGBTI activists can assert and advocate for their basic human rights and freedoms. Even in States where consensual same-sex activities are prohibited, LGBTI persons retain all of the other rights that are afforded to individuals through national constitutions, as well as regional and international legal instruments.

Homosexuality is not a criminal offence

The Botswana government argued that because homosexuality is illegal, LEGABIBO's objectives, which include advocating for the interests of homosexual individuals, were unlawful. This argument is based upon a gross misconception which the Court of Appeal rectified in their judgment. The Court of Appeal emphasised that the criminal provisions prohibiting consensual sexual acts committed between persons of the same sex do not extend to criminalising LGBTI persons themselves.

Sections 164 and 167 of the Botswana Penal Code[36] criminalise same-sex sexual acts between consenting adults, irrespective of the gender and sexual orientation of the perpetrators.[37] While these Penal Code provisions might create a pernicious stigmatising effect against lesbian, gay and bisexual individuals, they do not criminalise the existence of LGBTI persons or limit, in any way, their right to associate with other people or enter into associations of their choice. Indeed, there is no law in Botswana that prohibits anyone from being lesbian, gay or bisexual, nor is there any law that permits the suspension, restriction, limitation or suppression of the fundamental constitutional rights of these individuals.[38] Botswana's criminal law in this respect, as with several other African countries, extends only to certain sexual practices between persons of the same sex. The Court of Appeal emphasised that while the provisions of the Botswana Penal Code have the practical effect of limiting same-sex sexual activities, "[i]t is not, however, and never has been, a crime in Botswana to be gay".[39]

The High Court of Kenya in *Gitari* similarly held that:

> "[T]he Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts 'against the order of nature'. That the State does not set out to prosecute

35 *Id* para. 104.

36 Cap 08:01 of the Laws of Botswana.

37 Id section 164, "Any person who (a) has carnal knowledge of any person against the order of nature; … or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years"; section 167 "Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."

38 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 60.

39 *Id* para. 62.

> people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct 'against the order of nature'… More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation, and does not contain any provision that limits the freedom of association of persons based on their sexual orientation."[40]

Several African governments have provisions in their Penal Codes that are markedly similar to those contained in the Botswana Penal Code. The misinterpretation of these provisions is often used to justify the limitation of LGBTI persons' rights, such as the right to freely associate with likeminded individuals and form associations to promote common interests. The Court of Appeal's clarification that homosexuality is not a criminal offence is significant because it creates a space for LGBTI activists to advocate and campaign for their rights without the fear of being unlawfully and arbitrarily arrested because of their real or perceived sexual orientation and gender identity.

LGBTI advocacy will popularise criminal acts

LEGABIBO lists in its objectives the desire to advocate for the rights of LGBTI persons by calling for the decriminalisation of consensual same-sex sexual acts. The State argued that this objective was illegitimate and incompatible with peace, welfare and good order in Botswana. This assertion was based on the idea that advocacy for LGBTI rights would popularise same-sex sexual acts, thus promoting the commission of a crime.[41]

In addressing this argument, the Court of Appeal held that advocating for laws to be changed is not illegal. The Court stated that, "there is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen."[42]

The Court of Appeal further noted that it does not follow that when an organisation advocates for changes in the law on abortion, the death penalty, or same-sex sexual acts, that the organisation, or its members, is engaging in abortion, or murder, or same-sex sexual acts.[43] Advocating for the legalisation of same-sex sexual acts does not necessarily mean that people are encouraged to participate in these acts. Moreover, there are organisations and politicians in Botswana that advocate for LGBTI rights and these groups and individuals are not accused of engaging in unlawful activities.[44] Therefore, if LEGABIBO was to engage in advocacy to change the law that criminalises same-sex sexual relations, this would not be unlawful.

The Court then reviewed each of LEGABIBO's objectives and concluded that there was no indication whatsoever that the organisation intended to pursue anything other than lawful and

40 G*itari v Non-Governmental Organisations Co-ordination Board and Others* Petition No. 440 of 2013, paras. 114-115. See also *Kasha Jacqueline and Others v Rolling Stone Limited and Another* No. 163 of 2010, 9 where the High Court of Uganda held that "section 145 of the Penal Code Act [does not] render every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism [sic] generally. One has to commit an act prohibited under section 145 in order to be regarded as a criminal."

41 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 21(3).

42 *Id* para. 64.

43 *Id*.

44 *Id*.

proper objectives.[45] In fact, the Court found that LEGABIBO's objectives were admirable because they focused on promoting the human rights and welfare of LGBTI persons. The organisation's objectives also include the bettering of public healthcare and public education around issues like HIV prevention.[46] As discussed above, being a LGBTI person is not a crime. It is also not criminal to advocate for the fundamental rights of LGBTI persons. As such, it was impossible for the Court to conclude that LEGABIBO's objectives were in any way unlawful.

The Court of Appeal then ordered that the Minister register LEGABIBO as an organisation.[47] This decision is a massive victory both for the activists who have been fighting for the registration as well as the LGBTI community at large as LEGABIBO can now advocate for their interests. Moreover, many of the remarks made by the judges in this case could be used to advance the recognition of LGBTI persons, not only in Botswana but on the African continent in general.

Analysis of the Impact of the Judgment

The decision in Rammoge contributed significantly to human rights jurisprudence in the African region. In addition, it has also contributed to advancing Goal 16 of Sustainable Development Goals[48] which requires equal access to justice and fundamental freedoms to all persons in accordance with national constitutions and international agreements. This contribution is not weakened by the criminal provisions prohibiting consensual same-sex sexual practices in Botswana, which are very similar to statutes in many other African States. This judgment, despite the continued existence of these criminal provisions, has the potential to foster greater tolerance and extended protection for LGBTI persons in Botswana and throughout Africa.

Changing social attitudes

The crucial take-away from this judgment is the recognition of the fact that fundamental rights are universal and applied to all persons regardless of their real or perceived sexual orientation and gender identity. This means that members of the LGBTI community are fully entitled to all rights necessary to protect their dignity.

Many African countries continue to criminalise consensual, same-sex sexual practices. While these criminal provisions do not extend to criminalising LGBTI persons themselves, the mere existence of these criminal provisions perpetuates and promotes stereotypes, which increase the LGBTI community's vulnerability to stigma, discrimination and harassment. The judgment in *Rammoge* emphasises the universal application of freedom of association as well as all fundamental human rights. The full realisation of these rights, however, is greatly hampered by negative public attitudes towards members of the LGBTI community. This Court of Appeal judgment seemingly brings an end to the State's reliance on criminal provisions that prohibit certain sexual practices as a justification for the limitation of the LGBTI community's fundamental human rights. States need

45 *Id* para. 66.

46 *Id* para. 3.

47 *Id* para. 81(b).

48 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

to start taking measures to change social attitudes and to educate the public about issues such as tolerance towards sexual diversity. African States should also take active and progressive steps to educate every segment of society about their constitutional and fundamental rights.

Civil society and organisations, such as LEGABIBO, could play a crucial role in assisting African governments to foster a culture that protects human rights. Indeed, civil society organisations could be important allies and partners to assist African States in carrying out intensive sensitisation campaigns and education on LGBTI and other human rights issues. This is especially true of those organisations that specifically represent the interests of the LGBTI community. By denying these organisations registration and treating them as adversaries, governments are missing out on a crucial opportunity for collaboration and the chance to create an inclusive society. That kind of society could breed a culture of tolerance and respect for diversity while simultaneously upholding the obligations contained in regional and international legal instruments.

Now that LEGABIBO has finally been registered it creates an opportunity for the government of Botswana to partner with LEGABIBO to promote human rights and work towards a just and caring society. The registration of LEGABIBO in Botswana has created an important space within which LGBTI advocates and allies can assist the government of Botswana to fight against HIV, carry out advocacy and education, work towards the elimination of homophobia, and enhance the appreciation and respect of sexual expression and diversity.

Protecting the rights of LGBTI persons

While the *Rammoge* case did not seek to impugn any existing laws, the judge wrote a good deal of *obiter dicta* that could be used in future cases to extend the protections and rights afforded to LGBTI persons. Legal activists and associations in Africa are often hamstrung by a conservative legal culture that permeates throughout the legal system. This often means that cases about issues that are controversial and contrary to majority public opinion are not given a fair hearing, or sometimes, they are not heard at all. The judgment for LEGABIBO exemplifies the manner in which incremental changes in jurisprudence can be achieved.

Botswana was one of the first countries to include "sexual orientation" as a prohibited ground for employment discrimination in their employment legislation.[49] The reason for its inclusion stemmed from the vulnerable position in which LGBTI persons find themselves as a result of the stigma and harassment that they experience in conservative working environments. This recognition was a small step towards greater protection of the interests of the LGBTI community. In addition, Botswana national policies created in order to address the HIV epidemic identified LGBTI persons as particularly vulnerable and in need of special attention.[50]

In *Kanane v State*,[51] the Court of Appeal dealt with the constitutionality of the provisions of the Penal Code that outlawed consensual same-sex sexual acts and concluded that the time had not yet come to include lesbian and gay people in the list of protected groups. They left the door

49 Section 23(d) of the Employment Act, Cap 47:01 of the Laws of Botswana.

50 See Botswana National AIDS Coordinating Agency "Progress Report of the National Response to the 2011 Declaration of Commitments on HIV and AIDS" (2015).

51 (2) BLR 64 (CA) (2003).

open, however, for another legal challenge to the criminal provisions at a time when society has progressed to a point where it would be appropriate.[52] In the arguments presented to the Court of Appeal in *Rammoge*, the process by which same-sex sexual acts have been decriminalised progressively was traced in various countries such as South Africa, the United Kingdom, the United States of America and Australia and New Zealand.[53] These arguments could not be used to make any definitive ruling in the case as the provisions in the Penal Code were not challenged. However, the Court held that it was evident that they showed a softening of opinions towards the LGBTI community.[54]

The Court in *Rammoge* emphasised the fact that because of the incremental changes, such as those listed above in healthcare policy and employment legislation, it is clear that attitudes towards LGBTI persons have improved in Botswana. The fact that there is now a public discourse on the promotion of LGBTI rights is indicative of the fact that the taboo has been eroded and some semblance of normalisation can now take place. By building on the victories prior to LEGABIBO and the progressive *obiter dicta*, it might not be long before the time is ripe to once more challenge the provisions of the Penal Code that criminalise consensual same-sex sexual acts.

Conclusion

The Botswana Court of Appeal decision represents significant progress in the promotion of the rights of lesbian, gay, bisexual, transgender and intersex persons. The judgment has broader implications for Botswana and many other African countries. It highlights the State's duty to uphold basic rights and to ensure dignity, tolerance and acceptance for marginalised groups within society. It also illustrates the importance of the independence of the judiciary and highlights the judiciary's role and constitutional mandate in the protection of the most vulnerable groups in society.

52 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 49.

53 *Id* para. 47.

54 *Id*.

THE AMBIT OF PROHIBITED GROUNDS OF DISCRIMINATION IN BOTSWANA'S EMPLOYMENT ACT[1]

Galesiti G. R. Baruti J[2]

> "*We cannot solve our problems with the same thinking we used when we created them.*"[3]
>
> *"I do not think that I would be losing sight to my functions or exceeding them sitting as a Judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex."*[4]

Introduction

Section 23(d) of the Botswana Employment Act[5] lists many prohibited grounds for workplace discrimination. When this subsection was amended in 2010, additional grounds were added, including gender, sexual orientation, health status and disability.

Gender, health status, sexual orientation and disability are crucial indicators of the effectiveness and success of the law and courts in eliminating discrimination against women in the workplace.

This paper considers:

- Whether the existing national laws are adequate and effective enough to protect employees against discrimination on the basis of health status and gender; and
- Whether the courts have been effective and successful in addressing workplace discrimination based on health status and gender?

Discrimination

Definition and scope

When considering the scope of the concept of discrimination, the starting point must be the Constitution. Section 3 of the Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual". The framers of the Constitution decided that it was not necessary to list each of the rights and freedoms that normally constitute the Bill of Rights. Even the definition of the word discrimination was not accorded the definitions that are

1 Paper presented at Seminar entitled Successes and Challenges in Addressing Gender-Based Violence and Discrimination through the Courts, held at Phakalane Hotel, Gaborone, on 2 December 2016.

2 Judge of the Industrial Court of Botswana; LL.B (University of Botswana), LL.M (London).

3 Albert Einstein, Physicist, 1879-1955.

4 *Dow v Attorney General* (1991) BLR 233, 244-245 (Horwitz J).

5 Cap. 47:01.

current in the International Conventions. The wisdom of this gesture on the part of the framers of the Constitution, of an open ended list in the Bill of Rights, is that the courts have been granted a golden opportunity, on a continuous basis, to expound and elaborate on it. The courts have indeed done so by utilising international conventions, modern jurisprudence and legal scholars.[6] This is a judicial licence through which the courts in Botswana should modernise the Bill of Rights and its ever evolving concepts, such as the meaning and scope of "discrimination". Modernising the Bill of Rights simply means that the courts must adapt it to the changing times. It does not mean that the courts must make or promulgate any law, for that is the exclusive province of the legislature.[7]

Definitions of discrimination are found in international human rights instruments. Article 2 of the African Charter on Human and Peoples' Rights defines discrimination as follows:

> "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as the race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status."

The words "*other status*" makes it possible for new and evolving grounds to be added. This terminology was first seen in the Universal Declaration of Human Rights. The United Nations Human Rights Committee has widened the scope of discrimination by defining it as:

> "… any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[8]

These are the definitions that the courts in Botswana must adopt and modify to suit the local circumstances. The definition of discrimination in section 15 of the Constitution contains an exhaustive list of the prohibited grounds of discrimination. With such a closed list it has become difficult to add to it new grounds, which are internationally accepted, such as birth, sexual orientation, health status, or disability. It must be pointed out that these new grounds are no longer alien to Botswana, its culture or its values. For instance in 2010 the legislature amended section 23(d) of the Employment Act by including sexual orientation, gender, health status and disability as additional grounds for discrimination. Courts in this country would be doing a disservice to the nation if, when defining discrimination, they ignore these newly added grounds. The courts should never lose sight of the ultimate cause of the law, which is the welfare of the society. Cardozo J, a famous American jurist has authoritatively articulated the role of judicial officers as well as the fundamental purpose of the law. In his treatise, *The Nature of the Judicial Process*, he lectured as follows:

> "The final cause of the law is the welfare of Society. The rule that misses its aim cannot permanently justify its existence. 'Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.' Logic and history and custom have their place. We will shape the law to conform to them when they may; but only within bounds. The end which the law serves will dominate them all."[9]

6 See *Attorney General v Dow* 1992 BLR (CA) 154.

7 Constitution of Botswana, 1966, section 86.

8 Human Rights Committee "General Comment 18, Non-discrimination" (1989) para. 7.

9 B.N. Cardozo "Lecture II: The methods of History, Tradition and Sociology" *The Nature of the Judicial Process* (1921).

The welfare of the Botswana society will be best served by factoring these newly added grounds in the definition of discrimination. In any case even if other courts choose to stick to the old and limiting constitutional definition of discrimination, the Industrial Court must comply with section 23(d) of the Employment Act by widening the scope of the definition. In the context of labour law, the Industrial Court would be contravening section 23(d) if its definition of workplace discrimination excluded the grounds of marital status, gender, sexual orientation, health status and disability. In the workplace context, discrimination means any form of distinction, exclusion, restriction or preference which is based on race, sex, religion, colour, language, political or any other opinion, national or social origin, marital status, gender, sexual orientation, creed, health status, disability or any other status or ground which has the purpose or effect of nullifying or impairing (wholly or partially) the enjoyment or exercise by any person, on an equal footing of all or any of the workplace rights and freedoms.

Forms of workplace discrimination

Discrimination comes in all forms, shapes and disguises. It would not hesitate to assume an attractive shape or ideal which may bamboozle its unsuspecting victims. It may appear with so attractive a dressing that its intended and unsuspecting victims may be the first to stand up and embrace it. In the workplace context it would rear its head at the three stages of the employment contract. Workplace discrimination generally takes two forms. The first would be any breach of any contractual term, employment rules or policies between the stages of employment and termination. The second, and more drastic form of discrimination, would be the termination of employment (dismissal). In simple terms an employee's workplace rights would be violated, or he or she would be dismissed on the ground that he or she is HIV-positive or she would be dismissed simply because of her gender.

HIV Status as a Prohibited Ground of Discrimination

According to the World Health Organisation, by the end of 2015 there were about 36.7 million people (women, men and children) on earth living with HIV.[10] Of these 36.7 million people about 19 million live in Eastern and Southern Africa, making this region the home of the epidemic, with women comprising more than half of all persons living with HIV.[11]

The HIV epidemic became a reality to the whole world in the 1980s. Since then many people who have been infected have suffered discrimination and stigma in the workplace. This stigma and discrimination have been manifested in ostracism, oppression, discrimination, demotion and dismissal (direct or constructive) of those living with the HIV.[12]

Many countries have taken proactive measures to address this stigma and discrimination. Botswana has in place a Bill of Rights in its Constitution and workplace legislation in the form of the Employment Act, which if effectively utilised by courts and relevant institutions must afford

10 UNAIDS Fact Sheet November 2016, 1, available at http://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf (last accessed: 12 December 2016).

11 *Id* 3.

12 See "HIV/AIDS and Human Rights in Southern and East Africa" *AIDS and Rights Alliance for Southern African* (ARASA) (2009) available at http://www.arasa.info/files/6714/0498/7909/ARASA_report2014_web_full.pdf (last accessed: 11 December 2016).

those living with HIV redress. It is often said that a tool is as effective as the person who uses it. The effectiveness of the available legal tools largely depends on how they are used by the courts and the relevant institutions and stakeholders.

Constitutional protection

The Bill of Rights included in the Constitution of Botswana clearly outlaws discrimination, provided it does not fall under any of the exceptions listed therein. At section 15, the Constitution makes this prohibition against discrimination explicit. As per the meaning of discrimination adopted herein an employer who discriminates against an employee on the basis of his or her HIV status violates the constitutional rights of such an employee. An employee so aggrieved is entitled to approach the High Court whereupon he or she should be reinstated, be granted constitutional damages or any appropriate remedy. At the Industrial Court he or she should be reinstated and granted compensation, and not constitutional damages. However the court that is competent to adjudicate on the violation of constitutional rights is the High Court, and not the Industrial Court.[13]

It is submitted that the Constitution of Botswana, through its Bill of Rights, fully and adequately protects the constitutional rights of employees at the workplace. Such rights would include the right not to be unfairly treated at the workplace, and the right not to be wrongfully or unfairly dismissed from work. Of course the ideal constitutional set up would be where the Constitution explicitly incorporates the fundamental workers' rights in the Bill of Rights. However, the absence of the ideal constitutional set up should not in any way distract from the legal reality that the Bill of Rights in the Botswana Constitution incorporates fundamental workers' rights, which are enforceable in courts of law. A generous and purposive interpretation of the Bill of Rights contained in the Constitution must include relatively new grounds including gender, health status, sexual orientation and disability.[14]

Statutory protection

Section 23 of the Employment Act lists the prohibited grounds or reasons for dismissal. If any of the prohibited grounds is the basis of the dismissal, then the dismissal is automatically wrongful or unfair. Generally it would not avail the employer to show or argue that he or she had the most convincing reasons to justify the termination of employment.

In 2010, the legislature expanded the list of the grounds that would render a dismissal automatically wrongful and unfair. Such a welcome gesture had the effect of widening the scope of statutory protection against unfair dismissals.[15] For present purposes the relevant subsections under section 23 are (d) and (e), which were added in the 2010 amendment. They read as follows:

13 The jurisdiction of the High Court is unlimited, as stipulated in section 95 of the Constitution. But that of the Industrial Court is limited to trade disputes.

14 *Ramantele v Mmusi and Others* CACGB-104-12 (unreported) para. 69, Lesetedi J. A. was in support of this generous approach.

15 Note that the South African Labour Relations Act uses the term "automatically unfair". This term has been borrowed from the English Unfair Dismissal Law. See Perrins (ed) *Harvey on the Industrial Relations and Employment Law*, Vol 1 at 1101. In Botswana it may be more appropriate to use the term "automatically wrongful" dismissal in consonance with the terminology of section 24 of the Trade Disputes Act of 2003.

> "23. Notwithstanding anything contained in a contract of employment an employer shall not terminate the contract of employment on the ground of …
> (d) the employee's race, tribe, place of origin, social origin, marital status, gender, sexual orientation, colour, creed, health status or disability, or
> (e) any other reason, which does not affect the employee's ability to perform that employee's duties under the contract of employment."[16]

If an employee is dismissed on the ground of his or her HIV status then such a dismissal is automatically wrongful or unfair. An employee who suffers this fate at the hands of the employer must approach the courts for redress. If he or she approaches the High Court it would order a reinstatement, payment of damages, or both. Such would entirely be within its judicial discretion. If he or she approaches the Industrial Court it would order a reinstatement, payment of compensation or both.[17] The court order would of course depend on the circumstances of the case before it. Section 23(d) therefore fully and adequately protects an employee who is HIV-positive. It is automatically wrongful or unfair, and a violation of section 24 of the Trade Disputes Act, to dismiss an employee simply because he or she is HIV-positive. A dismissal would be rightful or fair in terms of section 23(e) only if the illness has affected the employee's ability to perform his or her duties under the employment contract. It must clearly be established that the employee is unable to work at any part of the employer's business or workplace and that there is no scope for reasonable accommodation of the employee.

If discrimination takes place in the workplace but does not amount to dismissal and it is committed on the basis of any of the grounds listed in section 23(d) then it is automatically wrongful or unfair. The automatic wrongfulness or unfairness is not restricted to the discrimination that manifests in a dismissal. It is submitted that any other form of discrimination would be automatically unfair if is based on any of the prohibited grounds listed under section 23(d) of the Employment Act. It therefore follows that any discrimination short of a dismissal, which is visited upon an employee on the ground of his or her HIV status is wrongful or unfair, and the courts must grant him or her the remedies of reinstatement, damages or compensation.

Case law on HIV discrimination

As expounded above, discrimination of an employee by an employer on the basis of his or her HIV status is both unconstitutional and statutorily unlawful. The law, which is the tool to be used by the judiciary to protect employees against workplace discrimination, is in place. The task is for the courts to ensure that the protective provisions in the Constitution and legislation are given effect to.

In the case of *Diau v Botswana Building Society*[18] the Industrial Court addressed the issue of workplace discrimination which had been visited upon an employee on the basis of her HIV status.

In February 2002 the employer offered the applicant probationary employment. The full employment was conditional on her passing a full medical examination. On this understanding the employee commenced employment towards the end of February 2002. Six months later, the

16 Underlining added for emphasis.

17 Trade Disputes Act. 2003, amended in 2016, section 24.

18 IC 50/2003.

employer instructed the employee to undergo an HIV test. It was explained to her that it was part of the pre-employment medical examination. She refused to undergo the test. For her refusal she was not offered permanent employment. She approached the Industrial Court for redress. The Court invoked the Bill of Rights in the Constitution when determining the legality or fairness of the employer's conduct. It held that the employee's right not to be subjected to inhuman and degrading treatment had been violated because "to punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human."[19] With this reasoning the Court ordered the employer to reinstate the employee and pay her compensation.

In another Industrial Court case of *Jimson v Botswana Building Society*,[20] Jimson, the employee, was employed subject to a probation of six months, a 48 hour notice of termination during the probation period and a successful passing of a medical examination conducted by a doctor to be paid by the employer. He went through the medical examination and passed it to the satisfaction of the employer. However, a week later the employer instructed the employee to undergo what it termed "further pre-employment medical examination" in the form of an HIV test. He did and tested positive. Soon thereafter the employer informed him, through a letter, that his probationary employment was being terminated. Aggrieved by the employer's conduct he approached the Court for a remedy. In particular he wanted the Court to decide if compulsory post-employment HIV testing was legal. The Court held that this HIV testing, which was introduced after the employee had passed a medical examination, and the employment contract was in place, was unfair and unlawful. This was because the HIV testing was a breach of an employment contract, which was already in operation and did not provide for such a test. This case also clarified the status of the National Policy on HIV/AIDS, which was in operation then had no legal effect against the Botswana Building Society. It advised that, for effectiveness, clarity and efficiency the government should promulgate the necessary legislation. The employer was unhappy with the decision of the Industrial Court. It appealed to the Court of Appeal. The Court of Appeal reversed the decision of the Industrial Court on the ground that the HIV testing was part of the pre-employment medical examination. It is submitted that the outcome of an HIV test result as part of a medical examination ought not lead to a failure to employ in the context where antiretroviral medication has made HIV a chronic disease which can be managed without impacting negatively on performance in the workplace.

In the case of *Lemo v Northern Air Maintenance (Pty) Ltd*,[21] the applicant, Lemo, was employed by the respondent as a trainee aircraft engineer in 1998. Between 1999 and 2004 the health of the applicant deteriorated so badly that he was regularly on sick leave. As the health of the applicant deteriorated further the respondent reacted by insisting that he must undergo a medical examination. There was stalemate when the applicant refused to be examined by a doctor chosen by the respondent. The stalemate came to an end when the applicant informed the respondent (his employer) that he was HIV-positive. On the day following the date of the disclosure the applicant was dismissed from employment. The respondent argued that the reason for dismissal was that

19 *Id.*
20 IC 35/2003.
21 IC 166/2004.

the applicant was regularly absent from work, which absence adversely affected the productivity of the company. The applicant was dismissed at the time he was away on leave. He approached the Industrial Court for redress alleging an unfair termination of his employment contract. Upon analysis of the evidence before it the Court concluded that the real reason for the dismissal was applicant's HIV positive status, and not his absence because such was always authorised. Most crucially the Court found that there was no evidence showing that applicant's illness had incapacitated him to the extent that he could no longer perform his contractual obligations.[22] The dismissal was held to be unfair.

As alluded to above, the courts have generally not hesitated to hold that dismissals based on an employee's HIV status are unfair or wrongful. Living with the HIV virus should not affect an employee's workplace performance, especially not in the context of the availability of antiretroviral medication.

In the case of *Monare v Botswana Ash (Pty) Ltd*[23] the employee had fallen sick due to HIV. The employer had known of the employee's HIV status since 1993, but had taken no adverse action against him. However from July 1997 the employee's health deteriorated rapidly. The consequences of this failing health was that he clocked sick leave of 66 days. As his health deteriorated further he was dismissed in February 1998. He challenged his dismissal at the Industrial Court. The Court held that the dismissal was substantively fair because the employee was no longer able to do his work due to incapacity occasioned by HIV, and there appeared to be no chance of recovery. Owing to this incapacity the operational requirements of the employer warranted a termination of the applicant's employment contract. However with respect to the procedure leading to the dismissal the Court held that it was unfair. This was because the employer had failed to engage in sufficient consultation in the process leading to the dismissal. The applicant was awarded compensation equal to two months of his wages.

In the more recent case of *Latiwa v Komatsu Botswana*[24] the Industrial Court held, *inter alia*, that an employer can fairly dismiss an employee based on ill-health only if he or she is permanently incapacitated from carrying out his contractual duties. The Court held further that the dismissal will be fair only if there was no possibility of accommodating the incapacitated employee by way of adapting his work to his new status or securing an alternative job.

The rule that the courts have formulated with respect to sickness due to health status is that an employee can be dismissed only if:

1. His or her sickness has incapacitated him or her from continuing with the employment;
2. He or she cannot be accommodated by the employer by way of adaptation or alternative work;
3. There is no likelihood of recovery and;
4. He or she was adequately and sufficiently consulted in the stage by stage process leading to the termination of the employment contract.[25]

22 See section 23(e) of the Employment Act (the 2010 amendment).

23 No IC 112/98.

24 No ICF 438/14.

25 See *Botswana National Industrial Relations Code of Good Practice* "Termination of Employment" (2002) para. 9 available at https://www.hsph.harvard.edu/population/aids/botswana.aids.02.pdf (last accessed: 11 December 2016).

On the basis of the foregoing it could be argued that the courts have, to some extent, been effective in protecting employees who are HIV-positive at the workplace. The courts should strengthen protection for workers by utilising sections 23(d) and (e) of the newly amended Employment Act to stem out discrimination based on health status in the workplace.

Gender as a Prohibited Ground of Discrimination

Gender-based discrimination remains a challenge in Sub-Saharan Africa. Various social tools, such as culture and economic poverty, have been eagerly employed to perpetuate gender-based discrimination. Gender-based discrimination is present in many forms, including violence and sexual harassment. It is also present in many areas, such as the home, the village and the workplace.

There are two legal tools that have been devised to help eliminate gender-based discrimination at the workplace. The first tool is the Constitution of Botswana, whose provisions apply to all areas of social life, including the workplace. The second is the Employment Act.

Constitutional protection

According to section 3 of the Constitution all persons have the right to equal protection of the law. More recently the Botswana Court of Appeal has held that section 3 applies to every person irrespective of their gender, sexual orientation or gender identity. [26] A person who has fallen victim to discrimination is entitled to approach a competent court of law for remedies such as constitutional damages. The civil courts, in particular the High Court, would be competent to rule on such actions.

Statutory protection

According to section 23(d) of the Employment Act, any discrimination based on gender, sex, sexual orientation or marital status is automatically unfair. In Botswana, culture is sometimes used to oppose gender equality. Section 23(d) of the Employment Act is very clear that no amount of cultural or moral justification will make an automatically unlawful discrimination meted out in the form of a dismissal, lawful.

The termination of a woman's contract of employment solely on the basis of her gender or sex is automatically unlawful. Furthermore any wrongful labour practice during the life of an employment contract which is visited on a woman solely on the basis of her gender or sex is automatically unlawful. For example paying a woman less wages that a man for work of equal value is automatically unfair.

Case law on gender discrimination

The following cases are illustrative of how the courts, in particular the Industrial Court, has reacted to gender-based workplace discrimination.

Even prior to the amendment of the Employment Act to include gender as a prohibited ground

26 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) paras. 58-60.

of discrimination, the Industrial Court in the case of *Moatswi and Another v Fencing Centre (Pty) Ltd*[27] held that dismissal of two women applicants on the grounds that women were unable to load or work late night shift was tantamount to discrimination on the basis of their gender. In that case the court followed international conventions to which Botswana was a signatory to come to its conclusion.

In the case of case of *Kenaope and Kebotshabe v Bic Botswana (Pty) Ltd*[28] the employees were employed as Bic pen assemblers. For each employee the respondent had set a target of 4 500 Bic pens per day. Initially the applicants met their targets. At times they exceeded their targets. It so happened that the applicants fell pregnant and gradually lost that initial energy to work as fast as they used to. Eventually they could not meet their production targets. They were afraid to tell their supervisors or production manager the reason why they were failing to meet their targets. They feared that if they discussed their pregnancies they would be dismissed from work. The applicants testified in the Industrial Court that the respondent was notorious for dismissing pregnant employees. Upon noticing the pregnancy of the applicants the respondent dismissed them. The applicants sued for unfair dismissal and payment of maternity benefits.

The respondent's reason for the dismissal was that the applicants had failed to reach set targets. The evidence led before and evaluated by the Court pointed otherwise. The Court observed as follows:

> "from the above it is clear that the applicants were not guilty of misconduct. They were also not incompetent to do the work. The only reason that the court can infer is that they were temporarily unable to reach the target set by the management because of the pregnancy".[29]

The Court found that the dismissal was unlawful. It would be noted that the stated reason for the dismissal was failure to reach the targets, but that the real reason was the pregnancy of the applicants.

In the case of *Motsuokwane v Golden Wing (Pty) Limited t/a Cell City*,[30] the underlying reason for the dismissal was gender. The court was prepared to order a reinstatement in terms of section 24(2) of the Trade Disputes Act. However, the applicant was not seeking a reinstatement, but compensation. Compensation was granted accordingly. In this case the Court found that the real reason for the dismissal was the gender of the applicant.

It should be noted that discrimination based on gender does not typically rear its head in the blatant and obvious form of dismissing or ill-treating an employee because she is a woman. That form of gender-based discrimination would be too obvious and instead discrimination is often indirect.

The existing constitutional and statutory law go a long way in protecting women against gender-based workplace discrimination. It must be pointed out that the constitutional law protection extends to the workplace. In other words an employee can approach civil courts for the violation of her constitutional rights that happened at the workplace.

27 2002 (1) BLR 262 (IC).
28 Case No. IC 125/2003.
29 *Id* 5 (cyclostyled judgment).
30 I.C 609/2004 (J1493).

Conclusion

Target 16b of the Sustainable Development Goals emphasises the need to promote and enforce non-discriminatory laws and policies to ensure sustainable development. To achieve this, national laws (both constitutional and legislative law) must put in place explicit and clear provisions that protect employees against workplace discrimination based on health status or gender. The law in this regard must not be deciphered from a combination of provisions from different pieces of legislation. A person on the street must be able to right away point at a provision protecting her against discrimination without having to engage in some form of deductive reasoning. Deductive reasoning, interpretation of laws and extrapolations are the daily bread of lawyers and judges. But an ordinary person has neither the skill nor the time to engage in such an intellectual process. The law protecting against discrimination must also be couched in simple terms.

The courts still have a long way to go in protecting persons against discrimination. Of course they are moving in the right direction, but certainly more must be done. The general paucity of case law on discrimination in Botswana attests to this observation. Public campaigns on discrimination must also be intensified so that more cases flood the courts. It is only then that the effectiveness of the courts will be fully put to the test.

THE RIGHT TO EQUALITY IN MALAWI: RECENT DEVELOPMENTS IN FAMILY LAW[1]

Kenyatta Nyirenda J[2]

Introduction

Goal 16 of the new Sustainable Development Goals aims to promote just, peaceful and inclusive societies.[3] Key targets under this Goal include:

- Promoting the rule of law at the national and international levels and ensuring equal access to justice for all;[4]
- Developing effective, accountable and transparent institutions;[5]
- Ensuring responsive, participatory, representative and inclusive decision-making;[6]
- Ensuring public access to information and protecting fundamental freedoms;[7] and
- Promoting and enforcing non-discriminatory laws and policies.[8]

This paper seeks to reflect on recent legal and case law developments on the right to equality in Malawi as it relates to family law.[9] In this respect, the paper looks specifically at the extent to which a domestic law for implementation of non-discrimination, the Marriage, Divorce and Family Relations Act, achieves its purpose of ensuring equal access to justice for all.

Marriage, Divorce and Family Relations Act

The Marriage, Divorce and Family Relations Act[10] is the product of a special Law Commission that was constituted to undertake a review of the laws on marriage and divorce (the "Commission"). On 26 June 2006, the Commission published its Report on the Review of Laws on Marriage and Divorce.

The Commission emphasised the following three main principles in order to achieve a general, gender-based law reform that incorporates the welfare, interests, dignity and participation of women and men. These principles are:

- Non-discrimination in the enjoyment of human rights;
- Equal participation of both men and women; and
- Affirmative action to achieve gender equality and combat discrimination.[11]

1 This is an adaptation of a paper presented at a Seminar on the Role of the Courts to Protect the Rights of Vulnerable Groups, held at Mount Soche Hotel in Blantyre on 20 March 2015.

2 Judge of the High Court of Malawi; LL.B (Hons) (University of Malawi), Advanced Diploma in Legislative Drafting and LL.M (University of Malta).

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

4 *Id* target 16.3.

5 *Id* target 16.6.

6 *Id* target 16.7.

7 *Id* target 16.10.

8 *Id* target 16.b.

9 This paper follows on a previous paper entitled "An analysis of Malawi's Constitution and Case Law on the Right to Equality" *Using the Courts to Protect Vulnerable People* SALC (2014) 112 available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/12.pdf (last accessed: 21 November 2016).

10 Gazetted in April 2015.

11 "Report on the Review of Laws on Marriage and Divorce" Special Law Commission (26 June 2006) 18-19 available at http://

The provisions of the Act should be examined to determine if they meet the dictates of the right to equality. Admittedly, to examine all sections of the Act is beyond the scope of the present paper. Accordingly, I will examine only one topic to illustrate my point.

Nullity of marriage

Nullity of marriage was covered in the now repealed Divorce Act.[12] The Act outlined the procedure to petition for the nullity of marriage,[13] the grounds for a decree of nullity,[14] the procedure to place children of annulled marriages,[15] and the grounds for a decree of presumption of death and dissolution of marriage.[16]

The findings and recommendations of the Commission on nullity of marriage focused on the petitions for nullity of marriage and considerations for the children of annulled marriage.[17] With respect to petitions for nullity of marriage, the Commission recommended "the incorporation of the substance of section 11 of the Divorce Act in the proposed new law and the introduction of a new provision to reflect the reasoning and recommendations in the foregoing."[18] As regards children of annulled marriage, the Commission recommended deletion of section 13 of the Divorce Act for being redundant.[19] There is nothing in the Report to show that the Commission considered the grounds for a decree of nullity at all.

Section 12(1)(a) of the repealed Divorce Act provides that a marriage may be declared null and void if the respondent was permanently impotent at the time of the marriage. This provision was incorporated into the Marriage, Divorce and Family Relations Act as section 77(1)(a).

> "(1) The following are grounds on which a decree of nullity of marriage may be made-
> (a) that the respondent was permanently impotent at the time of the marriage;
> (b) that the parties are within the prohibited degrees of kindred or affinity;
> (c) that either party was of unsound mind at the time of the marriage;
> (d) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force;
> (e) that the consent of either party to the marriage was obtained by force, duress or fraud;
> (f) that the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage;
> (g) that the respondent was at the time of the marriage suffering from a sexually transmitted infection; or
> (h) that the respondent was at the time of the marriage -
> - pregnant by some person other than the petitioner; or
> - responsible for the pregnancy of some person other than the petitioner."

www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf (last accessed: 21 November 2016).

12 Previously Cap. 25:04 of the Laws of Malawi.

13 *Id* section 11.

14 *Id* section 12.

15 *Id* section 13.

16 *Id* section 14.

17 "Report on the Review of Laws on Marriage and Divorce" Special Law Commission (26 June 2006) chapters 7.5.2.8 and 7.5.2.9.

18 *Id* 81.

19 *Id.*

Section 77 of the Act seems to follow the general legal position that only spouses should be parties æto a petition for nullity of marriage; if the parties to a marriage are content, it would be almost intolerable to allow a third person to insist on an inquiry. It is also clear that the grounds in paragraphs (b), (c), (d) and (e) of section 77(1) of the Act apply with equal force to either spouse. On the other hand, this is not the case with grounds in paragraphs (a), (f), (g) and (h) of section 77(1) of the Act. The grounds in the second group are targeted at the respondent only, irrespective of whether the respondent is the husband or the wife.[20]

This raises the question whether or not the second group of grounds is in line with the right to equality. For example, on a petition presented by a husband (petitioner) for nullity of a marriage on the ground that the wife (respondent) was permanently impotent at the time of the marriage, the court can only announce a decree *nisi* declaring the marriage to be null and void if it finds that the case for the petitioner has been proved.[21] However, suppose that the respondent proves the petitioner is the spouse who is permanently impotent, rather than themselves. This strange situation is evident in some antiquated English case law.[22] In these cases, the court ruled it had no legal basis to annul the marriages.

In an oft-quoted case of *Pettit v Pettit*,[23] a marriage which took place in 1939 had not been consummated owing to the impotence of the husband, who made regular but unsuccessful attempts at intercourse with the wife until 1954. The parties continued to live together, however, and the wife never reproached the husband. In 1945 she gave birth to a child which had been conceived by *fecundation ab extra* (pregnancy that occurs in the absence of penetration). In 1957 the husband fell in love with another woman, and notwithstanding the wife's efforts to persuade him to remain with her and the daughter, he left his wife in 1959. Having discovered for the first time a year later that as a matter of law he could petition for a decree of nullity on the ground of his own impotence, he presented such a petition in 1960. The Court of Appeal held that in a petition for a decree of nullity by an impotent spouse, the whole of the circumstances, including the respondent's attitude and reaction to the position created by the impotence, must be looked at in order to determine whether it was just or unjust that the impotent spouse should obtain a decree. Because of the wife's behavior and in particular her forbearance, the Court ruled it would be unjust to accede to the petition and that it should be refused. It is important to note that none of the judges in this case was of the view of completely ruling out a petition by a spouse for a decree of nullity of marriage on the ground of his or her impotence.

In short, in so far as section 77(1)(a) of the Act does not allow an impotent spouse to bring a petition grounded on his or her own impotence, the clause is strictly speaking not based on the principles enunciated in *Pettit v Pettit*.

It is submitted that where a petition for nullity is founded on a petitioner's impotence, the overriding test ought to be whether or not in all the circumstances of the particular case it would be unfair and inequitable to grant the relief. Obviously, the circumstances will vary infinitely. In this regard,

20 *Id.*

21 *Id* section 2.

22 See *Norton v Seton* (1819) 3 Phillimore 147 "no man shall take advantage of his own wrong".

23 (1962) 3 All E.R. 37.

I would fully adopt the instructive passage in the speech of the Earl of Selborne, L.C., in *G v M*:[24]

> "there may be conduct on the party seeking this remedy which ought to estop that person from having it; as, for instance, any act which has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages of and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation has ever existed … that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind, many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred."[25]

It is submitted that a petition for nullity of marriage by an impotent spouse on the grounds of his or her impotence ought to be allowed in principle. If any authority is needed, I place reliance on the words of Normand J who in *F v F*[26] said this:

> "In principle any person who has a title and interest in the subject matter of an action is a competent pursuer, and it is a general rule of our law that title rests upon interest. There are exceptions to this general rule, but I know of none which bears relevantly on the present question. Taking the general rule as a useful test, it can hardly be questioned that the impotent spouse has an equal interest with the potent spouse in a question which vitally affects his or her *status*. The bond of a marriage which cannot be consummated, it may be added, can be as irksome and humiliating to the impotent as to the other spouse. If, therefore, the impotent spouse is to be denied the remedy, it is necessary to enquire what is supposed ground for this denial. Lord Fraser speaks of the potent spouse as the party aggrieved. But, with respect, both alike are aggrieved; and to treat the potent spouse as alone aggrieved is to imply that the impotent spouse is in some sense a defaulter, as though he or she had failed to implement a contract and was debarred from founding on his or her default. The condition of impotency which is a ground of nullity is not voluntary; and the voluntary refusal to have intercourse, though it may be dealt with as desertion, is not a ground for an action of nullity. Where the incapacity results from a physical or temperamental condition, for which sufferer is not responsible, he cannot be debarred from the remedy on the ground that he has defaulted in his obligations. There may, of course, be circumstances which will bar the potent spouse. If, for example, he or she entered into marriage knowing the defect, the other spouse would indeed be entitled to complain, and to plead the *suppressio veri* in bar of the action. But the report in the present case does not mention any facts suggestive of a plea of personal bar, and it is not necessary to consider further what circumstances would properly give rise to it."[27]

Further, it is significant to note that other jurisdictions have moved on and embraced petitions by an impotent spouse.

24 (1885) 10 App. Cas. 171.
25 *Id* 186.
26 (1945) S.C. 202.
27 *Id* 202 (underlined emphasis added).

In the United Kingdom, as far back as in 1948, an impotent man or woman was allowed under case law to petition for annulment of the marriage on the ground of his or her own impotence unless he or she was aware of the impotence at the time of marriage or unless it is unjust in all the circumstances.[28] Further, the ground of "a respondent being permanently impotent at the time of marriage" no longer appears in the statute law pertaining to nullity of marriage.

The term "permanently impotent" first appeared on our statute book in 1905 at the time of enactment of the repealed Divorce Act. The question remains whether the phrase "permanently impotent", as used in 2015 in section 77(1)(a) of the Act, has the same meaning it had in 1905. Over the last century, there have been considerable advances in medical science regarding treatment of impotency. These advancements materially change which men or women can be characterised as "permanently impotent". What was once considered an "incurabl[e]" impotency can no longer be characterised as such.[29] This archaic characterisation should be updated to modern understandings of medicine and society.

The repealed Divorce Act was modelled on nullity provisions in the UK Matrimonial Causes Act, 1857.[30] In the intervening period, the UK has reformed its law pertaining to nullity of marriages on several occasions through its enactment of the Matrimonial Causes Act, 1937, the Matrimonial Causes Act, 1950, the Nullity of Marriage Act, 1971 and the Matrimonial Causes Act, 1973. Applying section 77(1)(a) of the Marriage, Divorce and Family Relations Act is an unnecessary burden that the legislator of Malawi has left to the judiciary. It should be revised to comport with modern understandings of medicine and society.

Distribution of marital property

Kagwira v Kagwira[31]

The appellant and the respondent married in December 1990 and lived together as wife and husband until 25 October 2012. On this date, a Second Grade Magistrate sitting at Midima ruled on a petition by the wife (appellant), and dissolved the marriage.

Following the dissolution of the marriage, the lower court distributed the matrimonial property. The appellant was allocated a house, a television set, a sofa set, ten iron sheets, two beds, two mattresses, a bicycle and kitchen utensils. The respondent was allocated a house, a deep freezer, a sewing machine, a book shelf, a bed, a mattress and a pot. The lower court also ordered the respondent to "build a house for the wife at her home with burnt bricks and roofed with iron sheets".[32]

The appellant was unhappy with the lower court's decision regarding distribution of property and she contested that the lower court "erred in law by unfairly distributing the matrimonial property

28 See *Harthan v Harthan* (1948) 2 All ER 639 at 644, CA and *Pettit v Pettit* (1962) 3 All E.R. 376.

29 See *Cowen v Cowen* (1946) Probate 36.

30 20 & 21 Vict, c. 85.

31 HC/PR Appeal Case No. 24 of 2012 (unreported).

32 *Id*.

(including the matrimonial house) which is contrary to section 24(1)(b) of the Constitution".[33]

The case was appealed to the High Court for argument and counsel for both the appellant and the respondent had substantial and well thought out submissions. The Court considered sections 13, 20, 24 and 28 of the Constitution and reviewed a number of cases on the full import of section 24(1)(b) of the Constitution.[34]

Section 24(1) of the Constitution provides that:

> "(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right:
> a) to be accorded the same rights as men in civil law, including equal capacity:
> i) enter into contracts;
> ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
> iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
> iv) to acquire and retain citizenship and nationality.
> b) on the dissolution of marriage, howsoever entered into:
> i) to a fair disposition of property that is held jointly with a husband; and
> ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children."

Following these examinations, the Court made the following conclusions:

a) Men and women are allowed "to acquire and maintain rights in property, independently or in association with others, regardless of their marital status";
b) The Constitution recognises that a spouse can, during the subsistence of a marriage, acquire, own or hold property, either singly or collectively, to the exclusion of the other spouse;
c) Neither section 24 nor section 28 of the Constitution makes it automatic that, upon, during or after marriage, property belonging to either spouse be regarded as jointly held property;
d) Each spouse owns property he or she acquired before marriage, unless on marriage he or she demonstrates a desire to convert it into joint property or gives it as a gift to the other spouse;
e) For property acquired during marriage, it is not automatic that all such property is jointly held, evidence is needed to show that the property is jointly held;
f) An inference that property is jointly held by spouses is not to be made from a mere fact of marriage, and a spouse claiming a share in an object of property that is alleged to be jointly held bears the burden of proof;
g) "Fairness" is not "equality" and "equality" is not "fairness", that is, fair disposition of property does not necessarily entail equal disposition of property and equal disposition of property does not necessarily mean fair disposition of property;
h) Section 24(1)(b) of the Constitution requires "fairness", and not necessarily "equality", in disposition of property that is jointly held by the spouses and consequently, foreign case law

33 *Id.*

34 *Mkulichi v Mkulichi* HC/PR Civil Cause No 1062 of 2007 (unreported); *Munthali v Munthali* Mzuzu District Registry, Civil Cause No. 2 of 2011 (unreported); Khamisa v Khamisa, HC/PR Matrimonial Cause No. 9 of 2007 (unreported); *Kamphoni v Kamphoni*, HC/PR Matrimonial Cause No. 7 of 2012 (unreported); and *Kishido v Kishido*, HC/PR Civil Cause No. 397 of 2013 (unreported).

and provisions under international law that seek to achieve "equality" are neither relevant nor applicable and cannot limit section 24(1)(b)(ii) of the Constitution that requires "fairness"; and

i) The maxim "equality is equity" ought to be applied in disposing property that is jointly held by spouses only in circumstances where there is n way of discovering the parties' intentions and no fair way of distinguishing between their respective contributions.[35]

Jurisdiction of magistrate's courts

Nduya v Nduya[36]

Having dissolved a marriage celebrated under the maternal system of marriage, the First Grade Magistrate sitting at Chikhwawa took the view that they could not distribute the matrimonial property because the value thereof exceeded the maximum monetary jurisdiction of the lower court under section 39(1) of the Courts Act, that is, MWK1,500,000.[37] It accordingly referred the case to the High Court for the distribution of the matrimonial property.

The High Court held, among other matters, that once it is established that a magistrate's court has jurisdiction to dissolve a marriage, it has jurisdiction to make ancillary orders attending the primary jurisdiction such as distribution of matrimonial property irrespective of the fact that the value thereof exceeds the monetary jurisdiction of the magistrate's court.

The Court referred to the case of *Kalumpha v Kalumpha*[38] where Mwaungulu J held:

> "On dissolution of marriage, orders as to custody of children and matrimonial property are ancillary and do not go to jurisdiction. A court that has primary jurisdiction to dissolve a marriage must have jurisdiction to make ancillary orders unless, of course, a statute removes or limits in some way that court's jurisdiction.
>
> There is no statute, however, that limits the magistrate court's jurisdiction to make ancillary orders generally or ancillary orders as to matrimonial property or custody of children for marriage."

It is hoped that this decision will help to promote quick resolution of cases relating to distribution of matrimonial property and ensure affordability of civil justice.

Malola v Malola[39]

The High Court in this case considered the effect of the Marriage, Divorce and Family Relations Act on the jurisdiction of lower courts to deal with a marriage by repute.

Section 13 of the Act provides that "a marriage by repute or permanent cohabitation shall only be recognised under this Act upon a finding of a court of competent jurisdiction". The High Court held that, taking into account the provisions of the Marriage, Divorce and Family Relations Act[40]

35 *Kagwira v Kagwira* HC/PR Appeal Case No. 24 of 2012 (unreported), 14-15.

36 Miscellaneous Matrimonial Cause No. 24 of 2015 (unreported).

37 MWK1,500,000 is equivalent to approximately $2079 on 17 November 2016.

38 HC/PR Civil Appeal No. 1 of 2010, 6 (unreported).

39 Civil Appeal Case No. 48 of 2016.

40 Section 2 of this Act specifically defines a "court" as "the High Court or other court having jurisdiction as specified under this Act and, in relation to any claim within its jurisdiction, includes a traditional or local court".

and the Courts Act,[41] "the lower court appears not to generally have the jurisdiction to determine divorce cases where the parties were married by repute or permanent co-habitation".[42] The Court emphasised that "the only time magistrate courts will have jurisdiction over marriages by repute or permanent co-habitation is when the customary law of the area recognizes such marriages".[43] The Court noted that its conclusion was based on the unfortunate *lacunae* in the Marriage, Divorce and Family Relations Act and that accordingly "great hardship will be caused to people from all far away corners of this country whenever they want to settle their affairs upon break-down of their marriages by repute or permanent co-habitation".[44]

These cases raise fundamental questions about how we ensure access to justice in family law matters.

Conclusion

Law reform is an incremental process and, as we strive towards achieving the Sustainable Development Goals, we should assess whether improvements in legislation can improve access to justice and better achieve equality. This is the case even with recently enacted pieces of legislation such as the Marriage, Divorce and Family Relations Act.

41 Section 39(2) of the Courts Act provides that "no subordinate court shall have jurisdiction to deal with, try or determine any civil matter – (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".

42 *Malola v Malola* Civil Appeal Case No. 48 of 2016, 3.

43 *Id* 4.

44 *Id* 4-5.

BALANCING NATIONAL SECURITY AND HUMAN RIGHTS: INTERNATIONAL AND DOMESTIC STANDARDS APPLYING TO TERRORISM AND FREEDOM OF SPEECH[1]

Professor Jeremy Sarkin[2]

Introduction

Human rights are universally enjoyed. This statement is only true in theory. While rights are meant to be inherent, universal, indivisible, and inalienable, in practice this is far from true. All countries have human rights problems; it is the degree of abuse that is different around the world. Some countries commit gross human rights abuse against many of their inhabitants.[3] In practice, therefore, rights are not given the respect they are due or are entitled to. Some nations respect human rights in very limited respects. Some States are not able to respect and protect rights, while others do not want to. Some of the most egregious violators of human rights against their own people include Eritrea, the Democratic Republic of the Congo (DRC), the Democratic People's Republic of Korea (DPRK), Belarus, Syria, Sudan, South Sudan, and Somalia.

The events of 11 September 2001, and the terrorist acts of the last few years, have seen terrorism being used to justify enormous State intrusion into the lives of their citizens.[4] Much of these intrusions were done secretly without legal justification, even in democratic societies. Such processes only became known to some degree because of individuals such as Edward Snowden who leaked the information. Today more States are seeking lawful authority to carry out surveillance on the stated basis of fighting terrorism.

Thus, terrorism and the threat of terrorism is increasingly being used as a reason to justify intrusions and limit privacy. States are using terrorism to justify the limitation and, at times, the total restriction or abrogation of fundamental rights.[5] It is true that rights sometimes clash against each other. One person's right often clashes against another person's right. The State often

1 This paper emerges from an affidavit filed by the author in the High Court in Swaziland in support of the applications of Mario Masuku and Maxwell Dlamini to have parts of the Swaziland Suppression of Terrorism Act and Sedition and Subversive Activities Act declared unconstitutional. The Swaziland High Court in September 2016 found in favour of the applicants. At the time of writing, the State had appealed the decision of the High Court.

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3 See P Zeleza and P McConnaughay "The Struggle for Human Rights in Africa" *Human Rights, the Rule of Law, and Development in Africa* (2004) 1-20; see also J Sarkin "Humanitarian Intervention and the Responsibility to Protect in Africa" in D Zimbler and J Okopari *Africa's Human Rights Architecture* (2008) 45-67.

4 See J Banda, A Katz and A Hübschle. "Rights versus justice: issues around extradition and deportation in transnational terrorist cases" *African Security Studies* 14.4 (2005) 59-67; see also R Powell "The Concept of Security" *University of Oxford Socio-Legal Revie*w (2012).

5 C Gearty "Terrorism and human rights" (2007) 42(3) *Government and Opposition* 340.

wants to restrict people's rights especially where national security is concerned.[6] A major test of a democracy is how a State balances national security and human rights matters.[7] However, far too often a supposed clash of rights is used to justify the overbroad constraint of rights.[8] One or more rights can be used to attempt to justify restrictions on other rights, especially by undemocratic States or States that want to achieve a certain limitation of a right. Nowhere is this truer than with the use of terrorism as a means to challenge the exercise or claim of certain rights.[9] In circumstances where a State limits rights, it is important for an independent court to be the ultimate arbitrator on whether the justifications are adequate and legal.

The Sustainable Development Goals (SDGs),[10] as outlined in the 2030 Agenda for Sustainable Development, are a useful lens to examine such issues in domestic States as the SDGs set out certain goals that are supposed to be attained. The SDGs were adopted by all 193 UN Member States in September 2015, and are comprised of seventeen Goals. [11] Goal 16 is Peace, Justice and Strong Institutions. It has objectives that promote peaceful and inclusive societies to attain sustainable development, deliver access to justice for everyone and construct successful, accountable and inclusive institutions.[12] There are twelve targets within Goal 16. Only the targets that are relevant to States promoting the rule of law and promoting and respecting human rights will be examined in this paper.[13] In Goal 16, target 16.3 promotes the use and observance of the rule of law at all levels, including domestically. Target 16.10 promotes a number of matters including the protection of fundamental freedoms, in line with domestic law and international processes. Target 16.a actually mentions terrorism, and calls for processes to strengthen national institutions to combat terrorism.[14] This does not deal with the complexities around the use of terrorism as a means to ensure greater State fiat and limit transparency and accountability. Rather, those complexities are confronted in target 16.6 which deals with the matter of developing "effective, accountable and transparent institutions" at all levels. This includes the courts, especially when independence and accountability are problematic.

In this context, this paper examines the use of terrorism legislation to limit freedom of speech in Swaziland. It examines the case of Mario Musuku and Maxwell Dlamini who were being prosecuted under terrorism and sedition legislation for actions and statements they made which would be considered acceptable political expression in most democratic States.

6 C Walker "Legal Aspects of Counter-Terrorism and Intelligence in the Prevention of Terrorism" (2008) *International Legal Dimension of Terrorism* 147-172.

7 See Z Akhtar "Extraordinary Rendition: A Comment" (2006) 11.2 *Judicial Review* 210-212.

8 A Chaskalson "The widening gyre: counter-terrorism, human rights and the rule of law" *The Cambridge Law Journal* 67.01 (2008): 69-91.

9 M Ranstorp and P Wilkinson *Terrorism and human rights* (2013).

10 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1. The SDGs are meant to complete the Millennium Development Goals (MDGs); see JD Sachs "From millennium development goals to sustainable development goals" (2012) 379 *The Lancet* 2206.

11 United Nations General Assembly Resolution *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

12 T Pogge, and M Sengupta. "Assessing the sustainable development goals from a human rights perspective" (2016) 32.2 *Journal of International and Comparative Social Policy* 83-97.

13 ID Bunn "Rule of Law and the 2015 UN Sustainable Development Goals" (2015) 21.2 *Southwestern Journal of International Law* 257-509.

14 See BX Lee et al. "Transforming Our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators" (2016) 37.1 *Journal of Public Health Policy* 13-31.

The Masuku and Dlamini Case in Swaziland[15]

On 1 May 2014, Mario Masuku and Maxwell Dlamini attended an International Workers' Day celebration at a school sports ground in Manzini, Swaziland. Masuku addressed the crowd gathered at the event. Dlamini participated in the singing of songs and chanting of slogans. Both the speeches and the songs were critical of the Swazi government, accusing them of not adhering to their constitutional obligations, questioning the legitimacy of the governance system, and its absolute monarchy. They called on the government to restore the independence of the judiciary and the rule of law, and raised issues surrounding the African Growth and Opportunity Act (AGOA) agreement with the USA.[16] The speeches were intended to protest, non-violently, the actions of the Swazi officials, which they believed to be inconsistent with the Constitution of Swaziland and not in the democratic interests of Swazi society.

As a result of their actions, Masuku and Dlamini were charged with contravening sections 11(1)(a) and (b) of the Suppression of Terrorism Act[17] (STA) and section 4(a), (b), (c) and (e) and 5(1) of the Sedition and Subversive Activities Act.[18] The accused then challenged the constitutionality of various laws, including the Suppression of Terrorism Act before the High Court of Swaziland. Masuku and Dlamini's case was joined to three other cases, also challenging the constitutionality of provisions in the STA and the Sedition and Subversive Activities Act. The provisions of the STA that were challenged were aspects of the definition of "terrorist act" that criminalised conduct which "involves prejudice to national security or public safety"[19] and conduct which is an offence "within the scope of a counter-terrorism convention";[20] the provisions which make it an offence to support an organisation designated as a terrorist entity under the Act;[21] and the provisions empowering the authorities to declare an organisation a terrorist entity.[22]

The Overreach of the Suppression of Terrorism Act and its Violation of the Right to Freedom of Expression

Swaziland is a country with an authoritarian regime in power.[23] Swaziland protects rights in its Constitution and its laws in theory.[24] However, this protection is very limited and non-existent when rights come up against State control and State power.[25] Swaziland, as with many other similar countries, attempts to be a respected member of the international community. It has signed

15 *R v Masuku and Another* Case No. 184/14 (criminal case); *Masuku and Another v Prime Minster of Swaziland and Others* Case No. 1703/2014 (constitutional challenge).

16 Others have made similar calls on Swaziland, M Ramdeen and S Ngubane "Swaziland" (2015) 11 *Africa Yearbook* 491-495.

17 Act 3 of 2008.

18 Act 46 of 1938.

19 See paragraph (2)(j) of the definition of "terrorist act" in section 2 of the Act.

20 See paragraph (1) of the definition of "terrorist act" in section 2 of the Act.

21 See sections 11(1)(a) and (b) of the Act.

22 See section 28 and 29(4) of the Act.

23 See B Masuku and P Limb "Swaziland: the struggle for political freedom and democracy" (2016) 43.149 *Review of African Political Economy* 1-10.

24 MN Shongwe "Protection of children's rights in the Swaziland legal system: achievements and challenges" (2016) 17.1 *Child Abuse Research in South Africa* 58-67.

25 A Dube and S Nhlabatsi. "The King can do no wrong: The impact of the Law Society of Swaziland v Simelane NO and Others on constitutionalism" (2016) 16.1 *African Human Rights Law Journal* 265-282.

and ratified a variety of international treaties. It conducts itself as a member of the United Nations, serves on committees and processes that deal with democratic and human rights matters, but at home does not respond in kind. Thus, Swaziland, and most other totalitarian States have at least some domestic and international obligations to ensure the enjoyment of human rights. These States have many obligations to respect human rights domestically, in line with their treaty obligations and also State responsibility. They are duty bound to ensure the enjoyment of human rights within their borders by all, without discrimination.

The STA defines "terrorism" and "terrorist group" using very broad, vague and open-ended language. The definition of terrorism in the legislation includes acts which "involves prejudice to national security or public safety", without including any guidance on what type of conduct is criminalised under this provision. The conduct it can cover may have nothing to do with terrorism, and may do nothing to stop terrorism, terrorist attacks or those bent on such activities. It can also cover activities that may not be connected to terrorism. While these may be acts that are criminal, they should not necessarily be contained in this law as that would overreach the purported reason for the Act: to combat terrorism. The law is vague, in the definition of terrorism impugned by the applicants, in that it fails to give reasonable notice of what is covered by it. The law allows for arbitrary and discriminatory enforcement. It gives the executive wide and unchecked powers.

The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that precision in the definition is a critical requirement that includes a requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[26]

The Human Rights Committee, as well as other tribunals and institutions, has held that over-broad and imprecise definitions of "terrorist acts" in domestic laws renders that law contrary to the provisions of the ICCPR.[27] For that reason a law on terrorism must be directed at terrorist activities in the narrow sense, and not just crime in general. Terrorism needs to be legally defined in line with the generally accepted definitions of what it is, rather than to leave it loose and allow other activities to fall within the confines of its definition. A law that permits many activities to be captured within it is seen to be in violation of international law and specifically the various treaties that Swaziland has ratified.[28]

A law dealing with terrorism must not be so overbroad as to restrict legitimate democratic activities. To do so violates both international and domestic laws. While there is no universally accepted definition of terrorism it is generally seen to be acts of violence that target civilians for political or ideological aims.

26 E/CN.4/2006/98 (28 December 2005) para. 46.

27 See also R Foot "The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas" (2007) 29.2 *Human Rights Quarterly* 489-514.

28 Swaziland has ratified: International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and Convention on the Rights of the Child.

Schmid and Longman reviewed over 100 definitions of terrorism to develop a list of common elements on what terrorism laws ought to contain. They discovered that there were 22 common elements to these definitions, the most shared being "violence", "force", "political", "threat" and "fear, terror emphasised".[29] Weinberg and others found that within the 73 definitions they examined, the most frequently used elements were "violence, force, political and threat."[30]

The central tenet of a counter-terrorism law should be aimed at preventing and dealing with violence and threats of violence. The fact that some the aspects of the definition of a "terrorist act", in the Swaziland STA are not limited to dealing with the threat of, or actual use of violence renders the law problematic. Parts of the definition of terrorism in the STA are so wide that it allows it to be used in many circumstances that should not fall within the ambit of the law. This is how the law was used against Masuku and Dlamini.

While there are many definitions of what comprises terrorism around the world, in 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism[31] stated that terrorism includes:

> "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes [and that such acts] are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them".

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted:

> "that an act is criminal does not, by itself, make it a terrorist act … Crimes not having the quality of terrorism … regardless of how serious, should not be the subject of counter-terrorist legislation. Nor should conduct that does not bear the quality of terrorism be the subject of counter-terrorism measures, even if undertaken by a person also suspected of terrorist crimes."[32]

In 2004, the Security Council stated that the following offences are "within the scope of… terrorism":[33]

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act".[34]

Also in 2004 the UN Secretary General's High-level Panel on Threats, Challenges and Change described terrorism as any act "intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a

29 AP Schmid and A Jongman *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (1988).

30 L Weinberg, A Pedahzur and S Hirsch-Hoefler "The Challenges of Conceptualizing Terrorism" (2004) 16.4 T*errorism and Political Violence* 777-794.

31 A/Res/49/60 (9 December 1994).

32 E/CN.4/2006/98 (28 December 2005) paras. 39 and 47.

33 S/RES/1566 (8 October 2004) para. 2.

34 *Id.*

population, or to compel a Government or an international organisation to do or to abstain from doing any act"[35] and identified a number of key elements, with further reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council Resolution 1566 (2004).[36]

In 2006 the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the definition of terrorism at the domestic level should be defined:

> "by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime."[37]

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has argued that conduct must be defined as that which is "genuinely of a terrorist nature".[38] He also argued that terrorism includes only acts or attempted acts "intended to cause death or serious bodily injury" or "lethal or serious physical violence" against one or more members of the population, or that constitute "the intentional taking of hostages" for the purpose of "provoking a state of terror in the general public or a segment of it" or "compelling a Government or international organisation to do or abstain from doing something."[39] Additionally, in a 2006 report to the UN General Assembly, he argued that how "terrorist act" and "terrorist group" are defined are critical to determining whether the limitations on various rights in the law are permissible or not.[40]

Thus, legislation dealing with terrorism cannot be so wide so as to restrict ordinary activities that are necessary in democratic societies. Such activities include legitimate opposition protests and speech. A law that deals with terrorism must not be used to curb the democratic rights of political opponents, civil society organisations, trade unions, or human rights defenders.

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has also noted that crimes not specifically described in the relevant international treaties may be criminalised in the domestic context only where it "is strictly necessary and provided that the definition or proscription complies with the requirements of legality".[41]

States that adopt counter-terrorism laws need to do so by striking the right balance between

35 United Nations Secretary General's High-level Panel on Threats, Challenges and Change "A more secure world: Our shared responsibility" (2004) para. 164(d).

36 S/RES/1566 (8 October 2004).

37 A/61/267 (16 August 2006) para. 44.

38 *Id* para. 17.

39 Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/16/51 (December 22, 2010) para. 28.

40 A/61/267 (16 August 2006) paras.17-19, 23.

41 *Id* para. 44.

national security and human rights. While some argue that there are no worthy policy reasons that warrant a separate, parallel regime of counter-terrorism law,[42] it is clear that counter-terrorism regimes have become commonplace in many countries.

The very fact that there is a debate about whether a separate counter-terrorism regime is necessary, highlights the need for specificity in those separate terrorism laws. This should be in both purpose and means. The laws drafted for such purposes should be clearly and specifically focused to address terrorism rather than to be catchall pieces of legislation that can be used for many purposes that are not specifically defined in the law. This gives wide discretion to the executive that can be abused. Rather, legislation should be couched in careful narrow terms to ensure that constitutional rights and international laws are not violated. Terrorism laws must be crafted in a way that balances the competing rights of State and citizen.

To obtain the correct balance between national security and democratic principles and human rights, a realistic assessment needs to be made about the extent to which terrorism is a real threat to the State, as well as the extent and nature of that threat.

Governments like to overestimate the threat of terrorism and claim that the threat is larger than it is, or to claim that the law should be widened to allow other threats to fall within in its ambit. However, States may not claim that measures that limit the ordinary rights of people are being adopted to protect national security, when they are in fact much wider than what is necessary for the circumstances, and when the effect is to suppress political opponents. Counter-terrorism laws may not target purposes outside of what is deemed terrorism. For this reason, the Special Representative of the Secretary General on Human Rights Defenders has stated clearly that:

> "any organization has the right to defend human rights; that it is the vocation of human rights defenders to examine Government action critically; and that criticism of Government action, and the freedom to express these criticisms, is an essential component of a democracy and must be legitimized in law and practice. States may not adopt laws or practices that would make activities for the defence of human rights unlawful."[43]

Where States enact draconian or extremely broad laws, it can have consequences of driving opposition groups underground. That is one of the dangers of trying to use terrorism laws for such purposes.

In 2005 then United Nations Secretary General Kofi Annan noted that:

> "compromising human rights … facilitates achievement of the terrorist's objective - by ceding … the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element."[44]

42 See M Palmer "Counter-Terrorism Law" (2002) *New Zealand Law Journal* 456.

43 A/59/401 (1 October 2004) paras. 49, 51.

44 K Annan "Address to the closing plenary of the International Summit on Democracy, Terrorism and Security" SG/SM/9757 (10 March 2005).

The Swaziland STA is therefore out of step with internationally applied standards because some of the measures in the law to counter terrorism are not proportionate, and not in line with the Constitution, international law and democratic principles.

Swaziland is obliged to follow international law on these issues in that it has ratified various international treaties that give guidance on these issues. Some rights have also attained international customary law status including many of the rights contained in the ICCPR. Thus, compliance with these is obligatory.

Amnesty International has therefore argued that the STA "should be repealed or immediately amended, because it is an inherently flawed piece of legislation which is inconsistent with Swaziland's obligations under international and regional human rights law as well as of the Swaziland Constitution."[45]

The STA, in the challenged parts, is vague, uncertain, overbroad, and strikes the wrong balance between national security and human rights. It transgresses the Constitution of Swaziland and international law that Swaziland is bound to uphold.

Conclusion

It is clear that the terrorism law of Swaziland touched on in this paper is incompatible with Swaziland's own laws and certainly its international obligations. This was found to be so in the majority decision of the High Court in September 2016. The Court indeed found that the laws were incompatible with the Swaziland Constitution as alleged by the applicants. This is a major step forward for democracy and human rights in the country.

The need to find the right balance between competing rights and competing interests is fundamental in all States.[46] Principles contained in the rule of law ensure that such balancing must be done by independent and fair judges. Courts that the State can rely on consistently have a legitimacy deficit. They are institutions that citizens neither trust nor approach to have their matters adjudicated. This undermines the State and ensures that those in the State will find extra-democratic means to resolve their concerns.

Terrorism is a scourge that needs to be dealt with, but it must not be used as a means to limit or fight usual democratic opposition in a State.[47] Political freedom of speech, which is legitimate in a democratic State, needs to be protected and allowed to flourish. States that attempt overbroad restrictions on speech and democratic opposition activities are not democratic. It is for that reason that many international laws protect freedom of speech and freedom of association besides a range of other rights. The extent to which a State does not comply with its international obligations is an indictment of its commitment to these values and the significance of democracy itself.

The Sustainable Development Goals are meant to ensure that States achieve a range of objectives

45 Amnesty International Suppression of *Terrorism Act Undermines Human Rights in Swaziland* (2009) 11; see also T Debly "Culture and resistance in Swaziland" (2014) 32.3 *Journal of Contemporary African Studies* 284-301.

46 C Csanyi "Terrorism and Human Rights" (2016) 1 *Journal of Eastern-European Criminal Law* 176-179.

47 LD White "Terrorism and Human Rights" (2014) 104 *Analyzing Different Dimensions and New Threats in Defence against Terrorism* 41.

including in the areas of human rights and democratic freedoms. That some States will do so is without question. The difficulty is with the States that continue to trample upon or disrespect the rights of its citizens. It is in these countries where the SDGs will be most meaningfully tested. Much more needs to be done to make these States accountable and ensure that they don't use terrorism and a range of other legitimate problems as a means to illegitimately go after its political opposition. Human rights must be available to all regardless of who they are and where they are living in the world. At the moment there are still many States where rights are not upheld and the State is the primary violator. Even in democratic States, ensuring the correct balance between competing rights remains a continuing challenge. This can only be done where those doing the arbitrating are independent and do not simply do the State's bidding.