Using the Courts to Protect Vulnerable People:

Perspectives from the Judiciary and Legal Profession in Botswana, Malawi, and Zambia

SOUTHERN AFRICA LITIGATION CENTRE

NATIONAL ASSOCIATION OF WOMEN JUDGES AND MAGISTRATES (Botswana)

REPUBLIC OF MALAWI JUDICIARY

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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 litigation 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

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Realising the Right to Equality for Vulnerable Groups

Foreword

We live in a world where rights, enshrined in international human rights conventions and national constitutions, find little translation in reality – entombed in legal documents, they often never see the light of day. As judicial officers and lawyers, it is incumbent on us to understand and recognise the inequalities prevailing in our society and to promote remedies that protect and promote the rights and freedoms enshrined in our constitutions. In many cases, we are the custodians of citizens' rights and the last bastion of hope for many.

Various international human rights instruments and national constitutions recognise that certain groups, often defined as vulnerable, require protection. Such groups include women; children; persons with disabilities; older persons; refugees; internally displaced persons; persons belonging to national, ethnic, religious and linguistic minorities; migrant workers; persons living with HIV; and lesbian, gay, bisexual, and transgender persons. This list is not exhaustive and over time new groups are identified that require special attention if they are to realise their rights and receive equal treatment.

This publication – a selection of papers presented at judicial colloquia held in Botswana, Zambia, and Malawi in February and March 2014 – has two main objectives.

Firstly, it is intended to serve as a resource for judicial officers in southern Africa, when they are confronted with cases that concern human rights and, in particular, the rights of vulnerable groups.

Secondly, it is intended to enrich discussion on the need for the development, in the region, of a constitutional jurisprudence which recognises the universality of human rights and the importance of courts in protecting the rights of the most vulnerable and marginalised within our societies.

Highlighting this need, Lesetedi J stated in the recent Botswana Court of Appeal case of *Ramantele v Mmusi and Others*:

> It is well established that in interpreting provisions of the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed.[1]

This publication examines that statement, exploring options and modalities, with different judges and lawyers providing valuable insight into what exactly it means to breathe life into a Constitution. Each of us plays a unique and important role in upholding the constitutions of our respective

1 CACGB-104-12, at para. 69.

countries and in securing well-functioning justice systems that protect the human rights of all. This publication prompts us to examine our existing jurisprudence and to develop our understanding of what different rights mean and how we might realise them in practice.

Judge Sanji Mmasenono Monageng
First Vice-President, International Criminal Court

Introduction

Vulnerable groups are generally understood to be people who are easily susceptible to discrimination, marginalisation, or criticism. These groups experience socio-economic and attitudinal barriers which hamper their ability to exercise their rights. In such cases, there is a need for protection by the state, including the courts, in order to avoid exploitation or harm.

Various international human rights instruments and treaty bodies include in the definition of vulnerable groups women, children, persons with disabilities, the elderly, refugees, internally displaced persons, national minorities, migrant workers, persons living with HIV, and sexual minority groups. However, the extent to which courts have adopted the role of protecting the rights of vulnerable groups varies between different levels of courts and between countries. With this in mind, the Southern Africa Litigation Centre initiated judicial colloquia on the rights of vulnerable groups in Botswana, Malawi and Zambia in February and March 2014. The colloquia were co-hosted by the Judiciaries of Malawi and Zambia and the National Association of Women Judges and Magistrates of Botswana. The colloquia provided a unique opportunity for judges to discuss and debate the development of constitutional jurisprudence in their courts. This collection of papers seeks to broaden those discussions and debates to judicial officers who were unable to participate in the colloquia.

This publication starts from the premise that the judiciary has an important role to play in upholding human rights and promoting the rule of law. The papers represent personal views and experiences, with authors providing reflections on the role of the courts, either in their role as judge tasked with protecting the rights of vulnerable groups, or in their role as lawyer or activist appreciating the potential for courts to protect the rights of vulnerable groups in society.

Throughout the publication, authors show how the use of comparative jurisprudence can be useful in developing pioneering legal debates in their own countries, especially in areas where there has been limited domestic jurisprudence on a particular issue, for example, in cases relating to women's rights under customary law, the rights of arrested persons, or the rights of sexual minority groups.

The papers in this compendium are loosely organised around three overlapping themes.

The first theme is the role of the judiciary in protecting the rights of vulnerable groups. The authors explore how judges have and should develop jurisprudence in order to ensure the rights of vulnerable groups, including discussing when it is their constitutional duty to do so.

In his paper, Justice of Appeal of the Malawi Supreme Court, Andrew Nyirenda, reflects on the extent to which the courts in Malawi have used the constitutional framework to protect the rights of vulnerable groups. He notes that it is incumbent on the judiciary to safeguard human rights and the rule of law. He argues that courts must also enable access to justice for vulnerable groups.

Justice of Appeal of the Malawi Supreme Court, Lovemore Chikopa, describes in a very practical way how the cases that came before him have advanced his own approach to judicial activism, and prompted him, as a judge, to find creative solutions to problems facing vulnerable parties, especially in matters relating to the recognition of customary marriages, distribution of marital property, custody and maintenance of children, and sexual offences.

In a similar vein, Dr Oagile Dingake, Justice of the High Court of Botswana, contends that the judiciary does indeed develop the law, and should be informed and courageous when doing so, particularly when it comes to protecting the rights of disadvantaged groups within society.

Sunday Nkonde, defence counsel in the Zambian case of *People v Paul Kasonkomona* – in which Kasonkomona was accused of soliciting for immoral purposes after speaking about gay rights on television – cautions against past-experience, political interference, and prejudice influencing judicial decision-making, especially when tasked with protecting the right to freedom of expression.

Justice Kenan Manda, chairperson of the Inspectorate of Prisons in Malawi, argues that the courts can go much further to protect the rights of prisoners – including reducing overcrowding through a change in sentencing practices and addressing deteriorating health conditions in prisons.

Priti Patel, Deputy Director at the Southern Africa Litigation Centre, encourages courts not to see the lack of socio-economic rights in domestic constitutions as an obstacle to ensuring the well-being of marginalised populations. Using comparative case law, she shows how courts have used civil and political rights to improve access to health services for people living with HIV.

Sunday Nkonde and William Ngwira, legal practitioners from Zambia, discuss the narrow interpretation that Subordinate Courts in Zambia have given to the right of accused persons to access information held by the prosecution prior to trial. They show how many courts throughout Africa have accepted their role in protecting the rights of accused persons, and have adopted a more progressive approach to pre-trial disclosure of information to the defence.

Chikosa Banda and Anneke Meerkotter argue that courts should not be hesitant in declaring laws unconstitutional when such laws continuously infringe on the rights of vulnerable groups in society. They use rogue and vagabond offences as an example of colonial laws which do not muster constitutional scrutiny, and which, accordingly, deserve further interrogation by the courts.

The second theme is the use of international and regional law as a tool for judges to develop jurisprudence on the rights of marginalised and vulnerable groups in domestic courts. The authors discuss the extent to which international and regional law is applicable in dualist countries and when judges are obliged to recognise international law or simply take cognisance of it.

In his paper, Justice of the High Court of Malawi, Dr Redson Kapindu, examines the relevance of international law in judicial decision-making. He argues that a narrow view of dualism is no longer appropriate, and that international human rights standards must prevail over contradictory national law.

Justice of the Industrial Court of Botswana, Harold Ruhukya, surveys the development of international labour-law standards and their relevance for domestic courts. He maintains that

Industrial Courts, having equitable jurisdiction, are well placed to use international law to come to the aid of vulnerable groups.

Lilian Mushota, a legal practitioner who acted for the claimants in *Nawakwi v Attorney General* and *Longwe v Intercontinental Hotels*, uses these cases to highlight the progress that Zambian courts have made in recognising women's right to equality. She argues that where a country has ratified but not domesticated an international instrument, the courts should be obliged to take note of its provisions.

Wamundila Waliuya, Executive Director of Disability Rights Watch, highlights the need for judges to be aware of the provisions of the Convention on the Rights of Persons with Disabilities, and to actively facilitate access to justice for persons with disabilities. Waliuya, a party in the case of *Brotherton v Electoral Commission of Zambia* – which sought to ensure that persons with disabilities can exercise their right to vote – argues that the courts have an important role to play in protecting the rights of persons with disabilities.

The third theme is the right to equality. Fundamental to protecting the constitutional rights of vulnerable and marginalised groups is the recognition of the right to equality and non-discrimination. The authors set out the ambit of this right, reflecting on domestic and comparative jurisprudence which has gradually broadened the scope of the right.

In his paper, Justice Kenyatta Nyirenda, from the High Court of Malawi, explains that the importance of the right to equality in the Constitution of Malawi and notes that the courts have adopted a flexible approach to the prohibition against discrimination, and have expanded the list of prohibited grounds to include, for example, HIV status.

Mandala Mambulasa, a legal practitioner and chairperson of the Malawi Law Society, concurs that the prohibited grounds of discrimination are open-ended. This is the approach followed by international treaty bodies and many domestic and regional courts. He argues that courts should take note of the development in comparative jurisdictions to include HIV status and sexual orientation in the list of prohibited grounds of discrimination.

Chipo Mushota Nkhata and Felicity Kayumba Kalunga, legal practitioners from Zambia, submit that there need not be an artificial dichotomy between gender equality and culture, and that courts should – and increasingly do – recognise the need to subject customary law to the prohibition against discrimination, even where domestic constitutions ostensibly exclude customary law from constitutional scrutiny.

Elizabeth Macharia Mokobi, a law lecturer from Botswana, examines the extent to which the best interests of the child principle co-exists with laws which exclude a child born out of wedlock from inheriting from the father's estate. She encourages the courts to develop the law in cases where it falls foul of protecting the rights of children to equal treatment and protection.

Finally, Dr Chiwoza Bandawe and Anneke Meerkotter reason that the prohibition against discrimination should be understood alongside the concept of *ubuntu*, which sees discrimination as an affront to the community. The authors explain that courts have increasingly recognised the

right not to be discriminated against based on a person's gender identity, and they urge courts to approach cases relating to sexual orientation and gender identity with fairness, adequate information, and understanding.

The authors in this publication highlight the fact that constitutional jurisprudence is constantly evolving and in recent times there has been an increased recognition by domestic courts throughout Africa of the need to take additional measures to protect the rights of vulnerable groups. In such cases, courts have often drawn guidance from international human rights law and comparative case law on the rights of vulnerable groups.

While judges are increasingly bold in their pronouncements against rights violations, there are also clear limitations. This can be seen from the discussions in this publication on freedom of expression, women's rights, and the rights of prisoners – where judicial decisions on the rights of vulnerable groups do not necessarily lead to a material change for vulnerable groups. Often, what is needed is steady litigation and engagement with various authorities to entrench the recognition of rights. Judicial remedies which address the structural causes of discrimination have also been effective. Attention should be given to supervising the implementation of judgments and supporting public acceptance of the judicial process and its outcomes.

This publication attests to the need for laws and state policies to be assessed in terms of how they impact on the rights of vulnerable groups and for them to be relevant to the changing needs of society. The papers highlight strongly the role that courts can play in developing the law so that it provides equal protection to everyone in society, and ensuring that laws comply with regional and international norms.

The Role of the Judiciary in Protecting the Rights of Vulnerable Groups

THE ROLE OF THE JUDICIARY IN PROTECTING THE RIGHTS OF VULNERABLE GROUPS IN MALAWI[1]

Andrew K.C. Nyirenda SC JA[2]

Introduction

The Republic of Malawi is bestowed with a particularly comprehensive legal framework for the protection of human rights. Complemented by a permissive Constitution that embraces most major international and regional human rights instruments, the Malawi human rights chapter promises utopia. After so many years under the Constitution, though, we have to ask whether we are anywhere close to realising *de facto* and *de jure* protection of rights for the majority of our society.

Since the advent of human rights law in Malawi following the 1994 Constitution and the turn-around in the political order, many Malawians take pride in, and might proclaim knowledge of, their rights. The truth, though, is that most remain largely unaware of the extent of their rights, and especially the means by which these rights can be enforced. As for those with some idea of the means by which to enforce their rights, they soon realise that access to any such means is barred in many respects – and virtually beyond their reach.

It can thus be said that it is one thing to have a comprehensive legal framework, and quite another to achieve an effective legal order. We must accept that while we have made strides towards achieving formal equality and non-discrimination, we have yet to achieve substantive equality.

One of the key objectives of human rights law is to provide a life of dignity for every individual, without any kind of discrimination. The rights to equality and non-discrimination are at the fore of the human rights agenda. Inequality and discrimination of any kind, based on gender, race, and such other considerations should be frowned upon and challenged.

Due to so many factors, gross inequality and discrimination remain in large sectors of our society. The brunt of inequality and discrimination has unfortunately largely been borne by the sectors of our society who were intended to be the primary beneficiaries of human rights law. The principle aim of human rights instruments is the protection of those considered to be 'vulnerable' to the powers of state, and generally the society in which they live. It is to vulnerable individuals and vulnerable groups that human rights instruments dedicate most of their attention.

This paper briefly reviews the definition of vulnerable persons and groups, assesses the legal framework for the protection of vulnerable groups in Malawi, reviews the role of the courts in

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

2 Justice of Appeal, Supreme Court of Malawi; LLB (Hons) (University of Malawi); LLM (University of Hull).

protecting the rights of vulnerable groups, documents relevant case law in Malawi, and, finally, offers an assessment of the overall progress made.

Vulnerable persons and vulnerable groups

We live in a world in which poverty is pervasive, the gap between rich and poor continues to grow, political authorities continue to wield more power and wars continue to displace large sections of society, and derogatory customary and cultural practices continue to classify certain groups of people as inferior. As the second-class and under-privileged categories continue to grow in size, we continue to create groups of persons in our societies who are deprived of humanity.

It is difficult to define in clear and succinct terms what vulnerable persons or vulnerable groups are. It is generally agreed, though, that this is the part of the population that often encounters discriminatory treatment or is in need of special attention and protection by the state, in order to avoid exploitation. Such discrimination or exploitation could be based on sex, race, religion, disability, health, or other such criteria. Vulnerability is often linked to, or associated with, poverty. Potentially vulnerable persons or groups include women, children, the elderly, persons with disabilities, and persons with a serious illness or health condition. The list can never be closed.

Vulnerability is a challenge in itself, but it leads to more complex challenges. Vulnerable persons might have little education or knowledge of the law. They will not be able to surmount the practical hurdles of state institutions, including tribunals, and they will not be able to bribe their way through. They will likely not be able to afford quality justice. What adds to their plight is that legal-aid services are limited in most jurisdictions – as is the case in Malawi.

The legal framework for the protection of vulnerable groups in Malawi

In Malawi, the Fundamental Principles of the Constitution provide – in section 13 – for gender equality, support for the disabled, full development of children, and support for the elderly. The plight of women, children, the elderly, and persons with disabilities is therefore recognised and clearly prioritised as an area of concern. Beyond the Fundamental Principles, the Constitution also attends to inequality in section 20, and provides:

> (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.
>
> (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

The Constitution then provides for access to justice and legal remedies for all, ideally for the vindication of their rights. It states in section 41:

> (1) Every person shall have a right to recognition as a person before the law.

(2) Every person shall have the right of 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 or her by this Constitution or any other law.

Pursuant to section 20(2) of the Constitution, legislation has been passed in Malawi providing for the legal needs of specific groups in society, and further articulating their respective rights. Apart from providing for women's rights in section 24 of the Constitution, a comprehensive law has been enacted for the prevention of domestic violence, the Prevention of Domestic Violence Act,[3] the victims of which are mostly women. While the Constitution provides for the rights of children in section 23, alongside it is a comprehensive law on children in conflict with the law, the Child Care, Protection and Justice Act.[4]

Beyond the Constitution itself and related domestic legislation, Malawi is party to most major international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). These international conventions have long been part of the law that is enforceable in Malawi, by virtue of section 211 of the Constitution and relevant pronouncements from courts at different levels, including judicial dicta from *In Re David Banda*[5] and *In Re Chifundo James*,[6] which are discussed later.[7]

As stated earlier, Malawi can take pride in the extensive laws relating to the protection of rights, including the rights of some vulnerable groups. Obviously the remaining question is whether we can also achieve the vindication, protection, and enforcement of the rights of vulnerable groups. This question is much more about the role of law enforcement; in that regard, courts must play a pivotal and lead role.

The role of courts in protecting the rights of vulnerable groups

Storme[8] conceptualised the role of the judiciary as a state power, with three essential functions:

(1) To take an active part in the process of developing the law, whilst at all times doing so with the necessary degree of restraint.

(2) To have as its supreme function the safeguarding and protection of human rights, especially in terms of the relationship between citizens and the authorities.

3 Act No. 5 of 2006.

4 Act No. 22 of 2010.

5 [2008] MLR 1.

6 MSCA Adoption Appeal No. 28 of 2009.

7 For further discussion on these cases, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

8 M Storme "Law in Motion" *General Reports and Conference Papers*, Part 1, First World Law Conference International Encyclopaedia of Laws (1996) 133. These functions are also contained in the Revised International Standards of Judicial Independence, International Association of Judicial Independence and World Peace (2008) at para. 1.2.

(3) To be the ultimate bulwark in maintaining the rule of law.

The basic role of courts is to interpret and uphold national law, and international law where the latter is applicable. Courts must preserve their independence and impartiality in the administration of justice for all manner of litigants who approach the corridors of justice. In determining cases before them, courts must have reference only to relevant facts – as far as they can be established – and the merits of the facts in relation to the law. Justice, however, calls for much more. Judges must understand all the facts and also the attendant circumstances of the parties appearing before them. They must have the faculty and skill of immediately assessing the ability and capacity of those appearing before them, and must be ready to control the proceedings accordingly. It is the singular duty of the court to ensure equality as different sectors of our society try to fathom the thicket of intricate procedures and evidential burdens.

Beyond procedural and evidential complexities are the decisions we make. Obviously courts must make decisions that conform to the law. While they do so, it is inevitable that the decisions must find justification in the facts and the circumstances of the case. However, Aldisert[9] contends that judges may occasionally make decisions for extra-legal reasons – sometimes for personal reasons and even based on petty motivations. Sometimes judges make decisions based on over-riding motivations that cannot be publicly stated. But he considers that whatever the motivation, decisions must have justification; there must be a public explanation for the decision; there must be a statement of the norms that contain the exposition of stated rules and appropriate principles of law; there must be a statement that originates with the judge's choice of the legal precept, through the interpretation of that choice; and finally the decision must have application to the cause at hand. It is critical, however, that the private reasons for the decision be the same as those publicly stated in justifying them. Finally, he asserts that the decisions judges make will survive and endure only when they reflect desirable current public opinion or are congruent with contemporary community moral standards.

Returning to the subject at hand, contemporary community moral standards uphold human rights for all, irrespective of the individual's station in life. We must acknowledge that people, be they vulnerable or not, would rather not spend their time litigating in courtrooms, which are already intimidating, boring, and tiresome. Citizens would rather get on with their lives than spend valuable time in courts waiting to be patronised by intricate institutional designs, complex procedures, and gruelling examinations and cross-examinations, and in the end be subjected to the anxiety of waiting for the unknown, as judges take their time to come up with loquacious and legalistic decisions.

Vulnerable persons are already disadvantaged, and their lives are already concerned with the more pressing needs of survival. The last thing they think of is being in court. In the event that they are forced to go to court, it would be adding injury to misery. The first thing for them is to find the court, then how to approach the court, and finally there is the difficulty of explaining why they have come to court – if given proper notice by the system.

9 See RJ Aldisert *The Judicial Process, Text, Materials and Cases* Second Edition (1996) 604-676.

It is here that the role of courts becomes critical. It is suggested that as a starting point, courts must adapt to the institutional needs of vulnerable groups. It would include assessing the following: the location and proximity of the courts to vulnerable groups; the physical structure of the courts themselves; the reception arrangements at the courts; the procedures for complaint; and the procedures for trials themselves. More importantly, it is about the redress that vulnerable groups will get.

The trend of decisions taken by courts in Malawi – decisions relating to or having a bearing on some sections of vulnerable groups – are now briefly analysed.

The trend of court decisions

Public opinion, in the media and public discourse generally, is that our courts have not accorded particular attention to the plight of vulnerable groups. It is felt that there is undue adherence to procedural technicalities and high evidential burdens. It is further felt that decisions by courts in Malawi lack adequate recognition of the circumstances of the vulnerable generally, but in particular women and girls. Is there truth in this perception?

Sathe,[10] a leading commentator on judicial activism, commended the court's proactiveness in India thus:

> The court developed a new paradigm of judicial process consistent with the rights discourse it has generated through judicial activism. The new paradigm envisions an affirmative, proactive role of the court for facilitating access to justice for those who do not possess either the know-how or the resources for invoking the judicial process on their behalf and for ensuring greater public participation ... The new paradigm was for a court that has to protect the rights of the poor and illiterate people of India and to ensure that the rule of law was observed by citizens as well as rulers.[11]

Sathe's comments are specifically about public interest litigation, but also generally about a proactive court system. This is an area where courts in Malawi seem to be unprepared.

As mentioned elsewhere,[12] the nature of public interest litigation is the intention to uphold the public interest by providing socio-economic and political justice to a large number of people who are poor, lacking in knowledge of the law, socially and economically deprived, and who would not normally approach the court. It is based on the notion that individuals are equal and should enjoy their fundamental rights equally, irrespective of their poverty, illiteracy, and lack of knowledge.

In *Malawi Human Rights Commission v Attorney General*,[13] the High Court of Malawi stated:

> I think it is important to press home certain realities. In constitutional and human rights matters, individual human beings may be claimants both in their own right and as representatives of groups.

10 SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* First Edition (2002).

11 *Id* 201.

12 A Nyirenda "Public Interest Litigation: Procedure and Available Remedies" Paper presented at Chancellor College workshop on Public Interest Litigation.

13 [2000-2001] MLR 246.

> While individuals are of course, always the ultimate deprivees, they do not necessarily become active, or effective claimants in seeking remedy against deprivation or non-fulfilment. In many communities, many people who suffer deprivations or non-fulfilments are conditioned or forced to endure them in silence. They may be too intimidated, uninformed, powerless or resourceless to make claims. They become too used to being pushed around and accepting without questioning that which "they", in authority, have decided or done. In these circumstances, the relevance of public interest litigation cannot be over-emphasised ... [I]n such cases, if there should spring up a public-spirited individual or body and seek the court's intervention against legislation, decisions or actions that pervert the Constitution, the court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise to the occasion and grant him standing.[14]

In *Registered Trustees of the Public Affairs Committee v Attorney General and Another*,[15] the High Court supported the above approach, and explained:

> The answer on *locus standi* on the issues raised in the current Originating Summons will not come from how Judges in America, in England, in South Africa or elsewhere in the world construe it depending on their peculiar traditions and/or special wording in their Constitutions or Statutes, although that might still provide us a guide on the trend generally applicable. I do believe that the answer we need on this issue and in this case will come directly from our own Constitution, which after all is the document that contains the wishes and aspirations of our people. The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.
>
> ...
> I find, accordingly, that limiting "sufficient interest" under section 15(2) of the Constitution to only a person or only a group of persons that have a personal grievance does not take full account of the full breadth of the provision in question, in that it omits the fact that the provision also gives this right of access to the Courts to persons merely interested in protecting the rights (not necessarily their personal rights) and that apart from seeking remedies for grievance, the provision is open enough to allow promotion of rights well apart from protection of those rights.[16]

These two decisions did not have an opportunity to have any real impact. Soon thereafter there was a decision by the Supreme Court of Appeal of Malawi in *Civil Liberties Committee v Minister of Justice and Another*.[17] The Court opined:

> We wish to make it very clear that there is no reason to make apology for affirming the standard of *sufficient interest* for determining *locus standi*, in the field of public law. It is the standard which the eminent Lord Justices in England use: see *Regina v Secretary for Foreign and Commonwealth Affairs ex-parte World Development Movement.* It is true that the concept has undergone some reform and what constitutes sufficient interest is liberally interpreted. Nevertheless, according to the *World Development Movement* case a plaintiff is still required to establish *locus standi* by meeting the criteria laid down in that case; that criteria includes the absence of another responsible challenger

14 *Id* 255.
15 [2002-3] MLR 333.
16 *Id.*
17 [2004] MLR 55.

> and the role of the plaintiff in relation to the subject matter of the action. We take the view that that is fundamentally different from the total abandonment of the concept of *locus standi*, a result which has been achieved by Chipeta J's literal interpretation of the words *any person* contained in section 46(2).
>
> The concept of *locus standi*, expressed in terms of *sufficient interest, special or substantial interest* or existence of a *legal right or interest* in the outcome of a suit should not be misunderstood as failure to promote or respect human rights. Respectable democracies renowned for their respect of human rights such as United States of America, some Commonwealth countries including Australia and a number of countries which are parties to the European Convention on Human Rights and Fundamental Freedoms require *locus standi* expressed in the standard as earlier discussed. Would it be sensible to suggest as Chipeta, J does that the judiciaries in these countries cling hard to a *narrow, legalistic and pedantic* version of *locus standi*? The Americans are so proud of their version of *locus standi* that they entrenched it in their Constitution. There is no justification for us to be too shy to express frankly the idea of *sufficient interest* as a standard for *locus standi* which our Constitution provides.[18]

This being the approach and attitude of the highest court of the land, we have obviously left behind the poor, women, the young, the elderly, persons with disabilities, and many in other vulnerable groups. These are voiceless people in our society whom our courts must deliberately and positively accommodate. Unless we, in appropriate cases, allow for well-meaning persons or institutions to champion a cause on their behalf, the plight of these groups will continue to elude us.

There are further signs in jurisprudence that suggest that courts in Malawi are not sufficiently responsive to the situation of the vulnerable. In *Nwangwu v Republic*,[19] the appellant was tried and convicted of incest. He had carnal knowledge of his daughter, aged four. In approaching sentence, the High Court observed:

> The events of this case will leave [the victim] maimed, dejected and crestfallen for the rest of her life to say the least.[20]

The High Court proceeded to uphold the sentence of 13 years imprisonment with hard labour. On appeal, the Supreme Court of Appeal, in considering the appeal against sentence, said:[21]

> We need not consider the severity of sentence ... It has been submitted, however, that the High Court erred in law in sustaining the sentence by attaching undue weight to its finding that the events of the case will leave the victim maimed, dejected and crestfallen for the rest of her life. Learned counsel said that this finding is shocking because it cannot be supported by the evidence whatsoever. We have ourselves read the record of the proceedings. We are unable to find evidence on which the finding was based. It was, therefore, misdirection on the part of the High Court which would have constituted an error on a matter of law appealable to this Court.[22]

The Supreme Court of Appeal upheld the sentence, however, because, in principle, it did not find

18 *Id* [original emphasis retained].
19 [2008] MLR 103.
20 *Id.*
21 *Nwangwu v Republic* MSCA Criminal Appeal No. 11 of 2008.
22 *Id.*

it appropriate to alter the sentence as a court of appeal.[23] There could be no doubting that the little girl child would grow to fear and be apprehensive of any guardian. There was evidence that her physical being had been violated. She would have to live with the memory that the violation was at the instance of her own parent. It is submitted that to refuse to see the consequences and implications of a gross violation of the rights of the vulnerable in this manner, is serious cause for concern regarding the role of courts in Malawi in protecting the rights of the vulnerable.

While there are these glaring instances of unsupportive decisions, it is not that courts in Malawi have abdicated their responsibility regarding the plight of vulnerable groups. There are a number of instances where courts have clearly recognised that vulnerable groups require special attention and protection. A few cases should demonstrate that commitment.

In *In Re David Banda*,[24] the High Court granted an application for adoption. This was a case of inter-country adoption. The Court interpreted the rather restrictive laws in the Adoption of Children Act[25] as to allow for inter-country adoption. At stake was the best interest of the child, whose mother died seven days after his birth. The other members of the immediate family, including his father, were materially deprived and were forced to leave the boy at an orphanage. *In Re Chifundo James*[26] and *In the Matter of the Adoption of Children Act and In the Matter of Teleza Misomali*[27] were also about inter-country adoption. The decisions rested on the paramount consideration of the rights of the children concerned and what was in their best interest.[28]

A few earlier decisions should also demonstrate that courts in Malawi have been conscious of the plight of vulnerable sections of society. The High Court case of *Kaseka and Others v Republic*[29] is a solitary voice and yet a very important breakthrough in our Court's jurisprudence on the rights of vulnerable women. In the case, police on night patrol in a certain township decided they would search rest houses. In a number of them they found women – and in some instances they were with male partners. Police arrested only the women and prosecuted them for idle and disorderly conduct, and they were convicted. On review of the matter, the High Court quashed the convictions. The Court warned against discrimination and stressed that there was no justification for thinking it was only the women who erred and not their male partners. The message was simple but resounding. We must never victimise women for who they are and, in the words of the fundamental principles of the Constitution of Malawi, all persons have equal status.

23 *Id.*

24 [2008] MLR 1.

25 Cap 26:01 of the Laws of Malawi.

26 MSCA Adoption Appeal No. 28 of 2009.

27 [2009] MLR 247 (HC).

28 For further discussion on these cases, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

29 [1999] MLR 116. For further discussion on this case, see K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

In sentencing the convict in *Republic v Cidreck*,[30] a case of rape, the High Court observed:

> The offence which the accused committed is very serious. Society requires protection of the law through a meaningful penal process in our courts ...[31]

Similar sentiments will be found in several cases involving sexual offences, which suggests that our courts are conscious of the predicament of women and girls.

Republic v Balala[32] is yet another important decision. Balala was a juvenile who was convicted of being a rogue and vagabond by a Magistrates Court. On review, the High Court affirmed:

> I have examined the facts which were presented before the magistrate's court. It is not very clear to me for what purpose the juvenile was found wandering about within the trading centre. When he was questioned by the police he said that he came to the northern region to look for employment. It is possible that the juvenile is a person who needs care and protection. He is a needy person. I am concerned that the charge of being a rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison.[33]

It is only fair to say from the few cases considered, that while there is still cause for concern, the courts in Malawi are making an effort to rescue vulnerable groups from hazardous circumstances and from situations of inequality and discrimination, and to place them in circumstances where their rights can be realised.

Conclusion

Courts will continue to be centre stage in the protection of the rights of vulnerable groups. While courts in Malawi are still grappling with and trying to come to terms with philosophy and jurisprudence on the protection of rights of vulnerable groups, it is significant that demonstrable strides are being made to uphold these rights. We live in a nation in which most of our citizens lack access to even basic necessities, live in abject poverty, and lack basic education. It is imperative that our courts continue to renew their transformative role and pay particular attention to the full realisation of rights of such citizens. The protection of rights of vulnerable groups is the solemn duty of our courts, lest we leave behind the greater part of our community.

30 [1995] MLR 695.

31 *Id.*

32 [1997] MLR 67. This case is also discussed in C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

33 *Id* 68.

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

Lovemore P. Chikopa SC JA[2]

Introduction

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

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

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

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

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

Other online dictionaries refer to judicial activism as:

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

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

2 Judge of the Malawi Supreme Court of Appeal; LLB (Hons) (University of Malawi).

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

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

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

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

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

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

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

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

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

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

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

8 *Id.*

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

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

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

12 MSCA Civil Appeal No. 32 of 1997.

13 [1950] SCR 88.

What are vulnerable groups?

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

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

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

The institution of marriage

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

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

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

15 Cap 25:01 of the Laws of Malawi.

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

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

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

Distribution of matrimonial property

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

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

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

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

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

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

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

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

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

Custody of children

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

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

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

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

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

25 MWHC Civil Appeal No. 21 of 2008.

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

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

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

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

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

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

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

Maintenance

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

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

Procedure

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

Sexual offences

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

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

31 [2007] MWHC 8.

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

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

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

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

Conclusion

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

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

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

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

THE ROLE OF THE JUDICIARY AND THE LEGAL PROFESSION IN PROTECTING THE RIGHTS OF VULNERABLE GROUPS IN BOTSWANA[1]

Dr Oagile B. K. Dingake J[2]

Introduction

In this paper, I propose to focus on key issues relating to the rights of women, persons with disabilities, children, and sexual minorities, and what I perceive as the role of the judiciary and the legal profession in advancing the rights of these social groups. These groups of people – as human beings – are entitled to enjoy all the fundamental rights and freedoms to which every other human being is entitled. As such, persons that fall within these groups have a right to be treated equally. This therefore puts the right to equality at the centre of the discussion.

This paper explores the emerging jurisprudence on the rights of women, persons with disabilities, children, and sexual minorities to be treated equally and not to be unfairly discriminated against. To this end, the paper interrogates the role of the judiciary and the legal profession in selected jurisdictions in advancing the right to equality of these groups. The meaning of the right to equal protection of the law under the Botswana Constitution is also discussed.

Emerging jurisprudence on the rights of women, persons with disabilities, children, and sexual minorities

Inspired by the Universal Declaration of Human Rights,[3] among other sources, the courts have moulded a coherent body of jurisprudence (particularly in the last century) that asserts, unequivocally, that all human beings are equal.

Article 1 of the Universal Declaration of Human Rights proudly proclaims that all human beings are born free and equal in terms of dignity and rights.

At its core, the principle of equality "communicates the idea that people who are similarly situated in relevant ways should be treated similarly."[4] According to the principle of equality, "no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than against others

1 Keynote Address presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana, on 28 and 29 March 2014.

2 Judge of the High Court of Botswana and the Residual Special Court of Sierra Leone; LLB (University of Botswana), LLM (London), PhD (University of Cape Town).

3 See http://www.un.org/en/documents/udhr/index.shtml.

4 *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 64. The High Court decision was appealed to the Court of Appeal. The Court of Appeal judgment can be found at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf.

who belong to other groups."[5] Persons that fall under the social cluster of women, children, persons with disabilities, and sexual minorities are human beings, just like persons who fall under any other social group, and the principle of equality therefore requires that they be treated similarly. Emerging jurisprudence has, however, cautioned that a distinction must be drawn between formal and substantive equality.[6] Formal equality simply requires sameness of treatment and asserts that the law "must treat individuals in like circumstances alike".[7] On the other hand, substantive equality "requires the law to ensure equality of outcome".[8] Substantive equality, therefore, allows disparity of treatment, in order to achieve the goal of equality.[9] Thus, in order to achieve substantive equality, a previously disadvantaged group of people may be lawfully given preferential treatment, in order to address the substantive inequalities that already exist. Due to the conservative and patriarchal nature of our society, women, persons with disabilities, sexual minorities, and (to some extent) children, are some of the social groups considered to be historically disadvantaged.

Early efforts to bring sexual minorities into the human rights discourse have met with some resistance from conservative elements, who have used religion and culture to frustrate such efforts. It has only been in recent years that scholars and some United Nations experts, have reached agreement that it is untenable to treat sexual minorities as if they are not human.

In the South African Constitutional Court, Ackerman J in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*,[10] stated the following on the topic of criminal prohibition on sodomy:

> [I]t punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[11]

The Court thus unanimously concluded that the common law crime of sodomy was inconsistent with the Constitution, and, accordingly, invalid.

5 *Id* at para. 72.

6 See "The Right to Equality and Non-Discrimination" Icelandic Human Rights Centre available at http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/ humanrightsconceptsideasandfora/substantivehumanrights/therighttoequalityandnondiscrimination/.

7 See *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 65.

8 *Id*. See also "*The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality*" Equal Rights Trust 4 (2007) available at http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf.

9 *Id.*

10 (1999) (1) SA 6 (CC).

11 *Id* at para. 28.

The Botswana Court of Appeal, in *Kanane v The State*,[12] seemed to take a different view to the South African case cited above. Their decision has been criticised as retrogressive in a piece crafted by Chilisa, in one of the journals published by the Botswana Network on Ethics Law and HIV/AIDS (BONELA) a few years ago.[13]

As anyone familiar with the discourse on human rights would easily testify, majoritarian preferences can often be harsh and oppressive to minorities who exist outside the mainstream. It is the function of those charged with dispensing justice, consistent with the test and logic of the Constitution, to come to the rescue of the minorities and to validate their humanity – as long as, in doing so, no prejudice is done to the fundamental rights of any person or group. Equality does not mean uniformity. It also recognises divergence, even if such divergence may be uncomfortable to some.

The role of the judiciary

The theoretical perspective that informs my discussion in this section may be somewhat controversial to some, but it is intellectually and philosophically defensible. It is that judges make law.

Reid LJ, the highly esteemed luminary of the British bench, considered it a fairy tale to think that judges do not make law. This standpoint is controversial and is not accepted by all jurists. In academia, the debate about whether judges make law or not, rages on. Concepts such as separation of powers, counter majoritarian difficulty, and judicial activism – as well as numerous jurisprudential theories – are employed to interrogate the propriety of such law-making and how judges should (or should not) perform their law-making function.

While it can hardly be contested that democratically-elected legislatures are the primary law-making bodies, it cannot be denied that, in a limited way, judges also make law. For judges, law making is a refined art, one that accounts for past legal precedent and one that is based on a clinical and informed analysis of what the law 'is' – rather than what it 'should be'. Tragically though, judges make law, even when their decisions are inelegant, incoherent, or inconsiderate of the relevant legal sources, arguments, and implications. Even wrongly-decided decisions are binding.

In the process of making law, in the manner I have suggested above, judges need to be informed and courageous. They should not be "timorous souls", fearful, or biased.

In one of his most celebrated dissents at the Court of Appeal of England, the legendary common law jurist, Denning LJ, suggested the following classification of judges: "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required."[14] According to Denning LJ, the progressive development of the law is to be credited to judicial creativity and the courage of bold spirits. He disapproved of "timorous souls" who showed blind allegiance to existing rules and precedent – the "dead hand of the past" – and, in so doing, served a mechanical, not a constructive,

12 (2003) (2) BLR 67.

13 MM Chilisa "Two Steps Back for Human Rights: A Critique of the *Kanane* case" (2007) 1(1) *Botswana Rev of Ethics, L & HIV/AIDS* 42, 45.

14 *Candler v Crane, Christmas & Co.* (1951) 2 KB 164, 178.

role in the law.[15] He was of the considered view that, if "[t]he powerful still abuse their powers without restraint,"[16] it is essentially because of the dominant influence of "timorous souls"; for, according to him, bold spirits will not allow "any rule of law which impairs the doing of justice to stand". Denning LJ saw law as an instrument for doing instant justice, in accordance with the facts and circumstances of each case.

Denning LJ's view that judges must be "bold spirits" and not "timorous souls", has left an enduring imprint on conceptions of the judicial role held by post-colonial Africa's professional and academic lawyers. Nowadays, the term "timorous souls" is often used by contemporary Africa's common law lawyers to describe a judiciary that appears unable to use judicial power to restrain or counter the excesses of the legislative and executive branches. An assessment of the performance of African judiciaries in the post-colonial period – specifically with regard to judicial review of legislative and presidential action – often blames judicial timidity or executive mindedness for the authoritarian turn in Africa's political governance in the early decades after the end of colonialism.[17]

Executive mindedness undermines the people's confidence in the independence of the judiciary and has often been condemned by judges. For instance, Atkin LJ, in the famous case of *Liversidge v Anderson*,[18] had this to say about it:

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive.[19]

It is important that judicial officers, in interpreting the law, should never lose sight of the fact that the final cause of law is the welfare of society – of which women, children, and sexual minorities are part.

Cardozo J of the United States, in his much-quoted treatise *The Nature of the Judicial Process,* stated that:

> The final cause of 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 we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by mercy". That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that the judges are commissioned to set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.[20]

15 MD Kirby J "Lord Denning: An Antipodean Appreciation" (1986) 1 *Denning LJ* 103.

16 A Denning *The Discipline of Law* First Edition (1979) 315.

17 H Kwasi Prempeh "Neither 'Timorous Souls' nor 'Bold Spirits': Courts and the Politics of Judicial Review in Post-Colonial Africa" (2012) 45 *Verfassung und Recht in Übersee* VRÜ 157, 158 available at http://www.vrue.nomos.de/fileadmin/vrue/doc/Aufsatz_VRUE_12_02.pdf.

18 (1942) AC 206.

19 *Liversidge v Anderson* (1942) AC 206, 244.

20 BN Cardozo "Lecture II: The Methods of History, Tradition and Sociology" *The Nature of the Judicial Process* Yale University

With the above perspective in mind, what then is the role of the judiciary in advancing the equal treatment of these previously disadvantaged groups, so that they fully enjoy all their fundamental rights and freedoms as human beings?

Broadly speaking, the role of the judiciary is to ensure that the Constitution is enforced. Within the human rights discourse, the judiciary has an enormous task of protecting and advancing human rights.[21] This kind of role requires the judiciary not only to interpret the law, but sometimes to develop the law in a manner that promotes the enjoyment of fundamental rights. Today, most of the existing constitutional democracies – including the Republic of Botswana – require the judiciary to interpret and develop common law and customary law, as well as legislation, in a manner that promotes the spirit, purport, and object of the Constitution, particularly the Bill of Rights.[22] As such, it is the role of the judiciary to interpret and, under certain circumstances, develop the law in a fashion that ensures maximum protection and the widest possible enjoyment of the principle of equality by women, persons with disabilities, children, and sexual minorities.

It is trite law that in interpreting the constitutional guarantees of human rights and freedoms, including the right to equality, the court must adopt a generous approach to constitutional construction.[23] Thus, when interpreting the constitutional right to equality, the judiciary must opt for an interpretation that gives full effect to that right.

In *Smith v Attorney General, Bophuthatswana*,[24] Hiemstra CJ said: "The Bill of Rights is a declaration of values and a statement of the nation's concept of the society it hopes to achieve. It is the duty of the court to make it identifiable as such". Equally, I submit that the provision of the right to equality, under our Constitution, signifies the aspiration of our society to break from a past where women, persons with disabilities, children, and sexual minorities were treated as less human. Through the provision of the constitutional right to equality, our society seeks to advance to a stage where all human beings are treated equally. It is the duty of the judiciary to ensure that such a vision is realised through the proper interpretation of the law.

When interpreting constitutional provisions, including those that relate to the right to equality for previously disadvantaged persons, the judiciary must consider international law as an important guide. International law provides a framework within which the provisions under the Bill of Rights can be evaluated and understood.[25] The judiciary must also consider international law when interpreting not just the constitutional provisions, but legislation and other laws as well. An interpretation that is in line with international law ought to be preferred to that which conflicts with our country's commitments under international law. Botswana is a member of "the

Press (1921) (internal footnotes omitted).

21 L Olivier "Constitutional Review and Reform and the Adherence to Democratic Principles in Constitutions in Southern African Countries" (2007) 31-56, available at http://www.afrimap.org/english/images/documents/OSISA_constitutional_review.pdf.

22 *Id.*

23 See *Dow v Attorney General* (1991) BLR 233 (HC), 234.

24 (1984) 1 SA 196 (BSC) 199.

25 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para. 35. For a more detailed discussion on this case and the relevance of international law, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."[26] This principle is quite permissible under section 24 of the Interpretation Act.[27] Thus, in order to deduce the correct meaning of the right to equality for persons in these social groups, the judiciary must look at international agreements such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities – to mention but a few. The courts must also explore customary international law.

As mentioned earlier, the role of the judiciary is not just to interpret the law, but, under certain circumstances, to develop the common law and customary law – and they ought to do this in a manner that gives effect to the spirit, purport and object of the Bill of Rights. In this task, the courts must again refer to international law (both treaty law and customary international law) for guidance, in order to determine the content of constitutional provisions which provide for the right to equality for women, persons with disabilities, children and sexual minorities.

I must stress that given the history of our society and our culture, the judiciary has a huge task to develop customary law so that it is aligned with the constitutional right to equality – and international law is helpful in that regard.

Furthermore, in performing the role of interpreting constitutional and other legal provisions, as well as developing customary and common law, the judiciary cannot afford to ignore similar decisions made by foreign courts. In the Botswana High Court case of *Mmusi and Others v Ramantele and Another*, I held that:

> In my considered opinion, gone are the days, if ever they were, when decisions of other countries in any common law countries are to be frowned upon as irrelevant. It is of course trite that the decisions of those courts are only persuasive, given that they may have been rendered under circumstances then prevailing in those countries. Those decisions may give the most needed guidance and the wisdom to be derived from them must always be understood in the proper context.[28]

The role of the judiciary is intrinsically linked to that of the legal profession. The legal profession has an essential role to play in protecting fundamental human rights – a role that becomes more pronounced when dealing with the most vulnerable groups in our society. Although there is still some perceptible reluctance by many within our ranks across the world, and more particularly in Africa, to adjudicate alleged violations of vulnerable groups, as earlier defined, on the grounds that such issues fall within the power of the executive – such a reduced role for the judiciary appears increasingly anachronistic and particularly difficult to sustain in law.

26 *Attorney General v Dow* 1992 BLR 119 (CA) 154. This case is also discussed in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

27 Act No. 20 of 1984.

28 *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 61. This case is discussed in more detail in C Mushota Nkhata & F Kayumba Kalunga "Resolving the Tension between Gender Equality and Culture: Comparative Jurisprudence from South Africa and Botswana" in this publication.

Lawyers have a sacred duty to defend the human rights of all people without exception – bearing in mind, always that the issue of rights is not simply a matter of majoritarian preference. Just as a doctor has a sacred duty to preserve and prolong life, lawyers have a sacred duty to defend and protect the rights of all people – especially the rights of vulnerable groups in our society. Lawyers must be fearless and smart crusaders in the field of the rule of law and human rights. This is important, because history has taught us that governments – even in those countries with eloquent constitutions – are somehow reluctant to honour human rights. There is therefore a duty on lawyers everywhere to take up their strategic positions and protect against any threat to trample upon human rights. In this task, they will, just like judges, find international human rights law very useful.

As we look around our complex world and towards the next millennium, it becomes obvious that the legal profession has many challenges to overcome. In order for us to live up to our mandate, there is a need for continuous reflection, and evaluation of actions and strategies. To this extent, it is professional associations of judicial officers and lawyers who have to take the lead.

Conclusion

In conclusion, I reiterate that the right to equality and freedom from unfair discrimination is the centrepiece of the enjoyment of fundamental rights by women, persons with disabilities, sexual minorities, children, and any other vulnerable or marginalised groups in our society. To this extent, I must register my agreement with Marumo J, in *Muzila v Attorney General*,[29] when he said that:

> History teaches us that the most callous and brutal of human excesses, the most immoral and degenerate of legal orders and the most wicked and dissolute of authorities have been founded on various versions of the notion of superiority and distinction on the part of those in a position to influence the course of events. Such debauched attitudes must never be permitted to take root in our society, and those of us who find ourselves in a position to influence, in whatever small way, public discourse and opinion must be firm and unapologetic in our denunciation of them and their adherents.[30]

It is the role of the judiciary and lawyers to ensure that no human being is treated less favourably because of their social standing in our society. To that end, the judiciary must advance the right to equality and other human rights through proper interpretation of the law and the development of common and customary law – and, in that process, the courts must be vigorous in exploring and using foreign and international law as a guide.

29 (2003) 1 BLR 471 (HC).
30 *Id.*

JUDICIAL DECISION-MAKING AND FREEDOM OF EXPRESSION IN ZAMBIA: THE CASE OF *PEOPLE V PAUL KASONKOMONA*[1]

Sunday B. Nkonde SC[2]

Introduction

There is no doubt that freedom of expression is absolutely necessary for the existence, preservation, and growth of a democratic society. It is with this in mind that I received, with great excitement, an invitation to present a paper relating to such an important topic to this judicial colloquium of men and women – who are looked upon by the public as having achieved distinguished careers as lawyers, or so excelled in matters of law as to merit their appointment to the bench.

To be clothed with judicial office requires that the decision-maker refuses to allow past experiences or prejudices, the opinions of litigant parties or the issues, or social, political, religious, or similar beliefs to influence judicial decision-making.[3]

Holmes J of the Supreme Court of the United States put it aptly in a tribute, upon the death of his brother Cardozo J:

> [I]nto our past have been woven all sorts of frustrated ambitions with their envies, and of hope of preferment with their corruptions, which long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man ...[4]

This paper discusses freedom of expression in Zambia, with particular reference to the recent *Kasonkomona* case. The outcome of the case suggests that the judicial virtue described above is very relevant to a discussion of the development of freedom of expression jurisprudence in Zambia.

Freedom of expression

In Zambia, freedom of expression, with limitations, has been a constant feature in the Bill of Rights of the various constitutions. Thus, the current Constitution[5] states in article 20(1):

> Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Protea Hotel, Chisamba, Lusaka, Zambia, on 27 and 28 February 2014.

2 Managing partner at SBN Legal Practitioners, Lusaka, Zambia.

3 See ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication for a discussion on the influence of personal views and experiences on judicial decision-making.

4 M Glendon *A Nation under Lawyers* (1996) 127, citing Learned Hand "Mr Justice Cardozo" (1939) 52 *Harv L Rev* 361, 362-63.

5 Constitution of the Republic of Zambia, 1996.

> and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

The limitations are set out in sub-articles 3(a) to (c):

> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision –
>
> (a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
>
> (c) That imposes restrictions upon public officers; and except so far as that provision or the thing done under the authority thereof, as the case may be, is shown not to be reasonably justifiable in a democratic society.

I do not foresee the constitutional provisions pertaining to freedom of expression being materially different in the near future.

In terms of case law, the importance of protected freedom of expression to the workings of democracy was significantly established by the High Court in *Wina and Others v Attorney General*.[6] This was a petition that challenged a directive issued by the President of Zambia restricting access to government-owned newspapers by opposition parties. This clearly was a matter steeped in politics, as Zambia was transitioning from one-party to multi-party politics at the time. Musumali J held*, inter alia*, that:

> The directive ... hindered the petitioners in the enjoyment of their freedom of expression, as they were prevented from publishing their opinions through Government newspapers. The directive was accordingly quashed.[7]

Much has been written by others on freedom of expression, especially pre- and post- the one-party system of government in Zambia. The recent *Kasonkomona* case can significantly add to the existing discussion on freedom of expression.

6 (1990-1992) ZR 95 (HC).

7 *Id* 96.

The *Kasonkomona* case

On 25 February 2014, N'gambi J delivered a landmark judgment in the case of *People v Kasonkomona*,[8] heard in the Subordinate Court at Lusaka. The case was refreshing because it tested the ambit of freedom of expression in relation to gay rights, a contentious subject in Zambia.

What Happened?

Paul Kasonkomona is a human rights activist, and is married with children. He has lived positively with the Human Immunodeficiency Virus (HIV) for fifteen years and has been using antiretroviral medication for eight years. On 7 April 2013, he appeared on Muvi Television – a private television station in Zambia – in a programme called 'The Assignment'. This is a popular programme that discusses important topical issues. The burning issue of the day was 'Gay or Human Rights.' Paul Kasonkomona's appearance in this programme was at the invitation of Muvi Television. The producers of the programme chose the topic, identified Paul as the guest, and prepared questions for him to answer. The topic was current because there was a new constitution-making process taking place at the time, and the topic was controversial in the Zambian context.[9]

Before the programme could even finish, the police arrived at Muvi Television Studios to apprehend Paul. However, Muvi Television staff did not allow the police inside the studios, where they wanted to see the Director of Programmes – so that, in the words of one of the police officers: "We can tell him (the Director of Programmes) that we are around and want to apprehend the person on the programme".[10] Paul was apprehended immediately after the programme finished and was detained by the police. His house was searched by the police for "suspected articles used in pornography or homosexual activities being concealed in his house." Among the articles found in the house and seized by the police were female condoms. Paul was charged with the offence of idle and disorderly conduct in terms of section 178(g) of the Penal Code[11] – a law whose roots can be traced to the Vagrancy Act, 1898 (UK), which amended the Vagrancy Act of 1824 (UK).

Section 178(g) of the Penal Code provides that:

> (g) Every person who in any public place solicits for immoral purposes ... are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine ... or to both.

The particulars of the alleged offence read as follows:

> Paul Kasonkomona, on 7th April 2013 at Lusaka in the Lusaka District of the Republic of Zambia, being a person in a public place namely Muvi Television Studios on a programme called "The Assignment" did solicit for immoral purposes for Homosexual rights to be respected in Zambia.[12]

8 CR No. 9/04/13 (SubCt). All pertinent documents in this case are available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/zambia-activist-defends-right-to-freedom-of-expression/.

9 The prosecution subsequently made much of the fact that the Preamble of the Constitution of Zambia declares that Zambia is a Christian nation and that under Christianity homosexuality is considered immoral. *People v Kasonkomona* CR No. 9/04/13 (SubCt), Prosecution's Submission on a Preliminary Issue Raised by the Defence (Accused) for Constitutional Reference 5.

10 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Accused's Submissions on No Case to Answer 41.

11 Cap 87 of the Laws of Zambia.

12 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Ruling on Preliminary Issues for Constitutional Reference R1.

Despite the offence being a misdemeanour, Paul was denied a police bond and was only admitted to bail by the Subordinate Court after being in detention for four days.

Procedural History

During the course of the Subordinate Court proceedings, Paul Kasonkomona applied, within the terms of article 28(2)(a) of the Constitution of Zambia, to the Subordinate Court for a constitutional reference for determination by the High Court of, *inter alia*, the issue that section 178(g) of the Penal Code is unconstitutionally vague, unconstitutionally overbroad, and contravenes article 20 of the Constitution of Zambia.

A law is unconstitutionally vague if a reasonable person cannot tell what is allowed and what is not allowed. In the case of *Connally v General Construction*,[13] the United States Supreme Court stated that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning".[14]

Thus, in the case of *Papachristou v City of Jacksonville,*[15] the United States Supreme Court held that a vagrancy law was void because of vagueness:

> [B]oth in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" ... and because it encourages arbitrary and erratic arrests and convictions.[16]

In the Namibian case of *Fantasy Enterprises CC T/A Hustler the Shop v Minister of Home Affairs and Another*,[17] the High Court held that:

> [T]he words employed in a penal provision which limits the exercise of a fundamental freedom must at least provide an intelligible standard from which to gain an understanding of the act enjoined or prohibited so that those to whom the law apply know whether they act lawfully or not.[18]

In relation to constitutional reference, article 28(2)(a) of the Constitution of Zambia provides that:

> If in any proceedings in any Subordinate Court any question arises as to the contravention of any of the provisions of articles 11 to 26 inclusive,[19] the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

On 5 June 2013, the Subordinate Court referred for determination by the High Court the question of "whether the appearance by [Paul] and the views expressed by [him were] protected under the

13 (1926) 269 US 385 (SC).

14 *Id* 391.

15 (1972) 405 US 156 (SC). This case is also discussed in C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

16 *Id* 162.

17 Case No. A159/96 (HC).

18 *Id.*

19 Part III of the Zambian Constitution contains provisions pertaining to Protection of the Fundamental Rights and Freedoms of the Individual.

ambit of article 20 or whether section 178(g) is constitutional."[20]

On 15 August 2013, the High Court of Zambia, sitting at Lusaka, delivered a ruling touching on the constitutional issue, and concluded by holding that:

> A review of the two relevant pieces of legislation shows that section 178(g) of the Penal Code refers to a person being "idle and disorderly by soliciting for immoral purposes" whereas article 20 of the Constitution refers to the fundamental freedoms of expression. I am of the considered view that the subject contained under section 178(g) of the Penal Code is not the same as that contained in article 20 of the Constitution. The two issues are different. I therefore find that there was no constitutional issue concerning the contravention of fundamental rights of the accused and there was no ground for the court below to make this reference to the High Court.
>
> I therefore send this file back to the Senior Resident Magistrate in the Subordinate Court to deal with the matter before him.[21]

Thereafter, trial proceeded and the prosecution closed its case after calling six witnesses. Among the witnesses was a reverend of the Evangelical Fellowship of Zambia – one of the church mother bodies. There was also evidence that, prior to transmission of the programme, the Deputy Minister of Home Affairs (the Ministry in charge of the police and internal security) had issued a statement that people like Paul Kasonkomona risked being arrested.

The arresting officer from the Zambia Police Service summarised the case for the prosecution against Paul in the following piece of evidence:

> On 7th April 2013, on a Sunday, [I] reported on duty at Woodlands Police Station [Lusaka] and whilst on duty at the office, at around 18:30 hours, there was news on Muvi Television that they would conduct a programme called the Assignment, where one person was going to talk about gay rights. It was going to be aired at 19:00 hours on Sunday. I got interested and decided to wait for the programme to start. When it started on the screen of Muvi, then appeared Costa Mwansa [the presenter] and a man I came to know as Paul Kasonkomona. An introduction was made by Costa Mwansa that the programme was not of the view of Muvi Television, but the view of the interviewee. The public would hear Paul's views on gay rights. The programme started and Paul introduced himself as a Project Co-ordinator on behalf of gay rights and homosexuals. As the programme continued, I realised as a police officer that the said Paul was soliciting for immoral purposes, which is against the laws of Zambia.[22]

It was submitted, *inter alia*, on behalf of Paul Kasonkomona, that the manner in which the state was seeking to interpret and apply section 178(g) was wrong, and so broad that it violated Paul's fundamental right to freedom of expression; and that the police's use of section 178(g) to target Paul Kasonkomona as an activist was a perfect example of arbitrary use of section 178(g).

The defence referred the Court to the case of *Kabwe and Chungu v Sakala, Chitengi, and the Attorney General*,[23] in which the Supreme Court of Zambia pronounced on the interpretation of

20 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Ruling on Preliminary Issues for Constitutional Reference R6.

21 *People v Kasonkomona* HPR/05/2013 (HC) 5-6.

22 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Accused's Submissions on No Case to Answer 40.

23 Judgment No. 25 of 2012 (Appeal No. 152 of 2001) (SC).

fundamental rights, as follows:

> The provisions conferring the rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, any derogation of the rights will usually be narrowly or strictly construed.[24]

The defence also referred to the provisions of international instruments that Zambia has ratified to assist the Court in interpreting the constitutionally protected right to free expression. The Court was referred to the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Declaration of Principles on Freedom of Expression in Africa (promulgated by the African Commission on Human and Peoples' Rights).

In the Zambian case of *Longwe v Intercontinental Hotels*,[25] Musumali J noted the relevance of international law, stating:

> [R]atification of such [instruments] by a nation State without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.[26]

On 25 February 2014, after over ten months of trial, the Subordinate Court found that Paul Kasonkomona had no case to answer and he was accordingly acquitted[27]. In acquitting him, the Subordinate Court made fundamental observations in relation to freedom of expression – starting with a quote from *Whitney v California*[28] in the United States Supreme Court:

> Justice Brandeis of the United States Supreme Court eloquently stated the importance of freedom of expression, when he observed in *Whitney v California* that:
>
> > "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government."[29]

24 *Id* 30.

25 (1993) 4 LRC 221 (HC). This case is discussed in more detail in L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

26 *Id.*

27 The state has appealed the acquittal and, at the time of publication, the appeal has not yet been decided.

28 (1927) 274 US 357 (SC).

29 *Id* 375.

The Subordinate Court then went on to state, *inter alia*, that:

> [F]rom the evidence on the record the accused was not engaging anyone to practice homosexuality. What I heard was that he was advocating for the rights of those already practicing it to be protected. By way of analogy, if someone was to go on TV and advocate that the law on defilement should be amended will they be soliciting for immoral purposes? Or if someone was to engage the public discussing that the death sentence should be abolished, will they also be soliciting for immoral purposes? The answer is not. It is through debate that people share information and ideas whether good or bad.[30]

In these few passages the Subordinate Court exhibited judicial qualities of detachment and disinterestedness in its decision-making – in a case which had clearly been surrounded by religious, social, and political connotations[31].

Conclusion

The development of freedom of expression jurisprudence in Zambia has not been a constant feature of Zambian case law. In terms of the judiciary, freedom of expression has been developed and will continue to be developed by men and women who are "exempt from the handicap" of their past experiences or prejudices, the opinion of the litigant parties or the issues, and social, political, religious, or similar beliefs; men and women who are "runners stripped for the race". These men and women also ultimately mirror the independence of the judiciary.

30 *People v Kasonkomona* CR No. 9/04/13 (SubCt) R10.

31 A similar finding was made by the High Court of Botswana in the case of *Rammoge and Others v Attorney General*, Case No. MAHGB-175-13, where the Court ordered that the refusal to register an organisation which lobbies for the rights of gays and lesbians violated their rights to equal protection of the law, and freedom of expression, association and assembly. The High Court held that: "In a democratic society asking for a particular law to be changed is not a crime, neither is it incompatible with peace, welfare and good order (para. 23) ... Lobbying for legislative reforms is not per se a crime. It is also not a crime to be a homosexual (para. 58)."

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

Kenan T. Manda J[1]

Introduction

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

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

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

The situation in Malawi prisons

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

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

3 *Id.*

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

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

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

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

In most of the prisons, people are spending their entire sentences sleeping in a sitting position, in what are now commonly known as *shambas*.[8] *Shamba* is a word used to describe the space in the centre of a prison cell which the prisoners would normally use as a passage to go to the lavatories during lockup time. However, because of the limited space and congestion, this space is used by prisoners as a sleeping area. When we talk of congestion in a Malawi prison it means, for example, that a cell that would normally house 60 inmates is housing 200.[9] Ironically, the Swahili meaning of the word *shamba* is a small plot used for farming. Indeed, it is the view of most prisoners in Malawi that they are meant to 'work' in the *shambas*, because they can hardly sleep and if anybody needs to go the toilet during the night, they cannot do so and usually are forced to wet or soil themselves. Furthermore, when prisoners in the *shamba* are released from their cells every morning, they do not have the energy to do anything else and spend the entire day trying to catch up on sleep. Clearly these prisoners cannot effectively participate in any reformation or rehabilitation programmes. Rather, it could well be that these harsh prison conditions will make such prisoners grow bitter, which might increase the rate of recidivism.[10]

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

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

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

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

9 *Id.*

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

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

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

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

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

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

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

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

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

The role of the courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Courts and the right to health of prisoners

Ramcharan[26] once stated that the way in which society treats its vulnerable members is a reflection of its social health and conscience: prisoners are under the control of their jailers and therefore at their mercy. In view of this, Ramcharan stressed that it is important that national, regional, and international norms and policies that safeguard the human rights of prisoners be promoted and fully protected. It is indeed imperative for the courts in Malawi to realise that prisoners are actually a vulnerable group, as they do not have a say about their situation while in prison. In this regard, it was encouraging to note that the Constitutional Court decided that prisoners in Malawi have the right not to be subjected to torture and cruel, inhuman, and degrading treatment or punishment.[27]

24 Cap 8:01 of the Laws of Malawi.

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

REALISING THE FULL POTENTIAL OF CIVIL AND POLITICAL RIGHTS FOR MARGINALISED POPULATIONS IN AFRICAN COUNTRIES

Priti Patel[1]

Introduction

Socio-economic rights have long been guaranteed under international and regional treaties. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, provided for the rights to work, health, and education, among others. These rights were given more detailed content in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in 1976. Regionally, the African Charter on Human and Peoples' Rights (African Charter) guarantees a number of socio-economic rights, including the rights to work, health, and education – which are guaranteed under articles 15, 16, and 17, respectively.

Forty-eight countries in Africa have ratified the ICESCR, meaning that they have agreed to be bound by the rights guaranteed under the treaty.[2] Furthermore, all but one African country has ratified the African Charter.[3] Despite this apparent willingness to be bound by the socio-economic rights guaranteed under international and regional treaties, very few countries in Africa provide for such rights in their constitutions.

Constitutions in African common law jurisdictions clearly provide for a range of civil and political rights – though in some cases the full realisation of those rights can be restricted. For example, in Botswana and Lesotho the right to be free from discrimination has significant exceptions.[4] In the case of Botswana, the exceptions have been interpreted narrowly, while in Lesotho they have been interpreted broadly.[5] However, many constitutions in Africa do not clearly provide for socio-economic rights.[6] To the extent that they do, they are enumerated under the directive principles section, and the principles embodied in that section have been interpreted by some courts as being unenforceable.[7]

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2 Status of Ratification of the ICESCR as at 10 July 2014, Office of the High Commissioner for Human Rights, available at http://indicators.ohchr.org/.

3 Status of Ratification of the African Charter, available at http://www.achpr.org/instruments/achpr/ratification/. South Sudan has not yet ratified the African Charter.

4 See Constitution of Botswana, 1966, section 15 and Constitution of Lesotho, 1993, section 18.

5 Compare *Mmusi and Others v Ramantele and Others* Case No. CACGB-104-12 (CA) and *Masupha v Senior Resident Magistrate for Subordinate Court of Berea* Case No. 29 of 2013 (CA).

6 For a list of African countries where socio-economic rights are justiciable and where they are not, see D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 258.

7 See Constitution of Malawi, 1994, section 13 and Constitution of the Republic of Zambia, 1991, Part IX. Section 111 of the Constitution of Zambia specifically states: "The Directive Principles set out in this Part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal, administrative institution or entity".

For many lawyers and advocates of marginalised populations, this lack of socio-economic rights within domestic constitutions has been seen as an insurmountable obstacle to ensuring the safety and well-being of marginalised populations. Many scholars have argued for judiciaries to provide a more robust interpretation of directive principles, while others note the difficulty in adjudicating on socio-economic issues.[8]

This paper initially discusses the false distinction between civil and political rights and socio-economic rights before reviewing cases in Africa where the courts have used civil and political rights to ensure that marginalised persons have access to healthcare. The paper will argue that although socio-economic rights are important and relevant to the strengthening of the rights of marginalised populations, courts can do much to ensure the rights of marginalised populations if they thoroughly enforce the full guarantees of civil and political rights. This paper also argues that ensuring the full enforcement of civil and political rights will often ensure the socio-economic well-being of marginalised populations.

False distinction between civil and political rights and socio-economic rights

Numerous scholars and advocates have outlined the false distinction made between civil and political rights, and socio-economic rights.[9] This distinction appears to have been highlighted and enforced through the constitutions of many countries in southern Africa, where civil and political rights are guaranteed under the constitution, and socio-economic rights are relegated to the directive principles section of the constitution.[10] These sections have often been interpreted by courts as being merely advisory and not justiciable.[11]

The false distinction is often premised on three inter-related arguments: civil and political rights are fundamentally different from socio-economic rights; it is not the role of the judiciary to address issues of socio-economic rights, as that should be the purview of the other two branches of government; and courts are not best placed to adjudicate on socio-economic rights, as they involve questions of social policy.[12]

None of the arguments for the division between socio-economic and civil and political rights, however, stand in the face of further investigation.

8 See S Ibe "Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria" (2007) 7 *Afr Hum Rts LJ* 225; RE Kapindu "Courts and the Enforcement of Socio-Economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities" (2013) *Afr Hum Rts LJ* 125.

9 See *RM v Attorney General* (2006) AHRLR 256 (HC) where the court discusses the interdependence and indivisibility of civil and political rights and socio-economic rights.

10 See for example Constitution of Malawi and Constitution of Zambia.

11 See for example *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (2004) AHRLR 195 (CA) at para. 19.

12 A Nolan *et al* "The Justiciability of Social and Economic Rights: An Updated Appraisal" (2007) *CHRGJ Working Paper* No. 15; C Soohoo & J Goldberg "The Full Realisation of Our Rights: The Right to Health in State Constitutions" (2010) 60 *Case W Res L Rev* 997.

Civil and Political Rights Are Not Fundamentally Different from Socio-Economic Rights

The argument that civil and political rights are fundamentally different from socio-economic rights is based on a number of erroneous beliefs. These include: only the enforcement of socio-economic rights have budgetary implications for government; that socio-economic rights, as opposed to civil and political rights, are vague; and socio-economic rights require courts to look at state inaction, versus civil and political rights that look at state action.

With respect to the view that only socio-economic rights have budgetary implications for government, while civil and political rights do not, this clean dichotomy does not reflect the reality of judicial decision-making. Often, ensuring the civil and political rights of prisoners and those accused of crimes has significant budgetary implications for the state. For example, in a matter of the right to a fair trial, ensuring that criminal defendants have access to a government-provided lawyer will have significant budgetary implications for the state.[13] Similarly, cases requiring a court to determine whether minimum sentences for specific criminal offenses are constitutionally valid, will have budgetary implications for the government, as it will either increase or decrease the amount of time offenders spend in government-funded prisons. Finally, in cases involving poor prison conditions, upholding the basic right to be free from cruel, inhuman, and degrading treatment and punishment generally requires expenditure of government funds.

In terms of the argument that socio-economic rights are vague, there is no reason why socio-economic rights are any more vague than traditional civil and political rights – such as the right to be free from torture and cruel, inhuman, and degrading treatment. Domestic courts and regional and international bodies have spent considerable time outlining what constitutes torture and cruel, inhuman, and degrading treatment.[14] Despite this, in the wake of the events of 9/11, the United States claimed that roundly discredited interrogation techniques – such as prolonged stress positions like forced standing, solitary confinement for 30 days, and removal of clothing – did not amount to torture.[15] However, these same interrogation techniques were found to be in violation of the international prohibition on torture and cruel, inhuman, and degrading treatment by international bodies tasked with monitoring compliance with international treaties.[16]

Finally, the argument that socio-economic rights require courts to look at state inaction, while enforcement of civil and political rights involves state action, is not accurate. For example, in a case where a law only provides for male succession to a chieftainship, arguably in violation of the right to be free from discrimination on the basis of sex – a core civil and political right – it is the state's inaction to proactively ensure that its laws are in compliance with guaranteed civil and

13 See for example *Government of the Republic of Namibia and Others v Mwilima and Others* (2002) AHRLR 127 (SC), which discusses budgetary implications for increasing legal aid to indigent persons.

14 See Human Rights Committee, General Comment No. 20 at para. 2; *Doebbler v Sudan* Comm. No. 236/00; *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria* Comm. No. 137/94-139/94-154/96-161/97; *Huri-Laws v Nigeria* Comm. No. 225/98; *Ex parte: Attorney General, In Re: Corporal Punishment by Organs of State* (1991) NASC 2.

15 Memorandum to US Secretary of Defense from General Counsel of Department of Defense, 2 December 2002, which discusses which interrogation techniques would be legal in light of the prohibition against torture, available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf.

16 Human Rights Committee, Concluding Observations (United States), CCPR/C/USA/CO/3/Rev.1, 18 December 2006.

political rights that the courts must address when assessing the constitutionality of the law.[17] In other instances, such as the forced sterilisation of women living with HIV, it is the state's action of forcing women to agree to sterilisation that impugns their access to adequate healthcare, a core socio-economic right.[18]

Role of the Judiciary in Enforcing Socio-Economic Rights

The argument that it is not the role of the judiciary to adjudicate on socio-economic rights – as that should be the purview of parliament or the executive branch – similarly cannot stand. The primary concern is that issues related to socio-economic rights have budgetary implications and thus should be determined by the elected branches of government, and the failure to do so would violate the doctrine of separation of powers. The inaccuracy of how only the enforcement of socio-economic rights has budgetary consequences, and not the enforcement of civil and political rights, is addressed above. This argument was also rejected by the Malawi High Court in *Masangano v Attorney General and Others*, when the following was stated:

> [I]t is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age, where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison, as complained of by prisoners.[19]

Capacity of Courts to Address Socio-Economic Rights

The argument that courts lack the capacity and knowledge to adjudicate on socio-economic rights, while they do have the capacity to adjudicate on civil and political rights, similarly reflects a misunderstanding of courts and court processes. Courts have numerous mechanisms by which to ensure they have all the necessary evidence – before making needed determinations. For example, courts can ask for the intervention of *amici curiae*, friends of the court, to provide key specialised information. In addition, courts are required to make determinations on issues outside of their expertise in cases involving civil and political rights as well. For example, in the case of *Hoffmann v South African Airways*,[20] the South African Constitutional Court was required to determine whether South African Airways (SAA) could deny employment to an HIV-positive applicant, solely on the basis of his HIV status. SAA put forward detailed medical arguments for why it would harm the health of the employee and put others at risk of HIV should such a person be hired. The Constitutional Court relied heavily on *amicus curiae* submissions to parse out the medical

17 *Masupha v Senior Resident Magistrate for Subordinate Court of Berea* Case No. 29 of 2013 (CA).

18 *LM and Others v Namibia* (2012) NAHC 211.

19 MWHC Constitutional Case No. 15 of 2007, 28. This case is also discussed in KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

20 (2000) ZACC 17. This case is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" and C Bandawe & A Meerkotter "Developing a Conceptual Framework against Discrimination on the Basis of Gender Identity" in this publication.

arguments, and finally determined that denying employment to an individual solely due to his HIV status violated the right to be free from discrimination and the right to human dignity. In making its finding, the Court outlined the progression of HIV, noting that people living with HIV can live long and healthy lives; described how HIV is transmitted, finding that it was not a highly transmittable disease; and recounted the state of HIV treatment at the time of the ruling. This detailed understanding of the medical nature of HIV, how it is transmitted, and how it is treated, were critical to the Court's decision.

The stark distinction often drawn between socio-economic rights and civil and political rights is a fallacy, and often leads courts to limit themselves when addressing claims seen as impacting the socio-economic sphere. However, throughout Africa, there are a number of courts that have acknowledged the fallacy of the distinction between socio-economic and civil and political rights, and which have ensured that marginalised populations have access to fundamental rights, including the right to adequate healthcare.

Case examples from Africa

Courts throughout Africa have used civil and political rights to ensure that marginalised persons have access to healthcare.[21] Four case examples are discussed below from Namibia, Malawi, Nigeria, and Botswana.

In Namibia, the High Court was confronted with a case of three HIV-positive women who were sterilised at public hospitals, without their informed consent, in *LM and Others v Government of Namibia*.[22] The failure to obtain a woman's informed consent – meaning that she should be informed, at a minimum, of the nature and risks of the procedure in a language in which she is comfortable, informed of the fact that it is irreversible, and given the option of refusing the procedure – results in the woman receiving inadequate medical care. For a patient to receive adequate care, her informed consent must have been obtained prior to any medical procedure, such as a sterilisation, being performed.

The Constitution of Namibia provides for a range of civil and political rights, including the right to be free from discrimination; the right to equality; the right to be free from cruel, inhuman, and degrading treatment; and the right to found a family. However, it does not provide for the right to health.

The applicants – the three women – had argued that the treatment they experienced violated their constitutional right to life; right to liberty; right to human dignity; right to found a family; and right to equality and freedom from discrimination. They also argued that it violated their rights under common law.

The High Court held that the three women were sterilised without their consent in violation of the laws of Namibia. The Court clearly held that this violated their rights under common law. The

21 See for example *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (HC). For a more detailed discussion on ensuring the health of prisoners in Malawi, see KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

22 (2012) NAHC 211.

Court did not provide clarity on whether being sterilised without their informed consent violated their constitutional rights. However, despite a failure to have a right to health provided for under the Constitution, the Court was able to ensure that the three women's right to adequate healthcare was upheld.

In *Masangano v Attorney General and Others*,[23] the High Court – sitting with a panel of three judges – was confronted with a case brought by a prisoner, Masangano, who was held in Domasi prison. He brought his suit on behalf of all prisoners in Malawi. In the lawsuit, he alleged that his and other prisoners' right to be free from torture and cruel, inhuman, and degrading treatment or punishment was violated due to the treatment and conditions in prison. Among the treatment he highlighted was that prisoners received insufficient food, contrary to prison regulations; prisoners received insufficient clothing; over-crowding in the prison resulted in a lack of space; prisoners were not allowed to communicate with their families; prisoners were harassed and physically tortured in front of their families; prisoners without money had no means of communicating; and prisoners were denied access to medical care.

The claims that prisoners were denied access to medical care and "are even asked the offence they committed before receiving any medical attention and are even sometimes given wrong dosage",[24] and the lack of adequate food, are the focus of this discussion.

The government argued, in part, that these claims were not justiciable, as they required an inquiry into the allocation of public resources and courts were ill-equipped to deal with such inquiries.[25] In responding to this argument, the Court clearly rejected it, noting that the argument limits citizens' access to courts. The Court found that "[t]he judiciary must prioritise private rights over political concerns and maintain access to the courts".[26] Furthermore, the Court specifically addressed the argument that in matters of allocation of resources, the judiciary was ill-equipped to make determinations in that sphere. The Court held that, when it comes to the rights of prisoners, the courts cannot stand back when fundamental rights are being trampled. Finally, the Court noted that there is no reason to assume that it was not competent to address socio-economic issues.[27] Pointing to a decision by the Lesotho Court of Appeal,[28] which ordered prison walls to be painted, windows washed, and water toilets to be made available in the cells, the Court found that "no part of [the] Constitution [was] a no-go area for the courts".[29]

In ascertaining whether the lack of adequate medical care and food in prisons violated the rights enshrined in the Constitution, the Court held that the amount of food provided to each prisoner under the prison regulations should be increased and that every prisoner had a right to medical treatment. The Court concluded its decision by informing parliament to provide the government with the necessary resources to ensure minimum standards of care were provided to prisoners.

23 MWHC Constitutional Case No. 15 of 2007.
24 *Id* 5.
25 *Id* 18.
26 *Id* 28.
27 *Id* 32.
28 *Mothobi v Director of Prisons and Another* (1996) LSCA 92.
29 *Masangano v Attorney General and Others* MWHC Constitutional Case No. 15 of 2007, 35.

When confronted with a similar issue to the *Masangano* case, the Nigerian High Court in *Odafe and Others v Attorney General and Others*[30] addressed whether prisoners living with HIV and awaiting trial were entitled to medical treatment – specifically treatment for HIV. The prisoners had been awaiting trial for more than two years. In response to arguments regarding the cost of providing medical treatment to prisoners, the Court held that:

> The Court is enjoined to ensure the observation of these rights. A dispute concerning socio-economic rights, such as the right to medical attention, requires the Court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the state has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness.[31]

The Court found that denying medical treatment amounted to a violation of the right to be free from torture.

Most recently, in Botswana, the High Court ordered the government to provide anti-retroviral treatment to non-citizen prisoners. In *Tapela and Others v Attorney General and Others*,[32] two Zimbabwean prisoners living with HIV and the Botswana Network on Ethics, Law and HIV/AIDS – a non-governmental organisation advocating for the rights of people living with and affected by HIV – challenged the Botswana government's policy of denying foreign prisoners access to free HIV treatment. The prisoners argued that the denial of HIV treatment violated three constitutional rights: the right to life; the right to non-discrimination; and the prohibition on inhuman and degrading treatment.

The Court held that the denial of life-saving HIV treatment violated all three constitutional rights, namely the right to life, the right to non-discrimination, and the right to be free from inhuman and degrading treatment. In reaching its decision, the Court rejected the government's argument that providing HIV treatment to non-citizen prisoners would be too costly. The Court further held that in order to make such an argument, the government would have to provide evidence to that effect, and merely stating the proposition would not be enough. The Court stated:

> The respondents have, despite the cardinal importance of the medical officer's input not availed to the court any information about his findings on the circumstances connected with the treatment of the applicants and neither have they presented to the court any information that could, on a balance of probabilities, support their argument to the effect that the provision of HAART[33] to non citizen inmates will place an undue strain on their budget. Singularly lacking is also any information on the number of none [*sic*] citizen inmates that require HAART enrolment and the costs associated with such enrolment ... [34]

30 (2004) AHRLR 205.

31 *Id* at para. 38.

32 Case No. MAHGB 57/2014. The Attorney General has since appealed the High Court judgment and, at the time of publication, the appeal has not been decided in the Court of Appeal.

33 Highly Active Antiretroviral Therapy [HIV treatment].

34 *Tapela and Others v Attorney General and Others* Case No. MAHGB 57/2014, at para. 32.

In addition to the cases outlined above, there is currently another case awaiting judgment in the High Court of Zambia, which similarly relies on civil and political rights to ensure access to healthcare for marginalised populations.

In *Mwanza and Another v Attorney General*,[35] an HIV-positive prisoner had approached the High Court challenging current prison conditions and seeking adequate nutrition to ensure the full efficacy of his HIV treatment. There are three main issues before the Court. First, the prisoner claimed that he is denied adequate food, in terms of both quality and quantity. According to the prisoner's testimony, he receives only two meals a day, making it impossible for him to take his regular HIV treatment. In addition, he testified that the food he does receive is often of such poor quality that he cannot eat it. Second, he alleged that he has inadequate access to HIV treatment, as often there are no prison officials available to accompany him to the clinic to obtain his medication. He claimed that in those cases he misses doses of his treatment, putting him at risk of becoming resistant to first-line HIV treatment. Finally, he testified that the overcrowding and poor ventilation in the prison put him at higher risk of opportunistic infections. The Court took judicial notice of the poor prison conditions during the trial. The prisoner alleged that this treatment violated his right to life and right to be free from inhuman and degrading treatment, both guaranteed under the Constitution. The trial was concluded in September 2013 and legal arguments were filed in late 2013. As of September 2014, a judgment has yet to be issued.

Conclusion

The distinction that legal scholars and members of the judiciary often make between civil and political rights and socio-economic rights is not only wrong, but further impedes access to justice for marginalised populations. This can be addressed by a robust interpretation of existing fundamental rights guaranteed in constitutions throughout Africa. Indeed, the above case examples show that even without guaranteed socio-economic rights in domestic law, it is still possible for courts to ensure access to core socio-economic needs – including access to adequate healthcare – by developing existing fundamental rights.

35 Case No. 2011/HP/719.

ACCUSED'S RIGHTS AND ACCESS TO PROSECUTION INFORMATION IN SUBORDINATE COURTS IN ZAMBIA

Sunday B. Nkonde SC and William Ngwira[1]

Introduction

The Zambian criminal justice system in the Subordinate Court[2] is notorious for delays in the disposing of cases. The frequency of adjournments is alarming, and this is usually blamed on defence lawyers. But very few defence lawyers 'stand up to the accusing finger' by explaining that the frequency in adjournments blamed on defence lawyers – and which inevitably contribute to delays in the disposal of cases – is mainly due to the infamous 'trial by ambush', i.e., lack of disclosure of evidence prior to trial in the Subordinate Court.

A defence lawyer who is ambushed during trial with complex documentary evidence has a choice to either seek an adjournment to study the evidence, sometimes disguised as 'seeking further instructions from the client', or to proceed and suffer the possible embarrassment of appearing unprepared for cross-examination of a prosecution witness.

Despite being detested, this type of trial by ambush still survives in the Subordinate Court, with its embedded injustices and unfairness. But should the denial of evidence to the defence prior to trial in the Subordinate Court still have a place in the Zambian criminal justice system?[3]

In order to put the injustices and unfairness of trial by ambush in the Zambian Subordinate Court into perspective, the justification for pre-trial non-disclosure of evidence is reviewed and a criticism of the Zambian approach is made by reference to procedures in other African jurisdictions.

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2 Subordinate Courts are defined in the Subordinate Courts Act, Cap 28 of the Laws of Zambia, as courts which are subordinate to the High Court in each district, including a subordinate court of the first class to be presided over by a Principal Resident Magistrate, a Senior Resident Magistrate, Resident Magistrate, or a Magistrate of the first class; a subordinate court of the second class to be presided over by a Magistrate of the second class; and a subordinate court of the third class to be presided over by a Magistrate of the third class.

3 The accused's rights and access to prosecution information were intensely discussed at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Protea Hotel, Chisamba, Lusaka, Zambia, on 27 and 28 February 2014.

Justification for pre-trial non-disclosure of evidence

In *People v Kasonkomona*,[4] the prosecution put it as follows:

> While we note that under the Constitution in article 18(1) of Chapter 1 of the Laws of Zambia, a person arrested and charged for a criminal offence is entitled to a fair hearing, there is no corresponding provision either in the Constitution itself or the Criminal Procedure Code … which obligates the prosecution in the Subordinate Court to extend, provide or exchange the witness statements or exhibits which the prosecution are likely to avail before court.[5]

In addition:

> It is trite law that the burden of proof in criminal cases rests on the prosecution and the Accused has no burden to prove his innocence ... *Muwowo v The People* (1965) ZR 91 (CA) one of the many cases in which this well settled principles of law has been repeated ... In the same vein neither the Constitution nor the Criminal Procedure Code … has provision where the Prosecutions [*sic*] is obligated to give witness statements or exhibits to the defence before trial commences.[6]

Article 18 (1) of the Constitution of Zambia referred to above, and also article 18(2)(c) and (e), are relevant to this discussion. They state:

> 18 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence -
>
> …
> (c) Shall be given adequate time and facilities for the preparation of his defence.
>
> …
> (e) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

Dismissing the application by the defence to refer the question of whether failure by the state to provide the defence with witness statements contravened the provision of article 18(1) of the Constitution of Zambia, the Subordinate Court in its ruling[7] cited (as authoritative on the issue) the Supreme Court case of *Miyanda v Attorney General*,[8] which dealt with a summary trial and is

4 *People v Kasonkomona* CR No. 9/04/13 (SubCt). All pertinent case documents are available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/zambia-activist-defends-right-to-freedom-of-expression/. This case is discussed in full in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasonkomona*" in this publication.

5 Written response on 30 April 2013 from the prosecution to a request by the defence for witness statements and exhibits to be supplied before trial in *People v Kasonkomona* CR No. 9/04/13 (SubCt).

6 The state's submission opposing the accused's request for constitutional reference on the question of pre-trial disclosure of witness statements and exhibits in *People v Kasonkomona* CR No. 9/04/13 (SubCt), Prosecution's Submission on a Preliminary Issue Raised by the Defence (Accused) for Constitutional Reference 3-4.

7 *People v Kasonkomona* CR No. 9/04/13 (SubCt) Ruling on Preliminary Issues for Constitutional Reference.

8 (1986) ZR 58 (SC).

not directly pertinent to the issue under discussion. The Court in *Kasonkomona*, therefore, held:

Trial at the Subordinate Court is still summary. The prosecution is under no obligation to provide the statements and that is settled law.[9]

Criticism of the Zambian approach and comparative discussion

As can be seen from the example cited above, there is seldom exhaustive argument and corresponding judicial examination of an accused's protected rights in the Subordinate Court. The cited case of *Miyanda* is far from helpful in this respect. The case was decided on the premise that the appellant was wrongly questioning before the Subordinate Court his committal for summary trial in the High Court, when the offence he was facing, unknown to him, was reserved by statute to be tried by the High Court. The case is therefore not settled authority for the proposition that the denial of access to evidence prior to trial is constitutional.

The procedure of supplying witness statements and exhibits to the accused is observed in the High Court and there is no reason why it should not be the same in the Subordinate Court. As was well put in the Namibian High Court case of *S v Lucas*:[10]

> There is not a different brand of fairness in the lower courts in comparison to that applicable in any of the superior courts. After all, it is in the magistrates' courts that most members of the public come into contact with the law and, on the strength of their experience there, they form their perceptions of justice and fairness. The same rules of evidence and procedure apply, with certain exceptions, in all courts of law. Where there are distinctions it concerns practice rather than rules that are designed to ensure fairness and justice to all parties.[11]

It becomes a serious concern, however, if a narrow interpretation of the accused's constitutional rights to a fair trial – including having access to the evidence against him – is attributed to the need to avoid judicial activism.[12] Courts in jurisdictions near to Zambia, when confronted with the problem under discussion, have in fact tackled it with exemplary boldness.

Botswana

In the case of *Ahmed v Attorney General*[13] (decided by Collins J), the applicant, while awaiting trial in a Magistrates Court, made requests to the state for copies of the various documents in the police docket to be released to him, to enable him to prepare his defence and instruct his lawyers effectively. The state refused to hand over copies of state witness statements and other relevant documents to be used in the prosecution. The applicant made an application to the High Court contending that the refusal to hand over documents was in breach of his rights under section 10 of the Constitution of Botswana, which guaranteed him a fair hearing; that he was not being given

9 *People v Kasonkomona* CR No. 9/04/13 (SubCt) Ruling on Preliminary Issues for Constitutional Reference R5.

10 1997 (9) BCLR 1314.

11 *Id.*

12 Discussion with some judges on the sidelines of the Judicial Colloquium on the Rights of Vulnerable Groups, held at Protea Hotel, Chisamba, Lusaka, Zambia, on 27 and 28 February 2014.

13 2002 (2) BLR 431 (HC).

adequate facilities for the preparation of his defence [section 10(2)(c)]; and that he was not being given facilities to examine the witnesses called by the prosecution before the Court [section 10(2)(e)].

Except for the inclusion of the words "or recognised" after the word "established" in section 10(1), the wording of sections 10(1), 10(2)(c), and 10(2)(e) of the Constitution of Botswana, which was under consideration, is the same as the provisions of articles 18(1), 18(2)(c), and 18(2)(e) respectively of the Constitution of Zambia.

Collins J started by acknowledging that the applicable law was that:

> [P]rosecution witness statements are, generally, privileged ... But if that law offends against any of the protective provisions ... of the Constitution ... then any aggrieved person is entitled to ask the court to hold that such law offends his or her entrenched rights.[14]

The judge then went on to refer to Aguda JA in *Attorney General v Dow*,[15] in which this observation was made:

> I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of government - the Legislature, the Executive and the Judiciary - must strive to make it remain so, except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving, we cannot afford to be immune from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our learned brethren in the performance of their adjudicatory roles in other jurisdictions.[16]

Collins J therefore, *inter alia*, held:

> [1] That there was no general duty on the part of the prosecution to disclose witness statements to an accused person.
>
> [2] There was no reason to interpret section 10 restrictively so as to bring it in line with the common law.
>
> [3] While the word 'facilities' was not clear and unambiguous, it had to be given a generous interpretation.
>
> [4] The issue at stake was to redress the imbalance in a criminal trial, given the advantages the State enjoys: it was not to balance an accused's rights to a fair trial against the interests of the State.
>
> ...
>
> [6] The applicant was entitled to an order compelling the State to provide him or his legal representative, within seven days of the order, with copies of all the State witnesses' statements,

14 *Id* 439.

15 (1992) BLR 119 (CA). This case is also cited in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

16 *Id* 168.

> as well as documentary evidence in possession of the State and/or the police pertaining to the charges against the applicant.[17]

Conscious of the effect of his judgment, Collins J also said:

> There will be those who consider that this judgment ... marks a radical change from criminal procedure and the common law docket privilege which has served us well for the past 30 years or so ... I wonder whether it is really radical at all. To the extent that the prosecuting authorities (the police in particular) will need to sharpen their skills, their wits and their pencils in order to improve upon existing procedures and techniques is undeniable but that is a good thing and will result in a more efficient system of criminal justice over time. Perhaps we have been ignoring the essence of that system for too long and have reached a point where fair combat in our adversarial approach has been undermined by a creeping ethic of winning at all costs. It is neither a healthy nor productive development. It creates suspicion and mistrust which in turn governs the manner in which the State in particular conducts itself, i.e. to win. That is wrong. Criminal justice in a democracy has a broader and more pervasive objective. It is to punish the guilty but equally to ensure that the innocent go free. Once the State ascribes to the concept of 'winning' as its pre-determinant role then it forgets its social responsibility and prosecuting function as a seeker for truth.[18]

As expected, the state appealed to the Court of Appeal against the judgment – *Attorney General v Ahmed.*[19] In its landmark judgment, the Court of Appeal held:

> [1] In the absence of any specific limitations in section 10(2), no implied restriction should be read into that section.
>
> [2] It was the duty of the prosecution to lay before the court all the evidence which was relevant to the issue, whether favourable to the prosecution or favourable to the defence. It was a further duty of the prosecution to comply with the provisions of the Constitution, which entitled an accused person to a fair hearing and adequate facilities for the preparation of his defence. Any action to the contrary would be a dereliction of duty.
>
> [3] The word "facilities" when used in section 10(2) was apt to cover the acquisition by the defence of statements from witnesses and the acquisition of copies of any documents relevant to the charge. The only person in a position to authorise the supply of such statements and documents was the prosecutor and the prosecutor had to supply them.
>
> [4] In order to ensure a fair hearing and the provision of adequate facilities for the preparation of the defence, the prosecution should disclose to the defence all witnesses' statements and the documents on which the prosecution intends to found.
>
> [5] Every accused person is presumed to be innocent until the contrary is proved. The innocent accused should not be deprived of his constitutional rights because some villains may take improper advantage.
>
> [6] The word "adequate" applied to both time and facilities in section 10(2) and, accordingly, the

17 *Ahmed v Attorney General* 2002 (2) BLR 431(HC) 432.

18 *Id* 460.

19 2003 (1) BLR 158.

> provision was not absolute. If the prosecution could show that they had good reason to exercise privilege and that such exercise of privilege would not hamper the accused in the preparation of his defence, they may withhold the statement. The general rule was, however, disclosure. Privilege was the exception.[20]

The Court of Appeal further cautioned that:

> [I]t is useful to remember the role of the State in the prosecution of a criminal charge. It is not the function of the prosecution to obtain a conviction by any means fair or foul. It is not their function to conduct proceedings in such a way that the accused is ambushed and kept in the dark about critical issues until the last possible moment, whereby his ability to prepare a proper defence is severely hampered. It is not their function to conceal from the defence evidence in their possession which might be of assistance to the defence.[21]

Kenya

The issue was also well aired in the Kenyan High Court case of *Juma and Others v Attorney General.*[22] This was a constitutional reference arising from the charging of the applicants with certain criminal offences, whereupon the applicants applied to the trial court, before the commencement of the trial, for orders that the prosecution supply to the applicants copies of the statements made by the would-be prosecution witnesses, and also copies of exhibits on which the prosecution would rely at the trial. The trial court turned down the application and eventually the applicants went to the High Court, complaining that their rights under sections 70, 77(1), and 77(2) of the Constitution of Kenya were in danger of being violated by not being allowed to have access to the statements and exhibits of the prosecution witnesses.

Sections 70, 77(1), and 72 of the 1969 Constitution of Kenya relate to being afforded a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one's defence, and being given facilities to examine witnesses against one in a criminal case. These provisions are similar to the provisions of articles 18(1), 18(2)(c), and 18(2)(e) of the Constitution of Zambia.

The Court agreed that the applicants were entitled to pre-trial disclosure of the prosecution witnesses' statements and exhibits, after discussing the meaning of 'facilities' in the following passages:

> [F]or a hearing to be fair a person charged with a criminal offence must be afforded among other things 'facilities for the preparation of his defence' and 'facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf'. He must be given and afforded the facilities to do those things. In practical terms his constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses by the prosecution and securing witnesses to testify on his behalf. He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to defend the charge. In general

20 *Id.*
21 *Id.*
22 (2003) AHRLR 179.

> terms it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.
>
> We say so because we believe that the framers of our Constitution intended the expression 'facilities' in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bending of that word. In its ordinary connotation that word means the resources, conveniences, or means which make it easier to achieve a purpose; an unimpeded opportunity of doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to 'facilitate' and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward, assist, air or lesson [*sic*] the labour of one; to make less difficult; or to free from difficulty or impediment ...
>
> The fullest possible pre-trial access to information held by or in the control of the prosecution helps the accused or his advocate to determine precisely what case the accused has to meet, to prepare for cross-examination, to determine what witnesses are available to him, to make further inquiries if necessary and generally to explore such other avenues as may be available to him. Obviously the constitutional right to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation. Moreover, an accused's right to adduce and challenge evidence cannot be exercised properly unless he can determine from the statements and exhibits of the prosecution's witnesses whether there are any witnesses favourable to him who can be either those who had already made statements to the police or others who were mentioned in such statements.[23]

In the course of the judgment, the Court observed that:

> In an open and democratic society based on freedom and equality with the rule of law as its ultimate defender such as ours the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type courts cannot give approval to trials by ambush and in criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed. Subject to the rights of every person entrenched in the Constitution of Kenya and including the presumption of innocence until proved guilty beyond reasonable doubt, the fundamental right to a fair hearing by its nature requires that there be equality between contestants in litigation. There can be no true equality if the legal process allows one party to withhold material information from his adversary without just cause or peculiar circumstances of the case.[24]

Uganda

In Uganda, the Constitutional Court addressed this issue in *Kim v Attorney General*.[25] The reference to the Constitutional Court emanated from the charging of the applicants before the Magistrates Court with several offences under the Penal Code Act. Before pleading to the charges,

23 *Id* at paras. 10-11, 17.

24 *Id* at para. 14.

25 [2008] UGCC 2.

their counsel applied to the Trial Magistrate for an order that the Director of Public Prosecutions supply the applicants with copies of all statements made to the police by potential witnesses for the prosecution, as well as copies of all exhibits that the prosecution would rely on at the trial – to enable the applicants to prepare their answers, and also defences to the charges. The application was made under articles 28(1)(3)(a), (c), (d), and (g) of the Constitution of Uganda. The determination of the application necessitated interpretation of those provisions of the Constitution. The following question was referred for determination:

> Whether within the plain, natural and practical meaning of article 28(1)(3)(a), (c), (d) and (g) of the Constitution of the Republic of Uganda 1995, an accused person in a Magistrates Court is entitled to disclosure of:
>
> (a) Copies of statements made to police by persons who will or may be called to testify as witnesses for the prosecution and
>
> (b) Copies of documentary exhibits which are to be offered in evidence by the prosecution before being called upon to plead the charges.[26]

Articles 28(1)(3)(a), (c), (d), and (g) of the Constitution of Uganda, which was under consideration, states:

> (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
>
> ...
> (3) Every person who is charged with a criminal offence shall:
>
> (a) Be presumed to be innocent until proved guilty or until that person has pleaded guilty;
>
> ...
> (c) Be given adequate time and facilities for the preparation of his or her defence;
>
> (d) Be permitted to appear before the court in person or at that person's own expense by a lawyer of his or her choice;
>
> ...
> (g) Be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

In considering the provisions, the Court observed:

> What is in issue here is what constitutes "a fair hearing". Sub-article 3 of article 28 sets out the minimum requirements to constitute a fair hearing.
>
> These requirements include:
>
> (a) That a person who is charged with any criminal offence must be presumed innocent until he or she is proved guilty or until he or she has pleaded guilty.

26 *Id.*

...

(c) That such a person must be given adequate time and "facilities" for preparation of his or her defence.[27]

The Court, agreeing with the judgment of the Kenyan High Court in *Juma and Others*,[28] stated:

> We agree with the interpretation of section 77(1) and (2) of the Kenyan Constitution that the right to a fair hearing contains in it the right to a pre-trial disclosure of material statements and exhibits. We also agree that in an open and democratic society, courts cannot approve of trial by ambush. The right to a fair hearing envisages equality between the contestants in litigation.
>
> Similarly, our article 28(1) and (3) that guarantees the right to a fair hearing must contain in it the right to a pre-trial disclosure of material statements and exhibits. This is the only way to ensure equality between the contestants in litigation.[29]

The Court, therefore, held:

> Article 28(1)(3)(a), (c), (d) and (g) of the Constitution of Uganda in their plain, natural and practical meaning, *prima facie* entitle an accused person in a Magistrate's Court to disclosure of:
>
> (a) Copies of statements made to police by the would be witnesses for the prosecution.
>
> (b) Copies of documentary exhibits, which the prosecution is to produce at the trial.
>
> (c) The disclosure is subject to limitations to be established through evidence by the prosecution.[30]

Namibia

The Namibian High Court case of *State v Malumo and 112 Others*[31] also becomes relevant to the discussion to the extent that it was held that the late discovery of witness statements is tantamount to no discovery at all, and where this failure can reasonably be expected to limit an accused person's right to cross-examination and the opportunity of an accused person to present his case, evidence based on these witness statements may be excluded.

The Court also approved the use of foreign judgments from countries with similar constitutions, when interpreting domestic constitutional provisions – citing the South African Constitutional Court judgment of Kriegler J in *Bernstein and Others v Bester and Others NNO*,[32] that:

> Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.[33]

27 *Id.*
28 (2003) AHRLR 179.
29 *Kim v Attorney General* [2008] UGCC 2.
30 *Id.*
31 Case No. 32 of 2001.
32 1996 (2) SA 751 (CC) 811-12.
33 *Id* at para. 133.

International Instruments

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, promulgated by the African Commission on Human and Peoples' Rights, includes as essential elements of a fair trial, equality of arms between the parties to a proceeding; and an adequate opportunity to prepare the case, present arguments and evidence, and to challenge or respond to opposing arguments or evidence.[34]

The United Nations Human Rights Committee, in its General Comment Number 32[35] on the right to equality before courts and tribunals, and to a fair trial, states:

> The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[36]

Conclusion

The Zambian criminal justice system should move with the times and emulate progressive trends in other liberal and even less liberal democracies – where prior-to-trial disclosure of material prosecution evidence has been held to be the rule, and privilege the exception. Denying the accused access to the evidence against him, which is currently the order of the day for procedures in the Zambian Subordinate Court, is the antithesis of justice and fairness. It is, in effect, a trial by ambush. It not only attracts scorn from the public who the criminal justice system is supposed to serve, but also greatly contributes to the extremely slow pace at which the wheels of justice currently turn.

34 Section 2(a) and (e), Resolution of the African Commission on Human and Peoples' Rights, 26th Ordinary Session (1999) available at http://caselaw.ihrda.org/instrument/fairtrial_g/.

35 Human Rights Committee, General Comment No. 32.

36 *Id* at para. 13.

EXAMINING THE CONSTITUTIONALITY OF ROGUE AND VAGABOND OFFENCES IN MALAWI

Chikosa Banda[1] *and Anneke Meerkotter*[2]

Introduction

Malawi's Penal Code, like the Penal Codes of Zambia, Botswana, Tanzania, and many other former British colonies, contains the nebulous 'offence' of someone being deemed a rogue and vagabond. Essentially, the offence provides a tool for police to arrest persons whom they think are engaging in, or planning, criminal conduct – under circumstances when a charge under a substantive offence in the Penal Code[3] cannot be supported. In practice, the offence is often a tool for abuse by the police,[4] and legal scholars have long cautioned that these types of vagrancy offences are used almost exclusively against the poor and marginalised and target persons due to their status in society and not because of their actual conduct.[5]

This paper interrogates these assertions and seeks to establish whether rogue and vagabond offences meet the constitutional threshold for validity. The paper focuses on the two most frequently used sub-sections of the rogue and vagabond offence under the Penal Code. These are section 184(1)(c), and, to a lesser extent, section 184(1)(b), which have repeatedly been examined by courts in Malawi – and for good reason.

Section 184(1)(b) of the Penal Code provides that:

> Every suspected person or reputed thief, who has no visible means of subsistence and cannot give a good account of himself, shall be deemed a rogue and vagabond.

Section 184(1)(c) of the Penal Code provides that:

> Every person found in or near any premises or in any road or highway or any place adjacent thereto or in any public place,[6] at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed a rogue and vagabond.[7]

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3 Cap 7:01 of the Laws of Malawi.

4 See for example, research conducted in Blantyre, Malawi in 2013, which shows that the offence is often used as a basis to harass sex workers and extort money from them. Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, chapter 7.

5 H Zimmerman "Louisiana Vagrancy Law – Constitutionally Sound" (1969) 29(2) *La L Rev* 361, 363.

6 The Penal Code defines a "public place" as including "any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access, either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court".

7 Notably, the Penal Code (in section 185) allows for a removal order to be issued where a person was convicted under section

This paper discusses the purpose of sections 184(1)(b) and (c), and focuses on the historic and contemporary justification for the offences concerned, the courts' interpretation of rogue and vagabond offences, and their validity in a constitutional democracy. The paper draws lessons from the various ways in which foreign jurisdictions have interrogated the legality and constitutionality of comparative vagrancy offences.[8]

Historic[9] and contemporary justifications for rogue and vagabond offences

Traditionally, rogue and vagabond offences were broadly crafted[10] – giving police more discretion by creating a lighter burden of proof than with other offences. Often, these offences did not require specific conduct, causation, or intention. In addition, the offences allowed arrest based on mere suspicion, and without a warrant. These offences, dating back to 1349,[11] typically characterise targeted individuals as being idle, lazy, drunk, unwilling to work, habitual criminals, or morally depraved.[12] Over time, penalties for such offences varied and included branding, having an ear cut off, being whipped, or even the death penalty.[13]

The vagrancy offences were eventually codified in the English Vagrancy Act of 1824 (the 1824 Act). The 1824 Act contained provisions very similar to sections 184(1)(b) and (c) of the Penal Code referred to above.[14] Within a short period, the provisions of the 1824 Act were applied as part of the criminal law in British colonies and eventually – and unceremoniously – they found their way into the Penal Codes of these same colonies.[15]

The authority of the 1824 Act diminished in Britain over the years as various provisions were repealed or refined in line with changing notions of fairness and justice. In a number of countries

184. This provision potentially infringes on a range of constitutional rights, but is beyond the scope of this paper.

8 Section 11 of the Constitution of Malawi provides that, in interpreting provisions of the Constitution, a court shall, where applicable, have regard to the current norms of international law and comparable foreign case law.

9 For a detailed analysis of the history of rogue and vagabond offences, see Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, 15-28.

10 JD Berg "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 467.

11 *Id* 463; W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Soc Prob* 67, 68.

12 P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ* 55, 60-61.

13 W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Soc Prob* 67, 72.

14 Section 4 included the following offences, under rogues and vagabonds: "Every suspected person or reputed thief, frequenting any river, canal ... or any street, highway or avenue leading thereto, or any place of public resort, with intent to commit a felony". (This section was repealed in 1981.); "Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself." (Reference to "visible means of subsistence" was removed in 1935 and the option of imprisonment was removed in 1982.)

15 By the late 1800s, English criminal law applied in many areas under British control. In 1902, English law became effective in Malawi through the British Central African Order in Council. To ensure uniformity in the application of its criminal laws, Britain developed Model Criminal Codes, which explains the similarity between offences in former colonies. Wright notes that these Codes were developed by British administrators and adopted without local input. He contrasts this with the Canadian, New Zealand, and Queensland contexts, in which voluntary codifications were adopted through relatively democratic processes. B Wright "Codification of English Criminal Law, Imperial Projects, and the Self-Governing Codes: The Queensland and Canadian Examples" Presentation at Research Seminar Series, TC Beirne School of Law, University of Queensland (2006) 9, available at http://www.law.uq.edu.au/research/seminar-series/2006/seminar_outline_bwright.pdf.

where the 1824 Act provisions have been incorporated into domestic law, there has also been movement towards either abolishing vagrancy provisions entirely or ensuring that the offences specifically relate to a suspect's activities – rather than to his or her status.[16] These amendments and conceptual shifts reflect the recognition that the original vagrancy laws are archaic and anachronistic.[17]

However, this has not been the case in Africa. During the colonial period, rogue and vagabond offences were primarily aimed at maintaining control in the colonies.[18] This practice has remained intact in post-independence Africa and many of the offences have remained unaltered.

The contemporary justification for retaining the rogue and vagabond offences is that of crime prevention.[19] As expressed by a magistrate in Balaka, Malawi, recently, "[t]he tendency of loitering within the town at night can make the town prone to crime".[20] The Malawi Police Service has also noted protection of the public as the purpose of arrests under section 184.[21] However, these arguments can be problematic.

Firstly, there is no evidence that the purpose of section 184(1)(b) and (c) is actually achieved in practice.[22] The United Nations Guidelines for Crime Prevention emphasise – as a basic principle – that crime prevention strategies "should be based on a broad, multi-disciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices".[23] The Guidelines state that crime prevention measures should be assessed to determine both the outcomes and the positive and negative consequences of the measures concerned.[24]

Secondly, while crime prevention might be a laudable objective, a broadly-worded offence will,

16 In 1972, Canada repealed the offence of wandering abroad without an apparent means of support and not giving a good account of his or her presence. The reasons for the repeal included recognition of a need to make the criminal law more modern, compassionate, and remedial; that the law was unevenly applied between different classes of persons; that criminal law was seen as too punitive a measure to rely on; and that the provisions were too vague for the purpose of criminal law. P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ* 55, 87-88.

17 J Kimber "'A Nuisance to the Community': Policing the Vagrant Woman" (2010) 34(3) *J of Austl Stud* 275, 279.

18 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" (2000) 44 *J Afr L* 219, 219-20.

19 Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* 66. Interviews conducted with police regarding the use of section 184, indicated that police generally viewed section 184 as a useful tool of law enforcement which, in their opinion, had a deterrent value.

20 "Malawi Court Convicts 26 People for Loitering at Night" *Nyasa Times* (12 August 2014) available at http://www.nyasatimes.com/2014/08/12/malawi-court-convicts-26-people-for-loitering-at-night/.

21 "Police Nets 183 Suspects in a Sweeping Exercise in the Eastern District of Zomba" *Mana Online* (8 August 2014) available at http://www.manaonline.gov.mw/index.php/national/general/item/916-police-nets-183-suspects-in-a-sweeping-exercise-in-the-eastern-district-of-zomba.

22 Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* 71.

23 *United Nations Guidelines for the Prevention of Crime* Economic and Social Council Resolution 2002/13, UNODC, article 11. See also the United States District Court cases *Floyd and Others v City of New York* 08 Civ. 1034 SAS (DC) and *Ligon and Others v City of New York and Others* [2013] 12 Civ 2274 SAS (DC) 5. Quoting the US Department of Justice, Scheindlin USDJ noted that there was significant evidence that unlawfully aggressive police tactics are unnecessary for effective policing and that they are detrimental (and even counter-productive) to the mission of crime reduction. The Court noted that there was no evidence that the police's use of the stop-and-frisk technique was successful in producing arrests and reducing crime.

24 *United Nations Guidelines for the Prevention of Crime* Economic and Social Council Resolution 2002/13, UNODC, article 23.

inevitably, be subjectively applied. A recent case in point is that of *Chidziwe v Republic*,[25] in which a person was arrested under section 184(1)(c) because he was found at an odd hour with a bottle of beer. Needless to say, the High Court of Malawi overturned the conviction and held that there was no evidence that holding a bottle of beer implies an illegal purpose.

Finally, crime prevention can arguably be achieved by more precise and constitutionally valid provisions. These include other provisions in the Penal Code; developing alternatives to arrest; ensuring arrests are more targeted and based on actionable intelligence; reducing vulnerability; addressing structural issues; preventing and reducing exploitation; and adopting strategies to expand educational, economic, and social opportunities.[26]

Court interpretations of rogue and vagabond offences

Courts have long expressed their discomfort with the wide ambit of rogue and vagabond offences, and have sought to narrowly interpret these offences to save them from invalidity. In addition, courts have emphasised that a conviction under rogue and vagabond offences would only be proper where all the elements of the crime have been proved.[27] The High Court of Malawi – when reviewing convictions under section 184 – has been particularly alarmed that magistrates have allowed persons to plead guilty under section 184, without such persons understanding what they were pleading to[28] or acknowledging all the elements of the offence.[29] Similarly, in a 2010 study conducted by Women and Law in Southern Africa (WLSA-Malawi) on women in prison in Malawi, the authors found that many arrests and convictions under section 184(1)(c) were irregular, and that the action of women prior to arrest under section 184(1)(c) simply did not correspond to the definition of the crime.[30]

Interpretations of section 184(1)(b) and section 184(1)(c) are now discussed in turn.

Interpreting Section 184(1)(b)

A conviction under section 184(1)(b) of the Penal Code requires proof of the following elements:

- The accused is a suspected person or reputed thief;
- The accused has no visible means of subsistence; and
- The accused, when asked to do so, could not give a good account of himself.

In the 1936 English case of *Ledwith v Roberts*,[31] the Court of Appeal held that reference to a "suspected person or reputed thief" should be construed narrowly to refer to one whom law-enforcement officers suspected of being guilty of criminal behaviour based upon previous conduct

25 *Chidziwe v Republic* MWHC Criminal Appeal No. 14 of 2013.

26 *United Nations Guidelines for the Prevention of Crime* Economic and Social Council Resolution 2002/13, UNODC.

27 Attorney General v Tse Kam-Pui [1980] HKLR 338 (CA).

28 *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC).

29 *Republic v Foster and Others* [1997] 2 MLR 84 (HC). The twelve accused were arrested at three different places and accused (in one charge) of being rogues and vagabonds. The Court held this to be a misjoinder. The Court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge.

30 S White *et al Poor, Invisible and Excluded: Women in State Custody Malawi* (2010) 38.

31 [1937] 1 KB 233.

of which they are actually aware.

The Supreme Court of Ireland, however felt that even on a narrow construction the offence is unconstitutional. As explained by Kenny J:[32]

> It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity. But what does "suspected person" mean? Suspected of what? What does "reputed thief" mean? Reputed by whom? It does not mean a person who has been convicted of theft, for then "convicted thief" would have been the appropriate words. So one is driven back to the conclusion that it is impossible to ascertain the meaning of the expressions. In my opinion, both governing phrases "suspected person" and "reputed thief" are so uncertain that they cannot form the foundation for a criminal offence.[33]

Courts have further interpreted reference to "suspected person" as incorporating an element of intent.[34]

Taking a different approach, Australian courts have interpreted the phrase "who has no visible means of subsistence" as being limited to "a person whose means of support so far as they are lawful are insufficient for the way he is living may fairly be regarded as belonging to a class of persons likely to resort for their support to activities from which society needs to protect itself."[35] The courts have deliberately not interpreted the offence as aimed at vagrants, despite the offence's origins: "It is not or should not be a criminal offence, per se, to sleep on a river bank, nor to adopt a lifestyle which differs from that of the majority."[36]

The High Court of Malawi, in *Republic v Willie*,[37] questioned the rationale behind a section in the Penal Code of 1929 – which is similar to section 184(1)(b). The Court held that failure to find employment does not make a person a rogue and vagabond.

It remains unclear what exactly is expected by the phrase "and cannot give good account of himself". In *United States v Margeson*,[38] the United States District Court considered the word "good" to be subjective and capable of too many meanings.[39] In the early English case of *R v Dean*,[40] it was held that to find that one has failed to give good account of oneself requires more substantial and incriminating evidence, and that the burden of proof should not be compromised.

32 *King v Attorney General and Another* [1981] 1 LR 245.

33 *Id* 263.

34 *Ledwith v Roberts* [1937] 1 KB 233 (CA); *Republic v Willie* [1923-60] ALR (M) 152 (HC) 154.

35 *Zanetti v Hill* [1962] 108 CLR 433 (HC) 442. The Court emphasised that "the onus is on the prosecution to prove that an accused person has no visible lawful means of support". *Id* 438.

36 *Moore v Moulds* [1981] 7 QL 227 (DC), quoted in G Lyons "*Moore v Moulds* (Vagrancy Conviction Appeal against Sentence – Desirability of Legal Representation – Proper Interpretation of the Offence of Vagrancy)" (1982) *Aboriginal L Bulletin* 1, 3.

37 [1923-60] ALR (M) 152, 154.

38 (1966) 259 F Supp 256.

39 "Criminal Law – Constitutional Law – Vagrancy Statutes and Due Process – *Alegata v Commonwealth* 231 NE2d (Mass 1967)" (1968) 9 *Wm & Mary L Rev* 1162, 1165.

40 (1) 18 Cr App R 134, quoted in *Republic v Willie* [1923-60] ALR (M) 152 (HC).

Interpreting Section 184(1)(c)

Section 184(1)(c) provides that a person is deemed a rogue and vagabond if found in a public place, at such a time, and under such circumstances, as to lead to the conclusion that such a person is there for an illegal or disorderly purpose.

A conviction under section 184(1)(c) should, in essence, hinge on whether or not there is proof of an illegal or disorderly purpose. For example, in *Republic v Luwanja and Others*,[41] the High Court of Malawi overturned a conviction under section 184(1)(c), on the basis that there was no evidence that the accused was loitering for an illegal purpose: "The accused might have been poor, with holes in their pockets but this unfortunate state of affairs, and often without choice, does not make them criminals." The Court emphasised that it is not an offence in terms of section 184(1)(c) to simply wander about.

In the recent case of *Chidziwe v Republic*,[42] Sikwese J reiterated that the illegal and disorderly purpose element is really an intention requirement.[43]

Examining the constitutionality of rogue and vagabond offences

The question that flows from the above discussion is whether judicial interpretations of sections 184(1)(b) and (c) of the Penal Code are sufficient to save these sections from being declared unconstitutional.

The Threshold for Constitutionality

In essence, any offence should comply with the rights, principles, and values underlying the Constitution and the constitutional order. Sections 12 and 44 of the Constitution of Malawi (the Constitution) provide a useful structure within which to measure whether any limitation of rights through any law is justifiable.

Section 12(1)(e) of the Constitution provides that "[a]ll persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society".

Furthermore, according to section 44 of the Constitution:

> [1] No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.
>
> [2] Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

41 [1995] 1 MLR 217.

42 MWHC Criminal Appeal No. 14 of 2013.

43 "There must be an intention in the mind of the accused that his mission at any particular place and time would be illegal or improper." *Id* 2.

Thus, any inquiry into the constitutionality of an offence must consider whether:

1) A right in the Constitution has been infringed by the offence.

2) The infringement can be justified as a permissible limitation of the right in terms of section 44 of the Constitution:

    a.) Was the violation prescribed by a law of general application?
    b.) Was the violation reasonable and necessary in an open and democratic society?
    c.) Does the violation meet international human rights standards?
    d.) Does the violation negate the essential content of the right in question?

The inquiry is primarily a factual one – including looking at evidence about the impact of the rogue and vagabond offences.

Are Any Constitutional Rights Infringed by Sections 184(1)(b) and (c) of the Penal Code?

A number of rights are implicated in arrests under sections 184(1)(b) and (c) of the Penal Code, each of which are briefly described below.

The Right to Dignity

Section 19(1) of the Constitution states that "[t]he dignity of all persons shall be inviolable". The right to dignity has received significant emphasis in regional law. In *Purohit and Another v The Gambia*,[44] for instance, the African Commission on Human and Peoples' Rights (the African Commission) held that "[h]uman dignity is an inherent basic right to which all human beings ... are entitled to without discrimination".[45]

In *Floyd and Others v City of New York*,[46] Scheindlin J noted that each police stop is a demeaning and humiliating experience that makes people feel unwanted and distrustful of the police. It creates a situation in which people live in fear of being stopped when they go about their daily activities, and it alienates the police from the community.[47] Similar arguments can be made about arrests using rogue and vagabond offences, where the broad nature of these offences exposes innocent people to degrading treatment at the hands of the police during questioning, arrest, and detention.

Freedom from Inhuman and Degrading Treatment or Punishment

Section 19(3) of the Constitution provides that no person shall be subjected to cruel, inhuman, or degrading treatment or punishment.

The African Commission emphasised in *Doebbler v Sudan*[48] that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but those "which

44 (2003) AHRLR 96 (ACHPR).
45 *Id* at para. 57
46 [2013] 08 Civ 1034 SAS (DC).
47 *Id* 3, 82.
48 (2003) AHRLR 153 (ACHPR).

humiliate or force the individual against his will or conscience".[49]

The right to be protected from inhuman and degrading treatment is infringed when rogue and vagabond offences are applied arbitrarily against particular groups of people or are used to target behaviour that is not criminal.[50] In such cases, the arrest and detention of a person amounts to inhuman and degrading treatment. Even if detention is only for a short period, the harm done to the individual and his or her family is significant. In this regard, the 2010 Open Society Initiative for Southern Africa (OSISA) survey of five police stations in Malawi noted that police stations provided little or no food to persons in custody, and conditions were often unhygienic and hazardous.[51]

Freedom and Security of Person

Section 19(6) of the Constitution provides that every person shall have the right to freedom and security of person. The right to security of person is infringed when a person is stopped, arrested or detained arbitrarily by police.[52] In *King v Attorney General*,[53] the Irish Supreme Court held that a section similar to section 184(1)(b) violated the right to security of person.

Freedom from Discrimination and Equal Protection before the Law

Section 20(1) of the Constitution prohibits discrimination in any form and all persons are, under any law, guaranteed equal and effective protection against discrimination on various grounds, including sex and social status. Section 20 should be read with section 41(1) of the Constitution, which provides that every person shall have the right to recognition as a person before the law, and also with section 12(1)(e) which states that all persons have equal status before the law.[54]

The enforcement of rogue and vagabond offences which allow police wide discretion to arrest, inevitably leads to cases where arrests are influenced by police assumptions of criminality based on biases relating to poverty, gender, race, ethnicity, and place of origin.

In *Floyd and Others v City of New York*,[55] the United States District Court held that the police stop-and-frisk practice violated the plaintiffs' right to equal protection of the law, since they were targeted for stopping based on their race. The Court held that it is impermissible to subject all members of a racially defined group to heightened police enforcement simply because some members of the group are criminals.[56] A similar argument can be made in relation to arrests that

49 *Id* at para. 36.

50 In the United States case of *Farber v Rochford* (1975) 407 F Supp 529, 533 (DC), a court struck down a loitering ordinance, in part because it criminalised a person's status (such as being a suspected person or reputed thief) in circumstances where there was no apparent criminal conduct. JD Berg, "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 483. See also UN General Assembly *Report by Special Rapporteur on Extreme Poverty and Human Rights* 66th session, 4 August 2011, A/66/265, 5, available at http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf.

51 L Muntingh "Survey of Conditions in Detention in Police Cells" in *Pre-Trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 52-65.

52 See *Floyd and Others v City of New York* [2013] 08 Civ 1034 SAS where the District Court held that the police's stop-and-frisk practice violated the plaintiffs' right to personal security and not to be subjected to unreasonable searches.

53 [1981] 1 LR 245, 57.

54 See K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" in this publication.

55 [2013] 08 Civ 1034 SAS.

56 *Id* 15.

are essentially based on social status.[57]

A concern around enforcement was raised by the High Court of Malawi in the case of *Kaseka and Others v Republic*,[58] where women in a rest house were arrested under the assumption that they were soliciting for an immoral purpose. The Court lamented that the arrest of the women and not their male counterparts, smacked of discrimination.[59]

Similarly, courts have expressed concern that vagrancy offences target persons who are poor.[60] Jackson J in the United States Supreme Court case of *Edwards v People of State of California*[61] cautioned:

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States ... The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed, or color.[62]

These concerns have been echoed in various Malawi judgments. In cases like *Republic v Balala*[63] and *Mwanza and Twelve Others v Republic*,[64] the High Court of Malawi expressed concern that the charge of rogue and vagabond could be used to oppress disadvantaged persons who are not criminals. The reality is that many persons in a developing country have no "visible means of subsistence", and an offence that requires proof of subsistence to avoid arrest invariably discriminates against the poor and marginalised groups within society.

The Right to Privacy

Section 21 of the Constitution provides that every person shall have the right to personal privacy, which shall include the right not to be subjected to a search of his or her person, home or property. This right is infringed when persons are questioned about their private life, and have their person searched prior to or during an arbitrary arrest.

57 See *King v Attorney General* [1981] 1 LR 245 (SC) 257.

58 [1999] MLR 116. That case dealt with the offence of being an idle and disorderly person under section 180(e) of the Penal Code. Women are, however, often arrested under circumstances similar to that case, and then charged under section 184(1)(c). This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" and K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" in this publication.

59 *Id.* "It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companion were not to be arrested just because they were suspected to be there for purposes of immoral activity."

60 The UN Committee on the Elimination of Racial Discrimination has also expressed the concern that laws which prohibit begging and loitering effectively criminalises homelessness. It also noted that such laws have a disproportionate effect on vulnerable groups, such as racial and ethnic minorities in the United States. Committee on the Elimination of Racial Discrimination, Concluding Observations (United States), CERD/C/USA/CO/7-9, 29 August 2014 at para. 12, available at http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf.

61 (1941) 314 US 160.

62 *Id* 184-85.

63 [1997] 2 MLR 67. This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication.

64 [2008] MWHC 228. The case concerned thirteen women who were arrested in rest-houses during a police sweep. The Court held that the convictions were improper, as there was no indication, based on the facts that the women were there for a disorderly purpose. The Court commented: "But surely the law could not have intended to criminalise mere poverty and homelessness, especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. One would have thought it becomes the state responsibility to shelter and provide for such people than condemn them merely on account of their lack of means."

Freedom of Movement

The right to freedom of movement and residence is protected under section 39 of the Constitution. Police have interpreted section 184 as allowing them wide discretion to arrest persons found loitering at night.[65] Notably, such arrests are more likely to affect the poor: someone who drives around at night will not be arrested under section 184, but someone who walks about at night might well be.

That section 184 is frequently used in a manner that infringes the right to freedom of movement, was recognised in *Brown v Republic*.[66] In this case, the accused was arrested for staying at a trading centre without work. He was convicted under section 184(1)(c) and sentenced to five months' imprisonment with hard labour. Overturning the conviction, the High Court of Malawi stated:

> It is not an offence merely to be found, during the night, on or near a road, highway, premises or public place. An unemployed or homeless person may be found sleeping on the veranda of public premises or beside a road or highway. He could be found loitering or sleeping at a market place or in a school building, just because he is poor, unemployed and homeless. It would be wrong and unjust to accuse such person of committing an offence under section 184(c). When faced with a case, such as the present, Magistrates must bear in mind the following: (1) Section 39(1) of the Constitution gives every person the right to freedom of movement and residence within the borders of Malawi; (2) Section 30(2) of the Constitution suggests that the State has a duty to provide employment to its citizens. It would, therefore, seem to me that it is a violation of an individual's right to freedom of movement to arrest a person merely because he is found at night on or near some premises, road, highway or public place.

Are the Rights Violations Resulting from Section 184 of the Penal Code Prescribed by Law?

The innocuous phrase "prescribed by law" is arguably steeped in meaning. It encompasses, in a constitutional inquiry, many of the common law principles of legality – including the prohibition against vagueness[67] and arbitrariness.

According to Currie and De Waal,[68] the enquiry about whether or not a law is "of general application"[69] is a two-pronged one. Firstly, it looks at whether or not the law is "sufficiently clear, accessible and precise that those affected by it can ascertain the extent of their rights and obligations." Secondly, it looks at whether the law is of equal application and not arbitrary in application.[70] The test is the same in relation to the phrase "prescribed by law", as contained in section 44(1) of the Constitution of Malawi. The Canadian Supreme Court has held that "prescribed by law" requires

65 Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* 65.

66 MWHC Criminal Appeal No. 24 of 1996.

67 *R v Rimmington* [2006] 1 AC 459.

68 I Currie & J De Waal (eds) *The New Constitutional and Administrative Law* (2001) 340.

69 Note: there is a difference between the exact wording of the limitations clause in the Constitution of South Africa, section 36, and the limitation clause in the Constitution of Malawi, section 44. The Constitution of South Africa refers to "a law of general application", whilst the Constitution of Malawi refers to "prescribed by law". It is submitted that both these phrases have the same meaning. In any event, section 44(2) of the Constitution of Malawi emphasises the requirement that the law must be of general application.

70 *Id.*

that the provision was properly adopted, that it is of general application, and that it is sufficiently accessible and precise.[71]

The High Court of Malawi has essentially applied the principles of legality to avoid a conclusion that sections 184(1)(b) and (c) are unconstitutional.[72] Court decisions based on section 184 have thus tried to interpret these sections narrowly, by reading into section an element of intent – so as to avoid the offence covering too wide a range of conduct.[73] Nevertheless, the High Court of Malawi has not been able to restrain the police from arbitrarily applying sections 184(1)(b) and (c).[74]

An offence should provide the public and the police with a clear standard of what constitutes prohibited conduct;[75] yet broad articulation of sections 184(1)(b) and (c) lead to the continued arrest of persons in circumstances in which the police are unaware that any offence has been committed. Thus, the offence, by its nature, leads to unlawful and arbitrary arrests.

The Malawi Supreme Court of Appeal in *Kamwangala v Republic* recently emphasised the problem of using arrest as a tool of law enforcement without facts justifying the arrest:[76]

> Speaking for ourselves we believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate.

In contrast, the offences in sections 184(1)(b) and (c) allow arrest on nothing more than the "mere suspicion of criminality". Such arrests are inevitably arbitrary, as they are based on an individual police officer's perception of whether a person is in a public place for an illegal or disorderly purpose, or gives good account of himself or herself.[77]

Whether a prescribed law is void on vagueness grounds, is therefore an important aspect for consideration in any inquiry into whether a law justifiably limits constitutional rights.[78] Indeed, many courts in the United States have explicitly ruled certain vagrancy laws void because of

71 *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component* [2009] 2 SCR 295 at para. 53.

72 This approach is also referred to as the Rule of Lenity, which requires that, in construing an ambiguous criminal statute, the court should resolve the ambiguity in favour of the defendant. *McNally v United States* (1987) 483 US 350.

73 *Brown v Republic* MWHC Criminal Appeal No. 24 of 1996; *Republic v Balala* [1997] MLR 67 (HC); *Mwanza and 12 Others v Republic* [2008] MWHC 228; *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC); *Chidziwe v Republic* MWHC Criminal Appeal No. 14 of 2013.

74 Ackermann J in the South African Constitutional Court case of *State v Makwanyane* 1995 (3) SA 391 (CC) at para. 156, emphasised that arbitrariness is contrary to the values underlying the constitutional order, since it inevitably leads to the unequal treatment of persons.

75 "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v Reese* (1875) 92 US 214 (SC) 221.

76 MWSC Miscellaneous Criminal Appeal No. 6 of 2013.

77 See *United States v Margeson* (1966) 259 F Supp 256 (DC), which held that a provision allowing a policeman's judgment (as to the validity of a person's 'account') to be determinative of guilt, is unconstitutional.

78 JD Berg, "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 470.

vagueness. In *Baker v Binder*,[79] the Federal District Court ruled that a law, which declared persons who habitually loiter without work vagrants, was too wide in ambit and not specific enough about what conduct it wanted to prohibit. In *Papachristou v City of Jacksonville*,[80] the United States Supreme Court struck down a rogue and vagabond offence as unconstitutionally vague, because the broad provision did not give citizens adequate notice of what conduct was forbidden and did not sufficiently curtail police discretion, which can easily be abused. The Supreme Court of Ireland, in *King v Attorney General*,[81] held that an offence similar to section 184(1)(b) was arbitrary and vague, and vested too much discretion in the prosecutor and judge.

Are the Rights Violations Derived from Section 184 of the Penal Code Reasonable and Necessary in an Open and Democratic Society?

The enquiries into reasonableness[82] and necessity[83] often overlap, and, for the purpose of this analysis, will be discussed as a single inquiry into the proportionality of sections 184(1)(b) and (c) of the Penal Code. This exercise essentially seeks to balance the objective of the offence against the rights infringements caused by it.

Currie and De Waal, in analysing the Constitution of South Africa's limitations clause, note that:

> It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the right-holder. If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights. The reasons for limiting a right need to be exceptionally strong.[84]

The proportionality test was articulated in the Canadian Supreme Court case of *R v Oakes*,[85] as consisting of three components:

- The offence must be rationally connected to its objective and not be arbitrary, unfair, or based on irrational considerations;
- The offence, even if rationally connected to the objective, should impair "as little as possible", the right or freedom in question; and
- There must be proportionality between the *effects* of the offence that are responsible for limiting the right or freedom, and the objective that has been identified as of "sufficient importance" to warrant over-riding a constitutionally protected right.

79 (1967) 274 F Supp 658.

80 (1972) 405 US 156. This case is also referred to in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasonkomona*" in this publication.

81 [1981] 1 LR 245, 257.

82 A reasonableness enquiry tends to consider whether or not the offence is relevant, sufficient, and proportionate to a legitimate government aim.

83 An enquiry into whether or not an offence is necessary in an open and democratic society incorporates a proportionality analysis and also examines the question of whether or not there is a pressing social need for the violation. The content of the phrase "necessary in a democratic society" has been discussed by the European Court of Human Rights. See *Koretskyy and Others v Ukraine* Case No. 40269/02 (2008) (ECHR) at paras. 39-42; *Gorzelik and Others v Poland* Case No. 44158/98 (2004) (ECHR); *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* Case No. 46626/99 (2005) (ECHR); *Tsonev v Bulgaria* Case No. 45963/99 (2006) (ECHR) at para. 52.

84 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 164.

85 [1986] 1 SCR 103 at paras. 69-81.

As stated earlier, sections 184(1)(b) and (c) are aimed at preventing crime. Whilst crime prevention is a legitimate government objective, any measures proposed to deal with this objective should be well researched and not be arbitrary, unfair, or based on irrational considerations.

Essentially, vagrancy laws like sections 184(1)(b) and (c) make assumptions about a person's likelihood of engaging in criminal activity, based on considerations that are often subjective. While persons who have no means of subsistence or who walk around at night might engage in criminal activity, this does not mean that all persons who are poor or who exercise their freedom of movement at night are potential criminals. As such, sections 184(1)(b) and (c) are overly broad. The High Court judgments that have set aside convictions under section 184 are indicative of this overbreadth of section 184.

In this regard, the Supreme Court of Canada noted:

> Overbreadth allows courts to recognise that the law is rational in some cases, but that it over-reaches in its effect in others ... For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual.[86]

In the United States case of *Fenster v Leary*,[87] the New York Court of Appeals held that a statute which defined vagrants as persons without visible means of support, constituted over-reaching of proper limitations of police power and made lawful conduct criminally punishable – even when such conduct in no way encroached upon the rights or interests of others.[88] The UN Special Rapporteur on Extreme Poverty and Human Rights has also noted that overly broad police powers "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials."[89]

Sections 184(1)(b) and (c) are, furthermore, not the most appropriate crime prevention measures. There are measures that serve the same objective, but with less infringement of the rights elucidated above. Section 28 of the Criminal Procedure and Evidence Code of the Laws of Malawi, for example, already provides for the circumstances under which a police officer may arrest a person without a warrant. The section authorises a police officer to arrest, without a warrant or order from a magistrate, any person whom he finds lying or loitering in any highway, yard, or place during the night – and whom he suspects, upon reasonable grounds, of having committed or being about to commit a felony. The section also extends to the arrest of any person who is about to commit an arrestable offence or whom the officer has reasonable grounds of suspecting is about to commit an arrestable offence. Section 28 of the Criminal Procedure and Evidence Code is a more appropriate response to crime prevention, as it contains the yardstick of "reasonable grounds". Section 28 further requires that the police officer must suspect that a specific offence

86 *Canada (Attorney General) v Bedford* 2013 SCC 72 at para. 113.

87 (1967) 20 NY2d 309.

88 *Id* 312-13; see also "Criminal Law – Constitutional Law – Vagrancy Statutes and Due Process – *Alegata v Commonwealth*, 231 NE2d (Mass 1967)" (1968) 9 *Wm & Mary L Rev* 1162, 1166.

89 UN General Assembly *Report by Special Rapporteur on Extreme Poverty and Human Rights* 66th session (4 August 2011) A/66/265, 5, available at http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf. See also UN General Assembly *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation* 21st Session of the Human Rights Council (2012) 11.

has, or is about to be, committed. This is a better option than section 184(1)(c), which simply requires a suspicion that the person is at a place for an illegal or disorderly purpose. The objective of crime prevention is better balanced against the rights of persons if an arrest is limited to cases where there is a suspicion that a substantive offence has actually been committed or is about to be committed. As explained by Hewart CJ in *R v Dean*:[90]

> It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge a prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824.[91]

The effect of sections 184(1)(b) and (c) is not only an infringement of the rights of those arbitrarily arrested under these sections. The policing and prosecution of these offences which relate to suspicious conduct (as opposed to actual conduct), are a strain on the resources of police, the courts, and prisons. Thus, it cannot be shown that the alleged deterrent effect of these offences outweighs the negative impact these offences have on the functioning of the justice system.

Since the offence is vague, overly broad, and disproportionate, it does not meet the requirements that justify an infringement of rights – as set out in sections 12 and 44 of the Constitution – and does not comply with international human rights standards.[92]

The fact that the courts have interpreted the offence narrowly does not save it from unconstitutionality. While sections 184(1)(b) and (c) could, as a result of precedent in Malawi, be read to include an element of intent, this is not the case in practice. These offences continue to be applied in an arbitrary manner and still do not give citizens a clear understanding of the conduct that is prohibited. These offences are, accordingly, in clear violation of section 44(1) of the Constitution of Malawi.

Taking the proportionality test further, the fact that sections 184(1)(b) and (c), in their effect, infringe on the essential contents of, *inter alia*, the rights to dignity, privacy, and security of person and the rights to be protected from inhuman and degrading treatment and discrimination, amounts to a violation of section 44(2) of the Constitution of Malawi.

90 (1) 18 Cr App R 134.

91 *Id*, quoted in *Republic v Willie* [1923-60] ALR (M) 152 (HC) 154.

92 The United Nations Guidelines for the Prevention of Crime (2002), provides (in article 12) that "the rule of law and those human rights which are recognised in international instruments to which Member States are parties must be respected in all aspects of crime prevention".

Conclusion

In 1996, the Malawi High Court opined in *Brown v Republic*[93] that "[i]n light of the new Constitution, offences such as that of rogue and vagabond need to be reviewed, as they appear to violate the Constitution".

The Malawi Law Commission published a report on its review of the Penal Code in 2000. However, the review did not include a discussion of the relevance of rogue and vagabond offences. Twea JA, who participated in the Law Commission review process, commented that:

These offences have been problematic and will continue to be so. Yes, we reviewed the law, but at the time consultations on the review of the Penal Code took place, we had not thought through the issues of the rights of the poor in respect of these laws ... It may be time to re look at the laws.[94]

While a review of the entire rogue and vagabond provision in the Penal Code is necessary, and urgent, this does not preclude the courts from ruling – in terms of section 108(2) of the Constitution – that the offence is invalid. In the rogue and vagabond cases that have come before the courts, the accused were often poor and did not have legal representation. In such cases, the court should not wait for a constitutional matter to be raised by the accused before interrogating it.

93 MWHC Criminal Appeal No. 24 of 1996.

94 Keynote Address of Justice EB Twea SC JA at the Expert Consultation on the Law and Practice Regarding Nuisance-Related Offences, 6 and 7 February 2014, Capital Hotel, Lilongwe, Malawi.

Invoking International Law in Domestic Courts to Protect the Rights of Vulnerable Groups

THE RELEVANCE OF INTERNATIONAL LAW IN JUDICIAL DECISION-MAKING IN MALAWI[1]

Dr Redson E. Kapindu J[2]

Introduction

One of the most important principles that govern international law is that of state sovereignty. State sovereignty can generally be understood as the notion that "there is a province of state conduct that should remain within the exclusive decisional domain of the state, interference with which is prohibited by international law".[3] One of the core features of state sovereignty, which is also a reflection of the right of self-determination, is the exclusive power of the state, through its democratic institutions and processes, to make laws that are applicable and enforceable within that state.

It is largely because of this fact that many states around the world remain cautious and guarded in adopting and applying either foreign law or international law within their domestic settings.[4] This guarded approach is most evident in those states that are commonly referred to as dualist jurisdictions. These are jurisdictions that require that, in order for an international agreement to be enforceable as law domestically, in addition to the formal act of ratification or accession that binds the state to the agreement on the international plane, a further domestic legislative act that domesticates the international agreement is required.[5] Malawi is among the states that are classified as dualist.[6] Dualism is distinguished from monism, which refers to a system whereby an international agreement automatically forms part of domestic law the moment it comes into force through the formal act of ratification or accession.[7]

Since the emergence of international human rights law as a substantive part of international law after the end of the Second World War, the principle of state sovereignty, as traditionally understood in the Westphalian sense,[8] has come under challenge.[9] A new understanding of

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

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3 RE Kapindu "Towards a More Effective Guarantee of Socio-Economic Rights for Refugees in Southern Africa" *PhD Thesis*, University of the Witwatersrand, Johannesburg (unpublished) (2014) 63.

4 See E Benvenisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 *Am J Int'l L* 241, 241.

5 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 70-74.

6 See Constitution of Malawi, 1994, section 211(1).

7 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 74-75.

8 The Westphalian sense refers to the Treaty of Westphalia concluded by western European states, whereby they agreed that sovereign states should not interfere in the domestic affairs of other states. This understanding remained dominant until the adoption of the Charter of the United Nations in 1945.

9 J Humphrey "The International Law of Human Rights" in *The Present State of International Law and Other Essays* (1973), quoted in P Sieghart *The International Law of Human Rights* (1983) 11. See also RE Kapindu "From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa" (2009) *Research Report Series*

"sovereignty as responsibility" has emerged, which subjects the internal treatment of people by the state to international legal scrutiny and supervision.[10] Even the International Court of Justice has emphatically stated that how a state treats its own citizens is no longer a matter within the exclusive domestic concern of the state, and that it is now a matter of international concern.[11] This is the legal paradigm within which international human rights law has grown.

The upshot of the challenge presented to the orthodox Westphalian understanding of sovereignty, is that the notion of dualism, as this paper will demonstrate, has also come under intense interrogation and challenge. Other scholars are now arguing that monism has gradually but surely been creeping in as the conceptually dominant and logical understanding of the consequence of entering into binding international commitments, especially in the field of human rights.[12]

In 1994, Malawi adopted a new and transformative Constitution that was the culmination of its change from an authoritarian regime to a constitutional democracy. This Constitution accorded a prominent role for the use of international law in judicial decisions.[13] Concerning the place occupied by international law in the development of Malawian human rights jurisprudence, Hansen[14] observed that:

> [Tiyanjana] Maluwa wrote "The new Constitution provides Malawian Courts with an opportunity to develop a constitutional jurisprudence in which international law and comparative law will play a major part"; and he continued, "[t]he challenge here falls principally upon both the judiciary and the legal profession as a whole". Today, the fact is that although the judiciary and the legal profession as a whole are being exposed to human rights law more frequently following the introduction of the 1994 Constitution, international human rights law is still not playing any important role in the courts of Malawi despite the constitutional recommendation hereof. The reasons are multiple, but it is fair to say that lack of training, material and literature are the fundamental reasons. Judges and legal practitioners are not being exposed to international human rights law. Consequently, the decisions made by the judges will not reflect the fact that Chapter Four of the Malawi Constitution to a large extent is an adoption of international human rights law. In the end, such an approach may endanger the protection of human rights in Malawi.[15]

My assessment is that, while Hansen's comment was fair when it was made in 2002, the judiciary and legal profession in Malawi have made significant strides since then towards infusing international human rights law norms into local jurisprudence. Admittedly, however, this infusion has not been as extensive and as profound as would be ideal. In the light of this background and challenges, this article explores the relevance of international law in judicial decision-making in Malawi. The paper provides a blend of descriptive, analytical, and critical approaches, as it briefly demonstrates the locus of international law in the Malawian judicial system.

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10 F Deng *et al Sovereignty as Responsibility: Conflict Management in Africa* (1996) xviii.

11 *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment ICJ Reports 1970, 32 at paras. 33-34.

12 See for example MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628.

13 See Constitution of Malawi, 1994, sections 11(2)(c), 44(1), 45(4)(a), 135(a), 211.

14 TT Hansen "Implementation of International Human Rights Standards through the National Courts in Malawi" (2002) 46(1) *J Afr L* 31.

15 *Id* 42.

Overview of provisions relating to international law in the Constitution

As observed by Maluwa,[16] the design of the Constitution of Malawi accords international law a major and important role in constitutional adjudication. Numerous provisions under the Constitution provide room for the relevance and applicability of international law in Malawi. Indeed, the very first declaration that the Constitution makes, in section 1, is that: "The Republic of Malawi is a sovereign state with rights and obligations under the Law of Nations." Further to the declaration made under section 1, the Constitution also states, in section 13(k), as a directive principle of national policy, that the state shall "govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs". These two provisions in particular signify the central place that international law assumed in the minds of the framers of the Constitution, in the broad realm of state governance.

Section 211 of the Constitution, which will be further explored below, makes provision for the direct application of international law as part of domestic law. It provides for the instances in which treaty law can be applied as part of Malawian law, and also instances where customary international law may or may not be applied as domestic law.

Section 11(2)(c) of the Constitution provides that, "[i]n interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law". The language of the Constitution gives discretion to the courts on whether or not to apply international law under these provisions; but, at the same time, where international law is applicable, the Constitution makes the consideration thereof peremptory.

Another provision that is central in human rights discourse is the clause on limitation of rights under section 44(1) of the Constitution. The Constitution stipulates that one of the essential conditions for a limitation on a right guaranteed under the Bill of Rights to be valid, is that it must be "recognised by international human rights standards". This therefore requires the courts to examine the prevailing position in international law in deciding whether or not to uphold the limitation.

International law again assumes an important role in the case of a state of emergency. Under section 45 of the Constitution, where rights are derogated from pursuant to the declaration of a state of emergency, section 45(4)(a) provides that, except in respect of a few rights listed under section 45(2) of the Constitution, the derogation from the rights under the Constitution can only be permissible to the extent that such derogation is "consistent with the obligations of Malawi under international law."

Under section 135(a) of the Constitution, the Law Commission is mandated to review laws and make any recommendations to ensure that laws comply with the Constitution and "applicable international law". Law Commission reports are important documents in any state where such a commission exists, and courts often revert to the recommendations of the Law Commission to assist in interpreting laws in appropriate cases.

16 T Maluwa "The Role of International Law in the Protection of Human Rights under the Malawian Constitution of 1995" (1995) 3 *Afr YB Int'l L* 53, 77-79.

Section 169 of the Constitution establishes the Prisons Inspectorate. Among other functions, under section 169(3)(a), the Prisons Inspectorate is charged with monitoring the conditions, administration, and general functioning of penal institutions, taking due account of "applicable international standards". This therefore clearly suggests that the treatment of prisoners, which is a key human rights issue in Malawi, must be informed by considerations of international law.

Justification for dualism

Traditionally, common law jurisdictions around the world, including Malawi, have adopted the dualist rather than the monist approach in the domestic application of international law.[17] In *Gondwe v Attorney General*,[18] Nyirenda J, as he then was, sought to express the underlying philosophy behind dualism. He said:

> The doctrines of State sovereignty and supremacy of Parliament in legislating are the basis, I believe, upon which, in common law jurisdictions, international law must be incorporated in municipal law for it to be enforceable. It logically follows therefore that sovereign States have the authority to determine the extent and limit to which they wish to incorporate international law.[19]

The parliamentary supremacy argument, however, was superseded by Constitutional supremacy upon the adoption of the 1994 Constitution. Another justification is said to lie in democracy and separation of powers. The power to make law, lies with the representatives of the people in parliament.[20]

However, I have already pointed out the challenge that the state sovereignty argument, as advanced by Nyirenda J, encounters in contemporary international law. The democracy argument sounds the most potent justification for dualism. However, when viewed closely, that argument must still be rooted in the broader state sovereignty argument in order for it to be invoked as a push-back shield against the percolation of undomesticated international law into the body of applicable domestic law.

Manner of application of international law

International law is applied in domestic courts directly or indirectly. Direct application refers to situations where international law is applied as part of domestic law. Indirect application, by contrast, refers to situations in which international law only serves an interpretive or inspirational function when interpreting the Constitution, legislation, or any other law. The Constitution also directs the state to follow international law when making and implementing national policies.[21]

17 See MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628, 635.

18 [1996] MLR 492 (HC).

19 *Id* 495-96.

20 See *In Re Adoption of Chifundo James (a female infant)* MSCA Adoption Appeal No. 28 of 2009.

21 See Constitution of Malawi, 1994, section 13(k).

Provisions on Direct Application in Malawi

In Malawi, the direct application scheme falls under section 211 of the Constitution. In terms of section 211(1) of the Constitution, international agreements entered into after the coming into force of the Constitution form part of the law of Malawi if an act of parliament so provides. Section 211(2) provides that "[b]inding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament." Customary international law forms part of Malawian law, unless contrary to the Constitution or an act of parliament, in terms of section 211(3).

Direct Application under Section 211(1)

Section 211(1) is a typical dualist clause that requires domestication of a treaty before it can be considered to form part of domestic law in Malawi. The apparent clarity and lack of ambiguity in section 211(1) notwithstanding, it is arguable that the section might possibly be interpreted according to the principle of self-execution discussed below.

The Principle of Self-Execution in Malawi

There is a significant school of thought in international law that holds that even in dualist states, a domesticating act of parliament is unnecessary where the provisions of the international agreement are self-executing, unless this principle is expressly excluded.[22] In South Africa, the self-executing exception is expressly provided for in section 231(4) of the Constitution. Ngolele[23] astutely describes the principle in the following terms:

> Self-execution refers to treaties or provisions thereof with 'statute like effect' which lend themselves to judicial and administrative application without a need for legislative implementation. Legislative transformation of self-executing treaty obligations is thus superfluous, the treaty being, by definition, directly applicable and therefore part of municipal law.[24]

The UN Committee on Economic, Social and Cultural Rights has stated that, in most countries, "the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature", and that "[i]t is especially important to avoid any *a priori* assumption that the norms should be considered to be non-self-executing".[25]

I argue that the principle of self-execution is embedded in the Treaties and Conventions Publication Act (TCPA).[26] Section 4 of the TCPA provides that:

> Where the whole or part of an international treaty, convention or agreement or any article, term, covenant or provision thereof either expressly or by reason of its subject matter impliedly requires for the purpose of its implementation or the giving to it of force or effect in Malawi, the enactment

22 See MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628, 638.

23 EM Ngolele "The Content of the Doctrine of Self-Execution and Its Limited Effect in South African Law" (2006) 31 *S Afr YB Int'l L* 141.

24 *Id* 141.

25 See Committee on Economic, Social and Cultural Rights, General Comment No. 9 at para. 11.

26 Cap 16:02 of the Laws of Malawi.

> of an Act of Parliament or any subsidiary legislation, the publication thereof pursuant to section 2 shall not be deemed to be a sufficient substitute for that requirement or for such Act of Parliament or subsidiary legislation.

The import of this section seems to be that where the whole or part of an international treaty, convention or agreement or any article, term, covenant, or provision thereof either expressly, or by reason of its subject matter, does not require, for the purpose of its implementation or the giving to it of force or effect in Malawi, the enactment of an act of parliament or any subsidiary legislation, the publication thereof pursuant to section 2 may be deemed to be a sufficient substitute for that requirement or for such act of parliament or subsidiary legislation. It is a contentious argument, but it appears to flow logically from the tenor of section 4 of the TCPA.

Treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and others have been published under the TCPA.

Direct Application under Section 211(2)

Courts in Malawi have held that the import of section 211(2) of the Constitution is that agreements entered into by Malawi prior to 1994 are part of Malawian law.[27] This approach however, in my view, is not in line with the language used in section 211(2). My position is that section 211(2) is unnecessary in the Constitution. That section, according to my understanding, simply restates the obvious. It reads: "Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament." Stating that Malawi would continue to be bound by agreements that were binding on the previous constitutional regime is simply restating a pre-existing position in international law. For instance, in *Krishna Achuthan (on behalf of Aleke Banda)*,[28] *Amnesty International (on behalf of Orton and Vera Chirwa)*,[29] and *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*,[30] the African Commission on Human and Peoples' Rights found the new Malawian government, under the new Constitution (the present one) liable for abuses committed under the previous government operating under the previous Constitution. It held that: "Principles of international law stipulate ... that a new government inherits the previous government's international obligations".[31] In other words, obligations that were binding on Malawi under the old Constitution and government, continued to bind the Republic after the change.

The approach adopted in *Kalinda v Limbe Leaf Tobacco Ltd*[32] and *Malawi Telecommunications Ltd v Makande & Omar*[33] suggests that Malawi was monist before 1994, which is clearly not correct. It suggests that once a treaty became binding on Malawi, it became part of Malawian law. The position

27 See *Kalinda v Limbe Leaf Tobacco Ltd* MWHC Civil Cause No. 542 of 1995; *Malawi Telecommunications Ltd v Makande & Omar* MSCA No.2 of 2006.

28 Comm. No. 64/92.

29 Comm. No. 68/92.

30 Comm. No. 78/92.

31 *Id* at para. 12.

32 *Kalinda v Limbe Leaf Tobacco Ltd* MWHC Civil Cause No. 542 of 1995.

33 *Malawi Telecommunications Ltd v Makande & Omar* MSCA No. 2 of 2006.

obtaining must, in my considered view, have been the common law position which was dualist.

The second limb to section 211(2), which suggests that treaties binding on Malawi would stop being binding on the Republic if an act of parliament was passed to that effect, is again an incorrect proposition in terms of international law. In order for Malawi to cease to be bound by an otherwise binding international agreement, it has to formally renounce such an agreement on the international plane, following the processes laid down for that particular treaty or in terms of the general international law on treaties. An act of parliament purporting to relieve the state from a binding international agreement, as suggested in section 211(2), would be otiose and ineffectual.

Indirect Application - Interpretive Approach (Malawi)

All the various provisions discussed above, apart from section 211 of the Constitution, require the indirect application of international law in interpreting the Constitution. In the case of *Kafantayeni and Others v Attorney General*,[34] the High Court affirmed the essence of section 11(2)(c) of the Constitution. It stated that:

> We accept and recognise that the [International Covenant on Civil and Political Rights, to which Malawi is a State Party] forms part of the body of current norms of public international law and, in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution.[35]

In *In Re David Banda*,[36] the High Court held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as possible, avoids conflict with international law. This is a well-known principle in most jurisdictions around the world.

In *In Re Chifundo James*,[37] the Malawi Supreme Court of Appeal re-affirmed the principle of avoiding conflict between domestic law and international law. It held that:

> In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.[38]

In *Mwakawanga v Republic*,[39] Southworth CJ cited with approval the position in Craies on Statute Law,[40] which stated that "a statute cannot be pronounced void as offending against international law, though judges will endeavour if possible to incline to a construction which will avoid a breach of it." [41] In *Gondwe v Attorney General,*[42] Nyirenda J clarified the effect of dualism in the following

34 [2007] MWHC 1. This case is also discussed in KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

35 *Id.*

36 [2008] MWHC 243. See discussion on this case in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication.

37 MSCA Adoption Appeal No. 28 of 2009.

38 *Id.*

39 (1968-1970) 5 ALR (Mal) 14 (SCA).

40 Sixth Edition (1963) 461-462.

41 *Mwakawanga v Republic* (1968-1970) 5 ALR (Mal) 14 (SCA) 38.

42 [1996] MLR 492 (HC).

terms:

> It is a trite observation ... that municipal law within a sovereign territory is supreme to international law, [but] if a conflict can be avoided by construction let the courts do so. Let me once more allow logic its course and say if it is apparent from the ordinary and clear interpretation of a statute that the conflict was intentional in order to give effect to a law intended for a purpose, international law cannot be relied upon.[43]

Indirect Application: South Africa

Section 39(1)(b) of the Constitution of South Africa provides that, "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law". Chaskalson J held in *S v Makwanyane and Another*[44] that international law, within the meaning of section 39(1)(b) of the Constitution, includes both binding and non-binding law. Considering its similarity in language, this is also the position in Malawi under section 11(2)(c).[45]

Indirect Application: Botswana

In Botswana, the approach adopted has been broadly similar to that of Malawi. Thus, in *Attorney General v Dow*,[46] the plaintiff challenged the constitutionality of sections 4 and 5 of the Citizenship Act 1982.[47] The issue related to citizenship laws discriminating against women in respect of their children acquiring citizenship by descent. The Attorney General contended that the High Court had erred in relying on undomesticated international instruments in arriving at a decision declaring the law in this respect unconstitutional.[48] The Court of Appeal held that relevant international instruments to which Botswana was a party, such as the African Charter on Human and Peoples' Rights (African Charter), were applicable as an aid in interpreting relevant legislation.[49] It held that domestic legislation had to be read in a manner that did not conflict with Botswana's obligations under the African Charter.[50]

Indirect Application: Ghana

In Ghana, courts have also emphasised the importance of paying due regard to the country's international obligations in the interpretation and application of domestic law. In the case of *New Patriotic Party v Inspector General of Police, Accra*,[51] the Supreme Court of Appeal of Ghana emphasised that non-domestication of international instruments does not mean that duly ratified international law treaties cannot be applied. Archer CJ said that: "I do not think the fact that Ghana has not passed specific legislation to give effect to the [African] Charter, [entails that]

43 *Id* 496.

44 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para. 35. This case is also cited in OBK Dingake "The Role of the Judiciary and the Legal Profession in Protecting the Rights of Vulnerable Groups in Botswana" in this publication.

45 See also D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 27.

46 (2001) AHRLR 99. This case is also cited in L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" and SB Nkonde and W Ngwira "Accused's Rights and Access to Prosecution Information in Subordinate Courts in Zambia" in this publication.

47 Act No. 25 of 1982 as amended by Citizenship (Amendment) Act 1984 (Act No. 17 of 1984).

48 *Id* at para. 100.

49 *Id* at para. 109.

50 *Id*.

51 [2004] 2 HRLRA 1.

the [African] Charter cannot be relied upon" in domestic courts. He stressed that Ghana was "expected to recognise the rights, duties and freedoms enshrined in the [African] Charter and to adopt legislative and other measures to give effect to the rights and duties."[52]

Indirect Application: Canada

Courts in Canada have stressed that international law, once ratified, still has room for application, even in the absence of domestication. Thus, in *Baker v Canada (Ministry of Citizenship and Immigration)*,[53] the Supreme Court held: "The principle that an international convention ratified by [Canada] is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation."[54]

Indirect Application: Australia

Finally, we consider Australia, another common law-based jurisdiction, where courts have considered the issue of the application of international law in domestic courts extensively. In the case of *Director-General, Department of Community Services: Re Thomas*,[55] the Federal Supreme Court stated, in relation to the Convention on the Rights of the Child (CRC), that: "Australia is a signatory to CRC, and although this does not incorporate the Convention into our domestic law, it has relevance to decisions made in respect of children by administrative and judicial decision-makers."[56] The Court then eloquently outlined the various ways in which international law is relevant to judicial decision-making. The Court stated, firstly, that ratification of a treaty such as the CRC creates a legitimate expectation that decisions will be made having regard to the principles espoused therein.[57] Secondly, the Court held that the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law.[58] Thirdly, the Court held that where a convention has been ratified by a state, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic legislation.[59]

Lessons from Comparative Foreign Case Law

These selected decisions from comparable foreign jurisdictions give us a good picture of the approach that courts in other dualist jurisdictions have taken in instances where a treaty has been ratified, but not yet domesticated. In general, we see that the Malawian approach greatly mirrors these approaches. The approach is clear, that notwithstanding the absence of a domesticating legislative act, courts must take serious account and give effect to the state's international law obligations. A departure from compliance with a state's international law obligations in judicial decisions is

52 *Id* 63.

53 [1999] 2 SCR 817.

54 *Id* 821.

55 [2009] NSWSC 217.

56 *Id* at para. 37.

57 The Court cited *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273 (HC) as the authority for this proposition.

58 The Court cited *Mabo v Queensland [No.2]* [1992] HCA 23, 42 in support of this statement.

59 *Murray v Director Family Services, ACT* [1993] FamCA 103, 255-56 was cited in support of this point.

therefore viewed as an exception, even in dualist jurisdictions. The pointers provided in *Director-General, Department of Community Services: Re Thomas* on the importance of undomesticated international law on the domestic sphere, are particularly informative and instructive.

A Challenge to Dualism: Approach of Supra-National Tribunals

The position that gives primacy to national law, as for instance expressed in *Gondwe v Attorney General,* faces a challenge from the position adopted by various supra-national tribunals around the world. I will highlight, for reasons of space, only the approach taken by the African Commission on Human and Peoples' Rights (African Commission) in its interpretation of the domestic effect of the African Charter on Human and Peoples' Rights (African Charter), and the specific question as to which of international law and domestic law is superior when there is conflict. In *Legal Resources Foundation v Zambia*,[60] the African Commission held that:

> [T]he government of Zambia does not seek to avoid its international responsibilities in terms of the treaties it is party to (*vide* Communication 212/98 *Amnesty International/Zambia*). This is just as well because international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (Article 27, Vienna Convention on the Law of Treaties).[61]

Further, the African Commission held, with the utmost clarity, in *Media Rights Agenda and Others v Nigeria*,[62] that:

> To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the [African] Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the [African] Charter must be in conformity with the provisions of the [African] Charter.[63]

It is apparent from the approach domestically adopted by our courts, and that adopted by supra-national tribunals such as the African Commission, that these approaches have created a jurisprudential tension; there is disharmony over which body of law should take precedence. Domestic courts hold that domestic law has primacy and supremacy. International tribunals, by contrast, while acknowledging that, in certain cases, legislative domestication of international agreements is required by some states before treaties can become part of domestic law, have been emphatic, nonetheless, that where the two contradict, international law must prevail - and this will certainly be so where the dispute escalates to a supra-national forum. It is evident, therefore, that with this state of affairs, dualism as a theory faces a significant practical challenge, especially for states like Malawi that are subject to numerous international individual complaint mechanisms, including access for individuals to the African Court on Human and Peoples' Rights.

60 Comm. No. 211/98.

61 *Id* at para. 59.

62 (2000) AHRLR 200 (ACHPR).

63 *Id* at para. 66.

Conclusion

The position in Malawi is that where Malawi is a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is peremptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.

It is worth observing that the state in Malawi is also enjoined to govern in accordance with international law, as it formulates and implements national policy. It is submitted that when courts are called upon to interpret various rights under the Constitution, especially socio-economic rights, the courts are entitled to look for, consider, and apply applicable international law. In this way, international law is of particular relevance when deciding on cases involving vulnerable groups, especially those specifically mentioned in section 13 of the Constitution.

This paper has argued that while international law is not as widely invoked in Malawian judicial decisions as would be ideal given Malawi's constitutional framework, there has been a positive and progressive trend in the use of international law. The prospective outlook is promising. With the passage of time, with greater sensitisation of the various actors in the litigation process, and with a growing jurisprudence on the matter, we are likely to see greater and more appropriate use of international law in Malawian courts in the future.

THE ROLE OF INTERNATIONAL LABOUR STANDARDS IN DECISION-MAKING ON THE RIGHTS OF VULNERABLE GROUPS IN BOTSWANA[1]

Harold Ruhukya J[2]

Introduction

World history was permanently re-written in 1919. As a result of the 'Great War', the International Labour Organisation (ILO) was born. In the Preamble of its Constitution, the following is stated – setting the tone for what the ILO would seek to do in its attempts to restore normality in the 'broken' world of labour. It states:

> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including ... *the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, … recognition of the principle of equal remuneration for work of equal value ...*[3]

It is evident that the theme is protecting people identified as being in need of protection, while at the same time ensuring equality for all people engaged in work.

The term 'vulnerable' groups is regularly used in the instruments of the ILO; however, it has not been defined. To attempt to define the term and reach consensus between the current 185 member states is nigh impossible. Furthermore, and since 1919, what is considered to be a vulnerable group in one country is not necessarily a vulnerable group in the next country. A general (rather than specific) definition of the term seems to have worked for the ILO.

This paper briefly discusses what role the ILO plays in protecting vulnerable groups in the world of labour. The objective of this paper is to establish the role of international labour standards in decision-making on the rights of vulnerable groups – with particular reference to Botswana – to establish whether protection in international law is provided for vulnerable groups, including women, migrant workers, persons with disabilities, and persons living with HIV. With this in mind, this paper discusses the ILO and International Labour Standards (ILS), the application of international labour standards in domestic courts, and judicial decisions where courts have relied on international labour standards.

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana, on 28 and 29 March 2014.

2 Judge of the Industrial Court of Botswana; LLB (University of Botswana).

3 Own emphasis in italics.

What is the International Labour Organisation (ILO)?

The ILO is a specialised agency of the United Nations Organisation that deals with all labour-related issues in the workplace. It currently has 185 Member States.[4] There are four fundamental documents that shape the work of the ILO, and guide it in achieving its mandate. These are:

- The Constitution, 1919;
- The Declaration of Philadelphia, 1944;
- The Declaration on Fundamental Principles and Rights at Work, 1998; and
- The Declaration on Social Justice for a Fair Globalisation, 2008.

A perusal of the above fundamental documents reveals that the aim of the ILO is to create parameters in which as much fairness as possible is achieved for all human beings. To this end, for instance, the Declaration of Philadelphia, 1944, declares in clear and concise terms that:

> All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

One cannot, in my view, have economic opportunity without a guarantee of economic security, because the one cannot exist without the other.

In the Declaration on Social Justice for a Fair Globalisation, 2008, the concept of 'decent work' was coined. This concept was institutionalised in this declaration and, by so doing, 'decent work' was catapulted to become arguably the core of ILO policies. The 'decent work' concept highlights the importance of sustainable enterprises in creating greater employment and income opportunities for all. With the advent of the computer age and electronic advancements, new terms and concepts have, however, emerged. These terms, such as 'the world is a global village', are a direct result of electronic and technological advancements seen over the last decade or so. Advancement in technologies necessarily results in more efficient ways of doing things. If left unchecked, the workplace could easily become skewed in favour of the bottom line, without due regard and protection of workers' rights.

Clearly being conscious of these developments and the perils such advancements would bring if unchecked, world leaders unanimously declared at the 2005 United Nations World Summit that:

> We strongly support fair globalisation and resolve to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies, as well as national development strategies.[5]

It is interesting to note that in mentioning "decent work for all", the leaders appear to have been concerned (and therefore careful) that special mention be made of women and young people, as these historically disadvantaged group have common cause and bear the brunt of unfairness and inequality.

4 See alphabetical list of ILO Member Countries, available at http://www.ilo.org/public/english/standards/relm/country.htm.

5 See Toolkit for Mainstreaming Employment and Decent Work, available at http://www.ilo.org/integration/themes/dw_mainstreaming/WCMS_189352/lang--en/index.htm.

Goals of the ILO

Current ILO goals can be classified into two main areas:

- The promotion of social justice, in terms of the principles of the ILO's constituting document; and
- Driving the decent work agenda, in terms of employment, social protection, and social dialogue.

It is this way of doing things that sets the ILO apart from all other international organisations. The ILO is the only United Nations agency that operates on the principle of tripartism: in constructing its instruments and carrying out its work, the ILO has equal participation in all processes of governments, employers, and employee organisations. In the Decent Work Agenda it is stated, *inter alia*:

> Achieving the goal of decent work in the globalised economy requires action at the international level. The world community is responding to this challenge in part by developing international legal instruments on trade, finance, environment, human rights and labour. The ILO contributes to this legal framework by elaborating and promoting international labour standards aimed at making sure that economic growth and development go along with the creation of decent work. The ILO's unique tripartite structure ensures that these standards are backed by governments, employers and workers alike. International labour standards therefore establish the basic minimum social standards agreed upon by all actors in the global economy.[6]

Tripartism is not about competing. It is not about one group winning over the other. Tripartism is about reaching consensus over issues that affect the day-to-day running of workplaces. These are workplaces that put food on people's tables, send children to school, and strengthen social fabrics, by ensuring economic viability. True tripartism, in my considered view, has no place for over-reliance on one agenda at the expense of another. For instance, employers cannot demand that everything be about ensuring the bottom line is maximised, regardless of the fact that they are the owners of industry. At the same time, and from a different perspective, employees cannot demand that their terms of employment (especially issues of pay) be met at all costs, simply because they are the labour behind the generation of profits. Governments must not be seen to favour one side over the other, but should create an enabling environment with adequate protection for both sides, in order for the wheels of industry to turn smoothly, and thereby bringing about prosperity for all.

What are International Labour Standards (ILS)?

ILS comprise conventions, recommendations, and protocols. Conventions are international treaties ratified by member states.

Conventions

Once a member state has ratified a convention, it becomes legally binding on that state. The ILO currently has a total of 189 conventions on its books.[7] Eight of these 189 conventions are referred

6 See Rights at Work, available at http://ilo.org/global/about-the-ilo/decent-work-agenda/rights-at-work/lang--en/index.htm.

7 See ILO NORMLEX – Conventions, available at http://www.ilo.org/dyn/normlex/.

to as fundamental conventions.[8] Not all are up to date. All that this means is that some conventions were adopted in the early years of the creation of the ILO, and have been overtaken by events (in a manner of speaking). Once ratified, a convention cannot be updated, neither can it be cancelled or revoked. However, the ILO can adopt revising conventions in order to replace older ones, or adopt protocols to add new provisions to older conventions.[9] In the case of Botswana, a total of fifteen conventions have been ratified to date.[10] The fifteen include all eight fundamental conventions.

The Declaration on Fundamental Principles and Rights at Work, 1998, adds a very interesting and important dimension to the approach that member states must take to the eight fundamental conventions. It categorically provides that even if member states have not ratified the eight fundamental conventions, they have an international obligation to respect, promote, and realise fundamental rights and principles at work.

Recommendations

Recommendations are not open to ratification by member states and consequently they are not legally binding. Their sole purpose is to provide general and technical guidelines for national action, in the area spoken about in the body of the particular recommendation. As the term suggests, member states agree not to elevate a subject to the realm of adopting a convention, but resolve, for instance, to recommend ways in which fairness in a particular area could be achieved and what national action could be taken to achieve such fairness. The ILO currently has 203 recommendations on its books.[11]

Protocols

Protocols partially revise conventions. Nothing more; nothing less. This is so because conventions cannot be amended, either by addition or subtraction. The ILO has only five protocols in place.[12]

International Labour Standards and the protection of the rights of employees

Ratification of a convention raises certain obligations for the member state. Before addressing these, it is important to address the different legal systems in which member states might fall. There are generally two legal systems in which member states are categorised: dualist or monist.[13]

Dualist systems require that, once ratified, a convention can only become part of national law upon adoption via an act of parliament, which either adopts the convention wholesale or adopts certain

8 See ILO NORMLEX – Conventions, available at http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.

9 See How International Labour Standards Are Created, available at http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm.

10 See Ratifications for Botswana, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103303.

11 See ILO NORMLEX – Recommendations, available at http://www.ilo.org/dyn/normlex/en/.

12 See ILO NORMLEX – Protocols, available at http://www.ilo.org/dyn/normlex/en/.

13 For a more detailed discussion on dualism and monism, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

portions thereof.[14] For example, in Botswana, the Diplomatic Immunities & Privileges Act[15] domesticated the Vienna Convention on Diplomatic Relations wholesale. Without such adoption, the ratified convention is not law. Where a member state ratifies a convention but does not make its terms (either in whole or in part) part of its national or domestic law, its international obligations arising from the ratified convention are not necessarily domestically enforceable.[16]

In those states where the legal system is monist (an example is France) the act of ratification of any convention makes the terms of the convention part of their national law.[17] It is automatic. In other words, ratification of conventions makes them law.

Ratification

When stated in unambiguous terms, ratification simply means that a member state formally commits to giving effect – both in law and practice – to the provisions of the convention. Member states are not permitted to ratify any convention with reservation.[18] This means that they are bound, under international law, by the entire text of the ratified convention. The process of ratification then gives rise to protection of the rights of employees. At the end of the day, this is the most important reason the convention was drafted and adopted by member states, i.e. to protect workers.

The protection of employees' rights starts with a system of supervision of member states, in terms of the ILO's supervisory systems and mechanisms. Once a convention has been ratified, there is an obligation created against that member state to submit an annual report to the ILO on what it has done in order to domesticate the ratified convention. At article 22 of the ILO Constitution, the obligation is stated thus:

> Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

These reports are placed before the Committee of Experts – a body comprising high-level judges and lawyers from all over the world – for their consideration.[19] The Committee of Experts is an independent and impartial body. Its decisions and pronouncements are made on the basis of consensus having been reached between the members on the documentary information presented in the annual reports of the member states.

14 See E Benvenisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 *Am J Int'l L* 241, 241.

15 Cap 39:01 of the Laws of Botswana.

16 For a contrary view, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

17 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 74-75.

18 See How International Labour Standards are Created, available at http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm.

19 See Committee of Experts on the Application of Conventions and Recommendations, available at http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

Where member states are found to be in violation of the obligations or terms of the ratified convention, the ILO Constitution sets out a mechanism on how the violating state is to be approached. Article 24 allows either the organisation of either the employers or employees to make representations to the ILO of any violation they perceive a member state to have committed. When the ILO receives such a representation, it may then communicate the representation to the government of the state in question, together with an invitation to the government to respond as it thinks fit. The said article is couched as follows:

> In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Member states are also allowed to issue complaints against each other if one perceives that its fellow state is not in observance of the obligation arising under a ratified convention. These complaints are provided for under article 26, in the following words:

> 1. Any of the Members shall have the right to file a complaint with the International Labour Office, if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
>
> 2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

Where a member state has received such communication and does not respond to the request for comment, the governing body of the ILO may consider the appointment of a commission of inquiry to look into the matter. During the proceedings of the said inquiry, the member state in question is entitled to send a representative to participate therein.

Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)

When the Committee of Experts has considered reports that have been laid before them, their findings are published for international consumption in what are called general surveys. The content of the general surveys, like conventions and recommendations, are considered to be persuasive because they are conclusions that have been arrived at by jurists of international repute. Because of that, and further because they bring to the table vast experience from different parts of the world, their findings (or perhaps their conclusions) are regarded to be universal in nature and can be employed, *inter alia*, as a guide in policy formulation or judicial decision-making.

The Conference Committee on the Application of Standards (that is, ILS) is a permanent committee of the International Labour Conference (ILC).[20] Member states meet once a year in Geneva for an annual conference, where they discuss various matters, as agreed on a pre-arranged

20 See Conference Committee on the Application of Standards, available at http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm.

and determined agenda. The annual meeting is referred to as the ILC. The ILC receives, as part of its annual work, reports from the Committee of Experts. From those reports the ILC will select individual countries and ask them to respond to various contraventions of conventions they would have ratified, or alternatively contraventions of one or more of the eight fundamental conventions of the ILO. The proceedings of the Committee of Experts and its comments are again published for international consumption.

The importance of these publications is obvious: the ILO cannot force a member state to do anything, as to attempt to do so would raise questions about violation of a state's sovereignty.[21] That being the case, publishing contraventions and violations by member states acts like a check on a member state's moral standing amongst its fellow member states. No one wants anything bad said about themselves. The hope is, therefore, in my view, that when such adverse reports are published, a member state would be quick to 'pull its socks up' in order to keep its moral standing amongst its peers.

Application of International Labour Standards in domestic courts

The Industrial Court of Botswana (the Court) was established by the Trade Disputes Act[22] (the Act). Section 15(1) of the Act establishes the Court as one of law and equity. The section defines the mandate of the Court as:

- Settle trade disputes; and
- Further, secure and maintain good industrial relations in Botswana.

Under its equitable jurisdiction, the Court can rely on ILS in its bid to determine disputes brought before it. This unique ability provides confidence that the Court will be able to determine disputes properly, by allowing it to look outside domestic law in reaching its decisions. One must not forget that the Court is first a court of law. If domestic law exists and has been developed sufficiently well to enable the Court to determine the dispute, then there will be no need to look elsewhere or at ILS for that matter. However, where a lacuna exists in the domestic law, as endorsed by the highest court in the land, the Court of Appeal, the Court may refer to ILS to resolve the lacuna and determine the matter. That is what the equitable jurisdiction of the Court seeks to achieve, regardless of whether or not Botswana has ratified a particular convention. Thus, the Court is not bound by the ordinary rules of evidence and can even take into account unratified conventions if this would be useful to assist it to settle the dispute.[23] It is therefore important that judicial officers serving in the Court keep themselves abreast of the development of ILS and what other jurisdictions are doing to solve their problems.

21 For a discussion on the relationship between state sovereignty and the application of international law, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

22 Cap 48:02 of the Laws of Botswana.

23 See *Moeti and Others v Botswana Meat Commission* 2000 (1) BLR 153 (CA) 162 A-C.

Judicial decisions where courts have relied on International Labour Standards

The ILS have been used by domestic courts to protect the rights of vulnerable groups in a number of cases, some of which are described below.

Kioka v Catholic University[24]

The case concerned a young female employee, who was discriminated against at work in terms of not being paid similar benefits to her male counterparts, a lack of maternity protection, and loss of employment due to her HIV status. Finding in her favour, the Industrial Court of Kenya relied on the Constitution of Kenya, the Employment Act,[25] ILO Conventions 100[26] and 111,[27] ILO publications, the ILO Recommendation concerning HIV and AIDS and the World of Work (No. 200), and comparative jurisprudence. The Court ordered exemplary damages for the discrimination against the applicant based on her HIV status, and for the gross violation of her human dignity.

Diau v Botswana Building Society[28]

The case dealt with an employee who was denied permanent employment after she refused to submit to an HIV test. Finding in her favour, the Industrial Court of Botswana, per Dingake J, relied on comparative jurisprudence as well as the ILO Declaration on Fundamental Principles and Rights at Work in finding that HIV status falls within the list of grounds on which discrimination is prohibited in the Constitution:

> The ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, reaffirmed the constitutional principles of the elimination of discrimination at the workplace.
>
> I subscribe fully to the values of the above declaration and believe firmly that elimination of discrimination at work is essential if the values of human dignity and individual freedoms are to go beyond mere formal pronouncements. I also believe that the above position is in line with the Convention No. 111 (Discrimination Employment and Occupation Convention, 1959) that Botswana has ratified. I believe that the fact that Botswana has ratified the Convention cannot be regarded as irrelevant. By doing so, Botswana has demonstrated its clear intention to comply with the provisions contained therein and the Court should take cognizance of this action as an expression of the recognition which must be accorded to its provisions when interpreting similar fundamental provisions under the Constitution.[29]

24 IC Case No. 1161 of 2010.

25 Cap 47:01 of the Laws of Botswana.

26 ILO Equal Remuneration Convention No. 100.

27 ILO Discrimination (Employment and Occupation) Convention No. 111.

28 IC Case No. 50 of 2003. Subsequent to this case, the list of grounds upon which an employer may not terminate employment has been extended to *inter alia*, race, tribe, status, gender, sexual orientation, health status, or disability - see section 23 of the Employment Act of Botswana. The *Diau* case is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

29 *Id* 61-62.

First National Bank of Botswana Ltd v Botswana Bank Employees' Union[30]

This case concerned issues of collective bargaining and whether or not the employer had a right to object to the composition of the union's negotiating team. The Industrial Court of Botswana, per De Villiers J, held that the ILO Right to Organise and Collective Bargaining Convention (No. 98) was applicable, even though not ratified by Botswana:

> The fact that this Convention has not yet been ratified nor included in Botswana legislation, does not mean that this court should just ignore it. Because this court is also a court of equity it does make use of principles set out in unratified conventions, together with other principles when it has to decide whether a certain aspect is fair and reasonable.[31]

Ganelang v Tyre World[32]

This case dealt with the constructive dismissal of a woman. The employer suddenly said it did not want to see her face at the premises any longer. The applicant was re-designated from being a manager to a toilet cleaner on the same salary. She resigned and sued her employer for constructive dismissal. In reaching its decision, the Industrial Court of Botswana noted that the Employment Act[33] did not define constructive dismissal. Finding in the applicant's favour, the court applied definitions from legal dictionaries, authors, various local authorities, the ILO Termination of Employment Convention (No. 158) (even though this convention does not use the term), and the General Survey of the Committee of Experts.

Conclusion

It is the writer's opinion that judicial officers have a significant role to play in protecting the rights of vulnerable groups. They have both a legal and moral duty to translate domestic laws from appearing good on paper, to making them practical and meaningful in everyday life. An appreciation of ILS is helpful and of great assistance, as it is abundantly clear that in this day and age that it is no longer enough to occupy high judicial office with only a law degree. As per the words of the Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level, "[w]henever appropriate, judicial officers should make recommendations in one's judgment on how domestic law and/or policy might be reformed to bring it in conformity with the state's obligations under the Convention".[34]

30 1997 BLR 1177 (IC).

31 *Id* 1188.

32 IC Case No. 169 of 2013.

33 Cap 47:01 of the Laws of Botswana.

34 Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level, 11 September 2003, available at http://www.un.org/womenwatch/daw/cedaw/arusha-declaration2003.pdf. The Declaration came out of a judicial colloquium on the application of international human rights law, including the Convention on the Elimination of Unfair Discrimination against Women (CEDAW). The judicial colloquium was attended by judges from Botswana, Gambia, Ghana, Malawi, Mauritius, Namibia, Swaziland, South Africa, Tanzania, Uganda, and Zambia.

INTERNATIONAL LAW, WOMEN'S RIGHTS AND THE COURTS: A ZAMBIAN PERSPECTIVE[1]

Lillian Mushota[2]

Introduction

Zambian law and jurisprudence dates back to colonial times, when the dual legal system was introduced by the colonial government and it persists to the present day, although the reasons for its retention are very different from those for which it was introduced.

In 1874, the Colonial Office of the British Colonial Government, under the administration of the British South Africa Company, decided that it would apply British common law in its rule of the colonies – being the rules of equity and statute law in force in England on 24 July 1874, the date of the Colonial Charter. However, the juridical relationships of Africans would be governed by customary laws in civil suits "as regards marriages, wills, transfer of property and devolution on intestacy", as far as customary law was not repugnant to natural justice and equity. The promulgation was made in the Orders-in-Council, has survived all the constitutional amendments since independence, and could be said to be responsible for the perpetuation of the subordination of women.

I argue that, through this promulgation, the Colonial Office intended that in matters of personal law, Africans would be left to resolve their own issues according to their customary laws and practices as the Colonial Office did not want to be entangled in tribal matters that were diverse and intrinsic to different peoples. Thus, for example, provision was made that the High Court would have authority over all persons, whilst providing that nothing would "deprive any person of any benefit of any law or custom not being repugnant to natural justice, equity and good governance".[3]

These laws were typical of dual legal systems in Africa.[4] However, what started under colonial rule as an attempt to preserve customary laws and practices in the personal matters of Africans, translated into the preservation and reinforcement of patriarchy – an unjust social system of inequality between the sexes.

Women's fight for equal rights gained increased recognition in many regional and national legal instruments in Africa after the United Nations Women's Conference in Beijing, China, in 1995.[5] In the years that followed, the Government of Zambia came up with a National Gender Policy,

1 This paper is a modification of the one presented at the Judicial Colloquium on the Rights of Vulnerable Groups held at Protea Hotel, Chisamba, Lusaka, Zambia, on 26-27 February 2014.

2 Advocate of the High Court and the Supreme Court of Zambia in private legal practice; Former lecturer at the University of Zambia, School of Law 2000 – 2010; LLB (University of Zambia), LLM (University of Birmingham).

3 Section 8 of the High Court Procedures and Regulations of 1904. A similar provision is now in section 16 of the Subordinate Courts Act, Cap 28 of the Laws of Zambia.

4 R Seidman "Law and Stagnation in Africa" in M Ndulo (ed) *Law in Zambia* (1984) 271-295 available at http://saipar.org/wp-content/uploads/2013/10/CHP_12_Law_in_Zambia.pdf.

5 United Nations *Fourth World Conference on Women: Action for Equality, Development and Peace,* 4-15 September 1995, Beijing, China.

and passed some laws with gender-neutral language, such as the Matrimonial Causes Act[6] and the Anti-Gender-Based Violence Act.[7] These measures have contributed to *de jure* equality to women. Paradoxically, the *de facto* situation of women is very different.

This paper – after discussing women's rights and the Constitution of Zambia – discusses two examples of how courts in Zambia have ensured gender equality. It further considers the extent to which courts, in domestic litigation, have sought to benefit from developments in women's rights at the international level, through the application of international human rights law when interpreting constitutional rights provisions.

Women's rights and the Constitution of Zambia

The Constitution of Zambia[8] provides for fundamental human rights. Article 11 of the Constitution[9] prohibits discrimination on the grounds of sex and marital status, *inter alia*; while articles 23(1) and (2) provide the most encompassing statements that can be attributed to gender equality and women's rights. In article 23(4)(c), however, the guarantees of fundamental rights, given by the right hand, are taken away by the left, as that sub-article excludes the application of anti-discriminatory provisions to matters of personal law, tribal customs, and traditional practices.[10] Personal law represents particularly pernicious discrimination against women, because often a man, as head of the family, is endowed with roles that are superior to women. Personal law includes laws related to marriage, divorce, maintenance, custody of children, property rights, and, in many cases, participation in societal affairs.

I argue that while the Constitution is the highest law of the land, by exempting personal law from the anti-discriminatory provisions under the Bill of Rights, the Constitution is subordinating itself to traditional laws and practices.

It may be argued that this constitutional provision was passed on from the Orders-in-Council of the Colonial Office and inherited from the Zambia Independence Order of 1964, which established the Independence Constitution of Zambia. In my view, the Colonial Office considered it a fundamental right that indigenous people, men and women alike, be governed by their own laws in personal matters and provided for this in the Bill of Rights as a protectionist measure. Yet, article 23(4)(c) arguably protects customary law, which is blatantly discriminatory, from constitutional scrutiny.[11]

6 Act No. 20 of 2007.

7 Act No. 1 of 2011.

8 Act No. 17 of 1996.

9 Article 11 – "It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status ..."

10 Article 23(1) – "Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect."
Article 23(2) – "Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."
Article 23(4) – "Clause (1) shall not apply to any law so far as that law makes provision – (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

11 It should be noted that courts have increasingly sought to limit the applicability of exception type clauses such as those in article 23(4)(c). See for example *Rono v Rono* (2005) AHRLR 107 (CA) and *Ramantele v Mmusi and Others*, CAGCB-104-2012

In this context, there have been some judgments from the Zambian courts which sought to enforce women's right to equal treatment. In *Nawakwi v Attorney General*,[12] Nawakwi, a single mother, was required to submit forms to the passport office, signed by the father of her children, before the passport office could endorse the children in her passport. She successfully challenged the requirement, because no such requirement existed in the case of a man. Nawakwi relied on the constitutional provision that guaranteed equality of every person in Zambia, regardless of race, place of origin, political opinion, colour, creed, sex, or marital status. The High Court held that a single-parent family headed by a male or female constituted a recognised family unit in Zambian society and that the failure to endorse her children in her passport amounted to unfair discrimination on the ground of sex.[13]

After evaluating the applicant's case, the late Musumali CJ, held that discrimination based on gender had to be eliminated from society:

> In my considered view it is not at all justified from whatever angle the issue is looked at, for a father to treat himself or to be treated by the institutions of society to be more entitled to the affairs of his child/ren than the mother of that child or those children ...

Here the petitioner is both the father and mother of the two children. She is an unmarried mother. She is bringing up her two children without a husband. Now is it fair for this society to have to require of her to have been or to be married in order for certain things to be possible to be done for her children? The answer, in my considered view, is in the negative! It is in the negative because firstly the reality of her situation and of many others like her, is that she has illegitimate children; and secondly because discrimination based on gender only has to be eliminated from our society. Men and women are partners and not only partners but equal partners in most human endeavours. They must be treated equally.

The other landmark decision, also by Musumali J, is *Longwe v Intercontinental Hotel*.[14] Longwe sued Intercontinental Hotel, seeking, *inter alia,* declarations pursuant to articles 11 and 23(2) of the Constitution. Briefly, the facts are that Sara Longwe, a pregnant woman, had been at the Intercontinental Hotel, attending a workshop hosted by the Zambia Association for Research and Development (ZARD). She was one of the organisers of the event. After the closure of the workshop, she remained in the conference room to pack materials, and then followed her colleagues to Luangwa Bar in the hotel for refreshments. She was refused entry on the ground that she did not have male company, which was a requirement by the hotel for women wanting to go into the bar. She challenged that requirement and argued that Zambia had ratified many international and regional treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and was a party to the African Charter on Human and Peoples' Rights (ACHPR). She also quoted the Bangalore Principles of Judicial Conduct.[15]

(CA).

12 1990/ HP/1724 (HC). See M Hansungule "Domestication of International Human Rights Law in Zambia" in M Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83-108, 76.

13 The Court refers to sex and gender interchangeably in this judgment.

14 1992/HP/765 (HC). This case is also referred to in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasonkomona*" in this publication.

15 The Bangalore Principles of Judicial Conduct (2002) adopted by the Judicial Group on Strengthening Judicial Integrity, as

It must be noted that the respondent, Intercontinental Hotels, had argued that constitutional provisions apply to state actions and public bodies or offices only and that their application is vertical and not horizontal, as between private individuals.

The judge rejected that argument, referring to the definition of human rights used by Louis Henkin,[16] who said that human rights are:

> ... claims which every individual has, or should have, upon the society in which he/she lives. To call them human [rights] suggests that they are universal: they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender or race, class or status.[17]

Musumali J concluded that "the Constitutional provisions in this country are intended to apply to everybody: public or private persons unless the context otherwise dictates".[18] He also pointed out that most, if not all rights guaranteed in the Bill of Rights, are also covered by personal or private law, such as the law of torts or criminal law, and that an aggrieved party had a choice to proceed under the Bill of Rights or under another branch of the law – "[t]he golden choice in this regard is the aggrieved person's".[19] He ordered that the regulation be scrapped forthwith on the basis that it discriminated on the grounds of sex.[20]

The *Longwe* decision was not appealed against, and remains law until over-ruled or reversed by the Supreme Court. However, this has not meant that other hotels stopped discriminating against women. Five years after the decision in *Longwe*, a similar situation occurred at another hotel in Lusaka.[21] In *Mwanza and Mulenga v Holiday Inn Garden Court Hotel*,[22] two women were refused admission to the Holiday Inn by a security guard because they were not in the company of a man. Notably, even though the judge said he was well aware of the facts of *Longwe*, no reference was made to the arguments on which that decision was based. The petition was dismissed on the basis that the two women were allegedly intoxicated and thus the hotel had a legitimate reason to deny them entry.

The relevance of international law in domestic litigation on women's rights

The *Longwe v Intercontinental Hotel*[23] judgment is particularly important because it promotes the recognition of international human rights law and its relevance in adjudicating disputes in domestic courts.[24]

revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

16 L Henkin "Rights: Here and There" (1981) 81 *Colum L Rev* 1582, 1582.

17 Cited in *Longwe v Intercontinental Hotel* 1992/HP/765, J15.

18 *Longwe v Intercontinental Hotel* 1992/HP/765, J16.

19 *Id* J17.

20 *Id* J20.

21 See a discussion on the policy of hotels to refuse women, and on the *Longwe* and *Mwanza and Mulenga* cases in S Longwe "Case Study: Legal Action to Stop Hotels Discriminating against Women in Zambia" (2011) 15 *Feminist Africa* 83-104.

22 1997/HP/2054 (HC). See: M Hansungule "Domestication of International Human Rights Law in Zambia" in M Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83-108, 76.

23 1992/HP/765 (HC).

24 For a discussion on the relevance of international law in domestic courts, see RE Kapindu "The Relevance of International Law

After analysing the facts and the constitutional provisions, Musumali J concluded:

> Before I end, I have to say something about the effect of International Treaties and Conventions which the Republic of Zambia enters into and ratifies. The African Charter on Human and People's Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are two such examples. It is my considered view that ratification of such documents by a nation State without reservations is a clear testimony of the willingness by that State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of the Treaty or Convention in my resolution of the dispute.
>
> As for documents such as the Bangalore Principles, I am of the view that they do not enjoy the same status as the Treaties and Conventions. This is because it is my very considered view that in the separation of powers principle, I do not think that a meeting of jurists in an international forum can make resolutions which are binding on their respective States, in law. I am of the strong view that such powers are entrusted in the executive wing of the State. So whilst it is not wrong to take note of such resolutions I think it is a misdirection in law to treat them as standing at par with Treaties and Conventions entered into and ratified by the executive wing.[25]

Subsequently, and in a similar vein, Ngulube CJ, in the often-cited High Court case of *Sata v Post Newspapers Ltd and Another*,[26] held:

> I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent. What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had a uniform approach. For one thing, as the examples I have quoted show, the right to free expression and free speech is qualified by exceptions, in some cases more heavily than in others. For another, we are at different stages of development and democratisation and the courts in each country must surely have regard to the social values applicable in their own milieu.[27]

While the above passage by Ngulube CJ shows both an acceptance of reference to international law and a caution against its use, the first part of the passage has been quoted as authority for referring to international law in the more recent High Court case of *Kingaipe and Another v Attorney General*,[28] where Muyovwe J noted:

> This court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision

in Judicial Decision-Making in Malawi" in this publication.

25 *Id* J19.

26 [1995] ZMHC 1.

27 *Id*.

28 2009/HL/86.

made by other courts on any aspect of the law is worth considering.[29]

Ngulube CJ has, however, re-emphasised the need for caution in the Supreme Court case of *Mmembe and Mwape v The People*.[30] Nevertheless, the Supreme Court has, at times, taken considerable note of comparative jurisprudence to interpret constitutional rights – even if not explicitly acknowledging that it is doing so.[31]

In *Attorney General v Clarke*,[32] in which the respondent claimed a violation of his rights to freedom of expression and non-discrimination, the Supreme Court said:

> We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws.[33]

Interestingly, the extent to which courts can use international law to interpret constitutional rights has most often been raised in cases relating to freedom of expression and freedom from discrimination. This is precisely because the Constitution of Zambia, in its current form, contains outdated limitations which inhibit rights unless interpreted within a broader international human rights framework. That said, the Supreme Court's hesitance to embrace international customary law and international treaties to which Zambia is a signatory, is disappointing. A stronger formulation in line with other courts in the region would have been that courts must have regard to international treaties to which a state is party, even if not domesticated, unless explicitly contradicted by existing domestic law.

In Botswana, in *Attorney General v Dow*[34] – a landmark case on the rights of children to citizenship where only the mother is a citizen of Botswana – consideration was taken of various international instruments in deciding whether the constitutional guarantee of equality included discrimination based on sex. The Botswana Court of Appeal held that courts ought to interpret legislation in a manner that gives effect to international instruments to which the state of Botswana is a party, even though such instruments have not been enacted by Botswana:

> Botswana is a signatory to this Charter [ACHPR]. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge a quo made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of

29 *Id* J42.

30 ZMSC Case No. 4 of 1996.

31 See for example *Mulundika and Seven Others v The People* Case No. 95 of 1995 (SC). In that case, Ngulube CJ held that a provision of the Public Order Act violated the rights under articles 20 and 21 of the Constitution of Zambia. The Court cited comparative jurisprudence from a range of countries and regional courts in support of its argument, and declared the provision null and void.

32 2008 (1) ZR 38.

33 *Id* at para. 69.

34 1992 BLR 119 (CA). This case is also discussed in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and SB Nkonde & W Ngwira "Accused's Rights and Access to Prosecution Information in Subordinate Courts in Zambia" in this publication.

> enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution ... [W]e should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations ... Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[35]

The Kenya Court of Appeal case of *Rono v Rono*[36] is also instructive. Section 82 of the Constitution of Kenya is similar to article 23 of the Constitution of Zambia. The case dealt with distribution of the deceased estate of a man who had been in a polygamous marriage, and who had sons from one marriage and daughters from the other marriage. On appeal, all three judges agreed that there could be no basis for distinguishing between sons on the one hand, and daughters on the other. Despite being a dualist country, the Court held that international law was relevant in consideration of the case and interpretation of the exception to the prohibition against discrimination. The Court acknowledged that "current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation".[37] The Court cited the *Longwe* case, with approval. Waki JA further cited Principle 7 of the Bangalore Principles, which provide that:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law ...

Waki JA, going a step further than the view expressed above by Msusumali J in the *Longwe* case, held that the Bangalore Principles "amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women".[38]

Because the Kenya Court of Appeal was so unequivocal in its support of international law, the Kenya High Court was subsequently, in *Estate of Musyoka*,[39] able to affirm that – based on *Rono* – international law is applicable in Kenya as part of its law, as long as it is not in conflict with existing law, even without it being adopted by specific legislation. Thus, it was held that the limitations to the prohibition against discrimination which exempted customary law must be read in terms of the provisions of CEDAW and the ACHPR, which require the elimination of discrimination against women.

35 *Id* 153-154.
36 (2005) AHRLR 107.
37 *Id* at para 21.
38 *Id* at para. 21.
39 Succession Cause 303 of 1998.

It is submitted that the approach set out by the Courts of Appeal in Kenya and Botswana is a progression from the approach to international law adopted by the Supreme Court of Zambia and courts in Zambia should follow suit.

Conclusion

While customary laws and culture are important for a people's heritage, it is within the power of government to repeal those laws that are repugnant to natural justice and good conscience, and which hinder development of the law in line with international law. A number of courts have taken on the role of ensuring gender equality within the realm of customary law and many courts in Africa have used the country's international legal obligations to ensure gender equality.

PROTECTING THE RIGHTS OF PERSONS WITH DISABILITIES: A PERSPECTIVE FROM ZAMBIA[1]

Wamundila Waliuya[2]

Introduction

The world is experiencing a fast-growing and transformative shift in the way that disability is viewed. Increasingly, disability is seen less as a charity and medical issue, and more as a human rights and social issue. In short, disability is moving from being viewed using the medical model to being viewed using the social model.

This paper explores the medical and social perspectives of disability, examines the principles provided for by the Convention on the Rights of Persons with Disabilities, and identifies areas for reform in Zambia.

The purpose of this paper is to bring to light the rights of persons with disabilities – especially the rights to dignity, equal protection under the law, legal capacity, and access to justice. The paper is aimed at individuals and institutions in the justice system, and is premised on the fact that the justice system in many countries is still characterised by many barriers to access to justice for persons with disabilities, including those persons with psycho-social and intellectual disabilities.

The UN Convention on the Rights of Persons with Disabilities

Medical and Social Models of Viewing Disability

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in December 2006, and came into force in 2008. Persons with disabilities the world over consider the CRPD to be a milestone in the struggle to officially recognise disability as a human rights issue.

The CRPD symbolises a radical paradigm shift in conceptualising disability – from a medical and charity model to a human rights and social model. It demands a move from viewing persons with disabilities as 'objects' of charity needing medical treatment and requiring institutional rehabilitation, towards viewing persons with disabilities as being 'subjects' with rights who have the agency to claim these rights and to make meaningful decisions for their lives as active members of society.[3]

The CRPD is considered the first internationally binding human rights instrument to comprehensively address the rights of persons with disabilities. However, it does not create any

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

2 Executive President, Disability Rights Watch; BBA (Cavendish University).

3 Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, Professional Training Series No. 17 (2010) 9.

new rights for persons with disabilities. It simply clarifies the applicability of existing human rights law in the specific context of disability. In so doing, it interrogates the existing human rights law and shifts it towards addressing the attitudinal and environmental barriers faced by different persons with disabilities in society.[4]

The CRPD interprets disability as resulting from the interaction between persons with impairments and the various barriers that hinder their full and active participation in society on an equal basis, as compared with others who do not have disabilities. This places the CRPD strongly within a rights-based approach, which is the social model. It completely avoids a charity and a health-based approach, which is the medical model. The CRPD stresses that it is not the fault of the person with an impairment that he or she cannot fully and effectively participate in all social, economic, cultural, civil, and political activities of society. It is on this premise that the rights of persons with disabilities should be articulated.

Key Provisions of the CRPD

Article 3 of the CRPD outlines the principles of the Convention and should constitute the lens through which all the rights in the CRPD are considered. These principles include:

a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices and independence of persons;

b) Non-discrimination;

c) Full and effective participation and inclusion in society;

d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

e) Equality of opportunity;

f) Accessibility;

g) Equality between men and women; and

h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

These general principles should premise the thinking, planning, and implementation of systems and processes in the justice field. They should also influence the development of laws and regulations and their interpretation. It must be emphasised that these general principles apply to all persons with disabilities, including those with psycho-social and intellectual disabilities.

The CRPD avoids defining 'disability', but instead, in its Preamble, recognises it as "an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".[5] This absence of a definition of disability fits within the social model of disability.

4 *Id* 8.

5 Preamble of the CRPD at para. (e).

The CRPD does attempt to ensure that disability is viewed as broadly as possible, and, in article 1, it specifically 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". Clearly, this is not an exhaustive list.

The CRPD then looks at how the barriers which cause exclusion and participation in society lead to discrimination. Article 2 defines "discrimination on the basis of disability" as:

> [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

The inclusion of "denial of reasonable accommodation" as a form of discrimination should be applauded, since it is so often overlooked. In the CRPD, "reasonable accommodation" is defined as:

> [N]ecessary 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.

This requirement to provide reasonable accommodation should also be taken into account by people working in the justice system – and should form the basis for reforms, whether administrative or legislative. Notably, the requirement of reasonable accommodation does not require measures which would impose a disproportionate or undue burden on the person who has to make the accommodation.[6] However, since denial of reasonable accommodation constitutes discrimination, a failure to provide reasonable accommodation should be objectively and reasonably justifiable.[7]

Articles 5(1) and (2) of the CRPD provide for non-discrimination, equality before the law, and "effective legal protection against discrimination on all grounds". Article 5(3) further requires that states "shall take all appropriate steps to ensure that reasonable accommodation is provided".

The United Nations Committee on the Rights of Persons with Disabilities (the Committee), created per article 34 of the CRPD and tasked in part with monitoring compliance with the CRPD, has emphasised that the duty to prohibit discrimination and provide reasonable accommodation is "immediately applicable and not subject to progressive realisation".[8] This is significant, as the Committee has accordingly made recommendations regarding reasonable accommodation in the education setting – an area which is traditionally seen as subject to progressive realisation.[9]

It must be stated that the whole justice system should provide reasonable accommodation to

6 Article 2 of the CRPD.

7 *HM v Sweden* CRPD/C/7/D/3/2011 at para. 83. The case concerned a complaint to the Committee on the Rights of Persons with Disabilities. A woman with chronic connective tissue disorder had been unable to leave her home for eight years. She had applied, but was denied permission, to extend her home to include a hydration pool, which is the only therapy available to her for her condition. The Committee found that the refusal to grant a building permit violated various articles under the CRPD.

8 Committee on the Rights of Persons with Disabilities, Concluding Observations (Spain), CRPD/C/ESP/CO/1, 19 October 2011 at para. 44.

9 *Id.* See also *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa* 2001 (5) SA 87 (HC) which dealt with reasonable accommodation to ensure access to education for children with disabilities.

all categories of persons with disabilities, including those with psycho-social and intellectual disabilities. In addition, the justice system, including its buildings, should be accessible, as required by article 9 of the CRPD:

> There can be no effective access to justice if the building in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities.[10]

The Committee has noted that "accessibility is related to groups, whereas reasonable accommodation is related to individuals".[11] Thus, states should not wait to receive a request from a person with a disability before acting to make services and institutions more accessible to persons with disability, and, further, they cannot rely on resource arguments to avoid ensuring progressive accessibility for persons with disabilities.[12]

Article 12 of the CRPD deals with equal recognition before the law. This article is interesting because it emphasises that persons with disabilities have the right to recognition everywhere as persons before the law. The Committee has emphasised that the right to equality before the law is subject to immediate realisation.[13]

Article 12(2) provides that states "shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". Article 12(3) says that states "shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". Article 12(4) requires that states ensure that safeguards are provided to avoid abuse:

> Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person ... apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

The exercise of legal capacity applies to all persons with disabilities, including those with psycho-social and intellectual disabilities. This includes ensuring someone has access to the support they may require in exercising their legal capacity. This may be in circumstances where the decision-making capability of a person with a disability is restricted, but it should not in any way be interpreted as a test for legal capacity. Recognition of legal capacity is an inherent right, and is essential for access to justice on an equal basis with others.[14]

Article 13(1) of the CRPD provides for 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.

10 Committee on the Rights of Persons with Disabilities, General Comment No. 2 at para. 37.
11 *Id* at para. 25.
12 *Id*.
13 Committee on the Rights of Persons with Disabilities, General Comment No. 1 at para. 30.
14 *Id* at para. 38.

Access to justice includes providing appropriate training for those working in the field of administration of justice, and includes police and prison staff.[15] This would include alerting judicial officers and law-enforcement personnel of the rights of persons with disabilities, including the right to liberty and security of person (article 14) and the right to freedom from cruel, inhuman, or degrading treatment or punishment (article 15).

The above-cited articles are not the only ones affecting the justice system and it is essential to study the CRPD in order to appreciate all of its text.

The case of Zambia

As explained above, the principles of the CRPD are based on the social model of looking at disability. Persons with disability often experience discrimination, exclusion from society, and restriction in participating on an equal basis with other people. This discrimination, exclusion, and restriction is unfortunately found in some of our laws, regulations, and in the interpretation of such laws and regulations.

The Zambian government domesticated the CRPD through the enactment of the Persons with Disabilities Act.[16] The rights of persons with disabilities is elaborated in Part 2 of the Act. Section 5 states that "[e]very person has a duty to uphold the rights of persons with disabilities and respect and safeguard the dignity of persons with disabilities".

Section 8(1) of the Persons with Disabilities Act provides that "a person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life". Section 8(2) requires that "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". Section 8(3) states that:

> 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.

This part of the law still needs to be tested in order to determine how ready the judiciary in Zambia is to enforce these provisions. It should be noted that persons with psycho-social and intellectual disabilities and those who are deaf-blind are catered for by this law and that their rights must be upheld and protected. Arguably, the law requires the provision of sign language for people who are deaf throughout the justice system. The law further requires the provision of Braille for people who are blind and that the built environment around courtrooms should be accessible.

Despite domestication of the CRPD, several of Zambia's laws still require reform. For example, section 163(1) of the Criminal Procedure Code of Zambia still provides for detention, at the president's pleasure, in a "mental institution". Persons with a mental disability – who are required to undergo psychiatric assessment in order to ascertain whether or not they can stand trial – have been known to be incarcerated for protracted periods of time in prisons like the Chainama East

15 Article 13(2) of the CRPD.
16 Act No. 6 of 2012.

Prison in Lusaka. Similar concerns can be raised regarding section 166 of the Criminal Procedure Code, which is vague.[17] These laws and practices do not conform to the principles and rights set out in the CRPD.

Section 75(1) of the Constitution of Zambia provides that anyone who is registered can vote in the elections unless that person is disqualified by parliament. Section 7(1)(d) of the Electoral Act[18] disqualifies from voting, any person "who, under any law in force in Zambia, is adjudged or otherwise declared of unsound mind or is detained under the Criminal Procedure Code during the pleasure of the President". Given that persons with a mental disability can and have been detained in a mental institution under the Criminal Procedure Code, there is a risk that persons with a mental disability would be disqualified from voting in violation of their rights. Clearly, there is a need to revise legal provisions that are outdated in their conceptualisation of disability.

The High Court of Zambia has weighed in on the rights of persons with disabilities in *Brotherton v Electoral Commission of Zambia*.[19] In September 2011, the Court passed judgment in a case in which persons with disabilities – through the Zambia Federation of Disability Organisations (ZAFOD) – sued the Electoral Commission of Zambia for discrimination in the electoral process. The complaint by ZAFOD was that most of the polling stations in Zambia were not accessible to people with disabilities and that the services did not adequately cater for their needs. They further argued that there was a statutory obligation on the Electoral Commission to initiate legislation to ensure that people with disabilities were able to participate equally in the elections. ZAFOD argued that these shortcomings amounted to unlawful discrimination against persons with disabilities, in violation of article 23 of the Constitution of Zambia, and a limitation of the right of people with disabilities to exercise their franchise freely, fairly, in secret, and with dignity – as protected by article 75. ZAFOD argued that the Electoral Commission therefore violated its legislative duties to ensure equal participation of all persons, to make provisions for a special vote for persons who are unable to vote at the designated polling stations, and to relocate inaccessible polling stations to ensure that all people can access polling stations on election day.

The Court held that ZAFOD had demonstrated that the Electoral Commission had unlawfully discriminated against people with disabilities, and had unlawfully limited the rights of people with disabilities to exercise their franchise, by not providing premises and services accessible to people with disabilities. The Court emphasised that "all eligible citizens must be free to cast their vote [and] [t]hey must thus, not be hindered in any way".[20] This decision is significant because disability is not specifically included as a prohibited ground of discrimination in article 23(3) of

17 Section 166 states: "The question whether:
a) While before the subordinate court an accused person is by reason of unsoundness of mind or of any other disability incapable of making a proper defence; or
b) At the time of the act or omission in respect of which an accused person is charged, such person was by reason of unsoundness of mind incapable of understanding what he was doing, or of knowing that he ought not to do the act or make the omission;
shall not be determined in any preliminary inquiry held under Part VII and, for the purposes of any decision whether an accused should be committed for trial, the accused shall be deemed to have been at all material times free from any such disability."

18 Act No. 12 of 2006.

19 2011/HP/0818 (HC).

20 *Id* J24.

the Constitution of Zambia. The Court read the prohibition against discrimination in article 23 to include disability, after taking into account the provisions of the Persons with Disabilities Act, which does include such a prohibition against discrimination based on disability.[21]

The Court held that the applicants had proved their entitlement to a remedy, but declined to postpone the elections, which were to take place the next day. Instead, the Court ordered that the Electoral Commission – an autonomous body – should put in place measures, by the next election, to ensure that persons with disabilities are not disadvantaged in exercising their right to vote. These measures had to include erecting temporary ramps, ensuring that polling booths are located on ground floors at polling stations, and providing a tactile ballot guide for voters who are blind or partially sighted, but who do not wish to be assisted in casting their vote. In addition, the Court ordered that the Electoral Commission formulate and issue a detailed plan and budget aimed at ensuring equal participation by persons with disabilities in the electoral process.[22] The Court, however, stopped short of ordering that the detailed plan be submitted to the Court or that the Electoral Commission periodically report to the Court on progress made in implementing the order.[23]

Conclusion and recommendations

The CRPD has underlined that people with disabilities are entitled to fundamental rights. It is thus incumbent on the whole justice system, including the judiciary, to ensure the realisation of the following rights, at minimum:

- Respect for inherent dignity, autonomy, and independence of person;
- Full and effective participation in society;
- Respect for difference;
- Accessibility to the built environment, and to information, communication, and technology;
- Equal protection under the law;
- Right to life;
- Right to decide (exercise legal capacity) – despite any form of disability, including psycho-social and intellectual disability;
- Liberty and security of person, including the liberty of persons with psycho-social disabilities who are kept in psychiatric institutions while awaiting mental-health assessment at the request of the judiciary;
- Protection from torture, inhuman and degrading treatment – including protection of persons with psycho-social disabilities who undergo elective convulsive therapy, which causes pain;
- Mental and physical integrity;
- Independent living and being included in society;
- Privacy;
- Family life, including maintenance of fertility;

21 *Id* J25.

22 *Id* J28.

23 Compare with the structural, supervisory interdict ordered in *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa* 2001 (5) SA 87 (HC).

- Education and training;
- Health;
- Work and employment;
- Participation in public and political life. This should include exercising the right to a secret ballot by people who are blind.

Many countries in southern Africa – including Malawi and Zambia – have ratified the CRPD and have put in place disability laws that adopt some of the principles of the CRPD. This is only the beginning. In addition, the justice system should absorb the principles of the CRPD with their foundation – the social model – and use this to overhaul the system to ensure it is considerate of all persons with disabilities, including those with psycho-social and intellectual disabilities.

Specifically in relation to Zambia, the following recommendations are made to ensure compliance with Zambia's existing laws:

- The justice system should carry out a disability inclusion audit to assess the gap that exists in terms of equal access to justice for persons with disabilities. This audit should include legislation scoping, accessibility assessments, and disability awareness.
- The justice system should incorporate training for all staff who administer justice – including police, prison officers, lawyers, and judiciary personnel.
- The government should move with urgency to enact the new Constitution of the Republic of Zambia. Persons with disabilities made progressive submissions to the constitutional process to ensure the inclusion of the rights for persons with disabilities and to include disability as a prohibited ground for discrimination. It is hoped that these provisions will be included in the final draft Constitution.
- The government should repeal the Mental Disorders Act of 1951[24] and replace it with a new Mental Health Act that conforms to the principles of the CRPD.
- The government should amend those sections in the Penal Code and Criminal Procedure Code that require that persons with mental disabilities, who undergo psychiatric assessment, be detained in a prison like Chainama East Prison. In their current format, these provisions have led to the imprisonment of persons with mental disabilities for prolonged periods of time.
- The state should progressively allocate funds towards such reforms – as informed by the findings of the disability inclusion audits.

Finally, it should be emphasised that of essence in any development is the need to consult with, and actively involve, persons with disabilities through their representative organisations.[25]

24 Cap 305 of the Laws of Zambia.
25 Article 4(3) of the CRPD.

Realising the Right to Equality for Vulnerable Groups

AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY[1]

Kenyatta Nyirenda J[2]

Introduction

The right to equality is very important. Firstly, it requires that all persons be treated equally before the law, without discrimination; every person must be treated fairly and justly within the legal system. Secondly, the principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice. Without the right to equality, people would be unable to participate meaningfully in political activities, access resources, or enjoy many other rights.

This paper discusses the right to equality under the Constitution of the Republic of Malawi.[3] The paper also examines a number of Malawian cases that show how the courts have developed and interpreted the right to equality.

There are two important points to note regarding cases discussed in this paper. Firstly, because human rights are indivisible, inter-dependent, and interrelated, the cases invariably cover issues relating to two or more constitutional provisions on the right to equality. Secondly, most of the leading cases on the right to equality were delivered within a few years of the adoption of the Constitution in 1994. It is therefore important to read these cases subject to the 2010 amendments to the Constitution.

Definitions of 'discrimination'

Neither 'equality' nor 'discrimination' is defined by the Constitution. The United Nations Human Rights Committee (HRC), in its General Comment No. 18 entitled "Non-Discrimination", defined discrimination as:

> Any distinction, exclusion 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.

In contrast, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), in

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

2 Judge of the High Court of Malawi; LLB (Hons) (University of Malawi), Advanced Diploma in Legislative Drafting and LLM (University of Malta).

3 Relevant provisions in the Constitution include sections 4 (Protection of the people of Malawi); 11 (Interpretation); 12 (Constitutional principles); 13 (Principles of national policy); 14 (Application of the principles of national policy); 20 (Equality); 23 (Rights of children); 24 (Rights of women); 30 (Right to development); 44 (Limitations on rights); and 45 (Derogation and public emergency).

its General Comment No. 20, adopted a more expansive definition of discrimination.[4] The CESCR has however been accused of over-reaching by inferring rights that are not obviously present in the International Covenant on Economic, Social and Cultural Rights.[5]

Some legal commentators have urged Malawian courts to adopt the definition in General Comment No. 18, as opposed to General Comment No. 20, as the definition in General Comment No. 20 is much more expansive. It has been submitted that, unlike General Comment No. 20, General Comment No. 18 was already in existence at the time the Constitution was being negotiated and adopted. It is thus contended that the framers of the Constitution took into account the definition in General Comment No. 18, as opposed to that in General Comment No. 20.

Equality before the law does not necessarily mean 'same treatment'. Discrimination can arise just as readily from an act that treats as equals those who are different, as it can from an act that treats differently persons whose circumstances are not materially different. Further to this, not every distinction in treatment will amount to discrimination.

In general international law, a violation of the principle of non-discrimination arises if:

a) Equal cases are treated in a different manner;

b) A difference in treatment does not have an objective and reasonable justification; or

c) If there is no proportionality between the aim sought and the means employed.

Discrimination can be direct or indirect. It is direct when a person is discriminated against expressly based on enumerated – or, in some jurisdictions, analogous – grounds. It is indirect when state conduct or law appears to be neutral on the face of it, but has the effect of discriminating against a person on a prohibited ground. With indirect discrimination, it is important to look beneath the surface and to consider the consequences of the state's conduct and laws – to ensure there is no discrimination lurking beneath.

I will now discuss sections of the Constitution, which are relevant to any equality or discrimination inquiry and how courts have interpreted those sections to the extent that they have.

Section 4 of the Constitution

Section 4 contains a strong general commitment to equality for all the peoples of Malawi. It provides that "all the peoples of Malawi are entitled to the equal protection of this Constitution and laws made under it".

4 The Committee on Economic, Social and Cultural Rights in General Comment No. 20 at para. 29 notes that the "nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of 'other status' is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in article 2, paragraph 2. These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation." The CESCR lists a number of grounds that could fall within the scope of 'other status', including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. This General Comment is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

5 J Kelly "UN Treaty Body Expands Definition of Discrimination to Invent Human Rights" *Global Governance Watch* (2009).

Section 11 of the Constitution

Section 11(2) requires a court to take full account of the provisions of Chapters III and IV of the Constitution. These Chapters contain the core provisions on the right to equality.

Section 12 of the Constitution

Section 12 elaborates on the fundamental principles upon which the Constitution is founded. Section 12(1)(e) provides that all persons have equal status before the law and section 12(2) imposes duties on every individual towards other individuals, and his or her family. The duties include "the duty to respect his or her fellow beings without discrimination".

Section 13 of the Constitution

Section 13 sets out principles of national policy concerning, *inter alia*, gender equality, persons with disabilities, children, and the elderly. The section enjoins the state to "actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation", which are aimed at achieving a number of goals.

Section 13(a) aims to ensure gender equality for women with men through, *inter alia*, "full participation of women in all spheres of Malawian society on the basis of equal opportunities with men" and "the implementation of the principles of non-discrimination and such other measures as may be required".

With regard to persons with disabilities, section 13(g) requires the state to enhance the dignity and quality of life of persons with disabilities by providing "adequate and suitable access to public places; fair opportunities in employment; and the fullest participation in all spheres of Malawian society".

In terms of section 14 of the Constitution, principles of national policy are "directory in nature". Despite this, courts in Malawi may have recourse to them as a basis for arriving at a particular decision. Furthermore, principles of national policy may be used by concerned groups to lobby government to address particular issues.

Section 30 of the Constitution

Section 30 addresses the right to development and requires that women, children, and persons with disabilities, in particular, are given special consideration in the application of this right. The section also calls for equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment, and infrastructure. Under section 30(3), the state is also enjoined to take measures to introduce reforms aimed at eradicating social injustice and inequality.

Section 45 of the Constitution

Section 45(2) prohibits derogation with respect to some specified rights, such as the right to equality and recognition before the law, the right to life, and the right to *habeas corpus*.

There are a number of sections which are relevant to the rights to equality and non-discrimination

where courts in Malawi have provided guidance on their scope and content. Each section and relevant case law are detailed below.

Section 20 of the Constitution

The main provision in the Constitution on the right to equality is section 20:

> (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.
>
> (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

Section 20 embodies three basic concepts: non-discrimination, equal protection of the law, and positive measures to combat and eliminate inequality.

Discrimination against persons in any form is prohibited, be it discrimination in law, discrimination in fact, direct discrimination, indirect discrimination, formal discrimination, or substantive discrimination.

Section 20(1) also guarantees all persons equal and effective protection against discrimination on a number of prohibited grounds of discrimination, namely, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth, or other status or condition. One of the hotly debated questions is whether or not Malawi has adopted an 'open list' or 'closed list' approach to the list of grounds on which discrimination is prohibited.[6]

Most jurisdictions have adopted a variant of one of two broad approaches when setting the personal scope of the prohibition of discrimination. The first approach is termed a 'closed list' approach. It narrowly construes the right to equality, so it applies to a limited range of personal characteristics, such as race, sex, or disability, on the basis that these characteristics have historically resulted in discrimination and victimisation against certain classes of individuals. While the closed list approach permits greater legal certainty, it is often too restrictive and inflexible in its application. The other approach is known as the 'open list' approach. It allows for new grounds to be added by the courts should they deem it necessary to consider discrimination on grounds analogous to the grounds listed explicitly.

It should be noted that, in *Malawi Congress Party and Others v Attorney General and Another*,[7] the Supreme Court of Appeal held that the "right to equality before the law", provided in section 41 of the Constitution, was distinct from the right to "equal protection under the law". The "right to equality before the law" guarantees the right to recognition before the law, the right of access to courts, and the right to effective remedy.

6 D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 147; SALC *Equal Rights for All: Litigating Cases of HIV-Related Discrimination* Litigation Manual Series (2011) 50.

7 [1996] MLR 244.

Affirmative Action

The principle of equality can, in certain circumstances, require a state to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination. In this regard, section 20(2) requires the state to pass legislation "addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices".

Section 20(2) envisages three forms of affirmative action. The first encompasses law revision and reform efforts to extend existing benefits, privileges, or rights to a particular group that was previously denied these entitlements on any of the prohibited grounds. No one would then be prejudiced by such a law because the existing benefits would simply extend to a previously excluded group. The second form provides rights, privileges, and benefits to a particular group of people in acknowledgement of their unique characteristics and life experiences – e.g., maternity leave. The third form gives preferential treatment to members of a particular group because of its history as a victim of past systematic discrimination.

The section also requires affirmative action to be backed up by legislation. The requirement of legislation is meant to avoid the introduction of arbitrary measures and measures that have not been properly and fully debated publicly.

Case Law on Section 20:

Marinho v SGS Blantyre (Pvt) Ltd[8]

The plaintiff brought an action against her employer claiming, *inter alia*, damages for discrimination and/or unfair treatment. The High Court held, *inter alia*, that the defendant had violated the plaintiff's right not to be discriminated against:

> Discrimination is now proscribed by the Constitution. *There can be no doubt that some rights under the Constitution apply to relations between individuals*. There are others which relate to matters between the State and its citizens.
>
> *The rights under this provision (section 20) are intended to apply between citizens*. Where there has been a violation of them, the court is supposed to give an effective remedy ... Resignation, revulsion and rejection are the usual feelings of a man who has been discriminated. The law should therefore take injury to feelings as a component of the damages awarded. *It must also be borne in mind that any type of discrimination is forbidden*. Its practice must really have been detested by framers of the Constitution that right in the Constitution they provided for two things that underline the attitude that this Court must have when faced with this sort of matter. First, *the Constitution makes the right non-derogable*. Secondly, *the Constitution allows affirmative action by legislators to punish violators* and to pass laws that promote respect for equality.[9]

Notably, the Court used the terms "individual" and "citizen". These terms are not expressly mentioned in section 20. Was the intention then to qualify the word "person" as used in that section?

8 [1998] MLR 208.

9 *Id* 225-26 [Own emphasis in italics].

Malawi Congress Party and Others v Attorney General and Another[10]
The plaintiffs sought to have the Press Trust Reconstruction Act declared void for being unconstitutional in substance, and for being passed in contravention of the Constitution. The High Court held that the right to equality prohibits an "impermissible criterion or classification arbitrarily used to burden a group of individuals." The High Court considered at length the right to equality:

> Equality before the law is a fundamental right. It is provided under our Constitution in section 20(1).
>
> It is one of the fundamental principles of our Constitution.
>
> ... A law which results in unequal treatment between the citizens of the land will be arbitrary …
>
> ... The purpose of equality before the law provisions is that, those who are similarly placed in society will be dealt with similarly by Government action. This is far from suggesting that, in its formulation or application of the laws, Government cannot classify persons. The equality before the law provisions in our Constitution prohibit impermissible criterion for classification or a classification arbitrarily used to burden a group of individuals …
>
> ... It is an arbitrary deprivation of property to pass legislation, the effect of which is to treat an individual's property rights in a different manner that is accorded from others similarly placed. This is an extension of the equality before the law principle. Courts will intervene on a statute that is overtly discriminatory (*Asian American Business Group v City of Pomona* 716 F Supp 1328) ... Under the equality before the law provisions of our Constitution, laws that are promulgated by our national Parliament must be directed to all in class. Short of that, they will be attacked for discrimination. Laws which are promulgated against one individual are likely to be disqualified as vindictive and implying unequal treatment under the law and an arbitrary deprivation of property. While enforcement of a law on one individual is not unequal treatment under the law because Government wants to set an example (*Falls v Town of Dyer* 875 F 2d 146) laws cannot be enacted which single out an individual as a target. Our equal protection provision in the Constitution directs that all persons similarly circumstanced shall be treated alike …

Salaka v Registered Trustees of the Designated Schools Board[11]
The High Court held that the defendant, a private school, had discriminated against the plaintiff by paying her termination benefits using a different method to that applied to her fellow employees. The case is often cited as authority for the proposition that section 20(1) also applies to non-state actors.

Banda v Lekha[12]
The applicant went for voluntary counselling and HIV testing. She tested HIV-positive. When she reported for duty after the test, the respondent immediately and without any formality dismissed the applicant.The Industrial Relations Court found, *inter alia*, that the respondent dismissed the applicant on prohibited grounds and that the respondent violated the applicant's right to fair

10 [1996] MLR 244.

11 MWHC Civil Cause No. 2652 of 1999.

12 [2008] MLLR 338, [2005] MWIRC 44. This case is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

labour practices. The Court, in finding for the appellant, made the following observations:

> Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one's HIV status, it is to be implied that it is covered under the general statement of anti-discrimination in any form. This is why the South African Constitutional Court held in *Hoffman v South African Airways* [2000] 21 ILJ 2357 (CC) that: 'The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligations. South Africa has ratified a range of anti-discrimination Conventions ...'
>
> The position on anti-discrimination enunciated in the *Hoffman* case fits squarely with the situation in Malawi. Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified ILO Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.[13]

Chirwa,[14] among other authors, has noted how the flexibility provided by section 20(1) can be used to expand the list of prohibited grounds of discrimination, as with the above case.

The preponderant scientific view is that HIV is not a status, but a condition. In this regard, amendments effected to the Constitution in 2010 included changes to section 20 whereby the words "birth or other status" were replaced by the words "birth or other status or condition".

Section 23 of the Constitution

Section 23(1) provides that all children are entitled to equal treatment before the law. Section 23(1) must be read together with section 20(1), which prohibits discrimination against persons in any form and guarantees all persons equal and effective protection against discrimination, on grounds listed therein.

The Convention on the Rights of the Child (CRC)[15] might be relevant when trying to determine the ambit of section 23. The CRC protects children's right to life, right to protection from all forms of violence and abuse, and right to freedom from torture or other cruel, inhuman, or degrading treatment. It also requires states to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members".[16]

13 *Id.*

14 D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 147.

15 Convention on the Rights of the Child (1989).

16 *Id* article 2(2).

Case Law on Section 23:

Kaseka and Others v Republic[17]
The police had arrested and prosecuted women suspected of being prostitutes, while allowing their male companions to go free. The High Court found that there was sex-based discrimination in this regard. The Court, accordingly, refused to hold the respondents guilty of any criminal offence on the ground that the criminal prosecution in this case amounted to selective enforcement of the law, as the police had arrested and charged only women and not their male companions.

In the Matter of the Wills and Inheritance Act and in the Estate of Charles Exon Muyenza (Deceased)[18]
The High Court held that a child born out of wedlock cannot be precluded from inheriting a share of his or her parent's deceased estate, simply because of the child's birth status.[19]

Section 24 of the Constitution

Section 24 provides for the rights of women. It complements section 20 on the right to equality with respect to women. Section 24 lists two grounds, namely, gender and marital status, which are not mentioned in section 20.

In a nutshell, section 24(1) provides that women have equal capacity and the same rights as men in civil law. As such, women can "acquire and maintain rights in property, independently or in association with others, regardless of their marital status".[20] Furthermore, the sub-section requires that women be accorded the same protection as men by the law. In short, the law must protect women and men equally.

Section 24(2) in effect prohibits discrimination against women on the basis of gender or marital status. It specifically provides for the passing of legislation to eliminate customs and practices that discriminate against women in areas such as sexual abuse, harassment and violence, discrimination at work and in public affairs, and deprivation of property, including inherited property.

Case Law on Section 24:

Namatika v Namatika[21]
The plaintiff sought an order for the appointment of the administrator-general as the administrator of her deceased husband's intestate estate, in the interests of the child born of the marriage and of herself. The defendant claimed that he was the most able person, fit to be appointed administrator of the intestacy. This was because the deceased was his brother and because some of the property in the deceased estate was jointly owned by the defendant and the deceased. He further asked the court to consider that the plaintiff was not a Malawian and that she had not been married to the deceased under Malawian customary laws.

17 [1999] MLR 116. This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" and C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

18 MWHC Probate Cause No. 451 of 2003.

19 See E Macharia Mokobi "Lingering Inequality in Inheritance Law: The Child Born Out of Wedlock in Botswana" in this publication.

20 Section 24(1)(ii) of the Constitution of Malawi.

21 [1999] MLR 287.

The High Court decided the case in favour of the plaintiff, and reiterated the rights detailed in section 24(1) of the Constitution:

a) 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 gender or marital status, which includes the right to be accorded the same rights as men in civil law;

b) Women have the right and capacity to acquire and retain custody, guardianship and care of children and to have an equal right in making decisions that affect their upbringing;

c) Women have the right to acquire and retain citizenship and nationality;

d) Even on the dissolution of marriage, women have the right to a fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children;

e) 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 deprivation of property, including property obtained by inheritance.

Section 44 of the Constitution

Section 44 provides that no restriction or limitation may be placed on the exercise of any rights and freedoms provided for in the Constitution, unless the restriction or limitation: (a) is prescribed by a law; (b) is reasonable; (c) is recognised by international human rights standards; (d) is necessary in an open and democratic society; and (e) does not negate the essential content of the right.

Case Law on Section 44:

Somanje v Somanje and Others[22]

This was an application by the plaintiff for an order that the defendants unlock the matrimonial home and allow her and her seven children to stay in the house. The plaintiff's husband had died intestate and the defendants, who were the deceased's brothers and sisters, thereupon locked up the matrimonial home, together with the property of the family, and including household effects. The plaintiff and her seven children were forced out of the home and were not allowed to enter the house until the defendants had applied for letters of administration.

The High Court held, *inter alia*, that the rights of a widow and her children are protected by the Constitution, which provides for the right to equality and full protection by the law, fair disposition of property, and fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and needs of any children, Ndovi J observed:

> The right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1)(g)[23] specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law.[24]

22 [1999] MLR 400.

23 Now section 45(1)(g) of the Constitution, as amended in 2010.

24 *Somanje v Somanje and Others* [1999] MLR 400, 403-04.

The State v the President of Malawi and Others and Ex Parte Malawi Law Society and Others[25]
The applicants sought alike orders of certiorari and mandamus to quash directives by the President banning all forms of demonstrations in relation to intended constitutional amendments that sought to allow the President to serve unlimited terms in office.

The High Court held, *inter alia*, that:

- Section 44 requires limitation on human rights to be only as prescribed by law and the directives by the President were not law and therefore they were unacceptable limitations to the rights enshrined in the Constitution; and
- Human rights can be derogated from only during a state of emergency and no state of emergency had been declared in terms of the procedure provided by the Constitution.

Case Law on the Right to Equality:

By the very nature that human rights are indivisible, inter-dependent, and interrelated, most cases on the right to equality cover issues relating to two or more constitutional provisions.

Republic v Chinthiti and Others[26]
The accused were charged and the trial was to be heard before a single judge of the High Court. The accused raised preliminary objections to, *inter alia*, the mode of the trial. The High Court upheld the objections in part. Nyirenda J, as he then was, considered sections 20, 42(f), and 44 of the Constitution, and made the following pertinent observations thereon:

> Counsel submit that the accused persons have a right to jury trial. It is argued that section 294(2) inhibits that right and, therefore, that it is unconstitutional. *Counsel have argued this point with reference to section 20 of the Constitution of the Republic of Malawi, which promulgates non-discrimination and equality before the law*. I have also been referred to section 42(f) of the Constitution on the right to a fair trial. *Section 44(g) of the Constitution says there shall be no derogation, restriction or limitation with regard to the right to equality and recognition before the law.* Counsel have drawn this Court's attention to several other considerations. It is said that section 294(2) has no safeguards and, therefore, there is nothing to stop the Minister from exercising his powers impromptu, discriminately and even maliciously against a certain sector of our community ...
>
> ... Section 44(1) of the Constitution prohibits derogation, restriction or limitation of rights in the Constitution. Section 44(2) says, without prejudice to subsection (1), that certain restrictions and limitations prescribed by law may be placed on any right and freedom provided in the Constitution, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society ...
>
> It has been said that it is not every distinction or differentiation in treatment at law which will violate the equality guarantee. In order to govern effectively, legislatures must treat different individuals and groups in different ways. To achieve true equality, it will frequently be necessary to make distinctions: see *Andrews v Law Society of British Columbia* (1989) 2 WWR 289.

25 [2002–2003] MLR 409.
26 [1997] 1 MLR 59.

> *The principle of equality of individuals under law does not require mere formal or mathematical equality, but a substantial and genuine equality in fact. This is what section 294(2) strives to achieve and, therefore, could not be said to flout any provision of the Constitution.*[27]

The above-mentioned dicta have to be read subject to the 2010 amendments to the Constitution.

Conclusion

Constitutional jurisprudence on the right to equality in Malawi suggest that the judiciary is adequately empowered to uphold the supremacy of the Constitution, to enforce respect for human rights, and to declare null and void legislation and other governmental action that is contrary to the rights to non-discrimination and equality guaranteed under the Constitution. To effectively carry out this mandate, courts have to be vigilant and bold.

27 *Id* 63, 66 [Own emphasis in italics].

THE AMBIT OF PROHIBITED GROUNDS OF DISCRIMINATION: COMPARATIVE JURISPRUDENCE ON HIV STATUS AND SEXUAL ORIENTATION[1]

Mandala D. Mambulasa[2]

Introduction

Since the outbreak of the HIV epidemic in the 1980s,[3] many people who have been infected have suffered (and continue to suffer) discrimination[4] and stigma in different environments – such as their homes, communities, work places, and schools.[5] Discrimination and stigma increase the vulnerability of people infected and living with HIV. Some countries have responded by passing HIV-related legislation, and specifically providing for HIV status as a prohibited ground of discrimination.[6]

Key questions that arise for consideration include:

- Are the existing laws adequate to effectively protect people against discrimination and stigma based on their perceived or actual HIV status?
- Are our justice systems ready, able, and willing to better the lives of people living with HIV and to ensure that the global epidemic is contained in an environment in which the human rights of all people (both the infected and uninfected), are respected, promoted, and protected?

Similarly, sexual minorities across the globe – and in sub-Saharan Africa in particular – have suffered and continue to suffer stigma and discrimination because of their perceived or actual sexual orientation. Some have been killed;[7] others have been denied opportunities in social settings, such as housing and employment;[8] and other people have been subjected to harsher prison sentences than the gravity of the offence required.[9] In some cases, it is actually laws criminalising same-sex

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

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3 It is generally accepted that HIV was discovered in 1981 in the United States of America. See, for instance, P Brouard & J Maritz (eds) *HIV and AIDS in South Africa Training and Information Resource* (2008) 1.

4 See, for instance, AIDS & Rights Alliance for Southern Africa *HIV/AIDS & Human Rights in Southern Africa* (2009) available at http://www.safaids.net/files/ARASA_Human_rights_report_2009.pdf.

5 Malawi Government & UNDP *Assessment of Legal & Regulatory Environment for HIV & AIDS in Malawi* (2012) 28.

6 Thus far, 123 out of about 140 countries that made submissions to the Global Commission on HIV and the Law in 2012 provided for HIV as a prohibited ground of discrimination in their legislation. UNDP, HIV/AIDS Group *Global Commission on HIV and the Law: Risks, Rights & Health* (2012) 7.

7 BK Moon, United Nations Secretary-General's *Statement to Human Rights Council,* Geneva, Switzerland (2012). See also *06 Human Rights Monitor* International Service for Human Rights 64 (2006) 75.

8 Human Rights Watch *More Than a Name: State Sponsored Homophobia and Its Consequences in Southern Africa* (2003).

9 In the Malawian case of *Republic v Mpanda* MWHC Criminal Appeal Case No. 333 of 2010 [unreported] Kamwambe J opined

relations that are enhancing discrimination and stigma against sexual minorities.[10]

With the exception of South Africa – which specifically mentions 'sexual orientation' as a prohibited ground of discrimination in its Constitution of 1996[11] – the constitutions of all the countries in sub-Saharan Africa do not explicitly provide for sexual orientation as a prohibited ground of discrimination.[12]

Given that many persons are being discriminated against in many countries – based on their HIV status and sexual orientation – should our courts fail to protect such persons simply because HIV status and sexual orientation are not specifically mentioned in the Constitution and other pieces of legislation as prohibited grounds of discrimination? Is there room for an expanded interpretation of the equality and non-discrimination clauses in those laws to protect persons based on their HIV status and sexual orientation? How have treaty monitoring bodies dealt with discrimination based on these two grounds? These are some of the questions that this paper will attempt to address.

The paper addresses the above questions, and is divided into four sections. The first is this introduction. The second provides a broad overview of the current prevalence of HIV in the world and in sub-Saharan Africa. This is important, because judicial officers and attorneys are sometimes detached from some of these issues, unless they are either infected or affected, or are working in this area. The third section of the paper will deal with understanding sexual orientation and discrimination. The fourth section will examine international human rights law. The final part of the paper will address comparative jurisprudence on HIV status and sexual orientation as prohibited grounds of discrimination.

Broad overview of the HIV epidemic today

The World Health Organisation (WHO) estimates that, as at 2012, there were 35 million people living with HIV globally.[13] Specifically, 52 percent of all persons living with HIV in the world are women. As of 2010, 22.4 million of the people living with HIV in the world were in sub-Saharan Africa.[14] In fact, sub-Saharan Africa is said to be the epicentre of the epidemic, with 70 percent

thus:

> "Just to entertain a wandering mind the heavy sentences have been meted unjustifiably on "homosexuals" as one may wish to call it, most likely due to the intensive and hounding publicity, negative or positive, that the media has given. Since the act of homosexuality has born acute debate, criticism and abhorrence, the courts have fallen in danger of adopting such strong sentiments and imposing heavier sentences than practice allows. Courts should not be carried away by public opinion anyhow so as to be distracted from the realities of the offence. As such buggery as unacceptable as it may be should not be regarded as the most heinous offence deserving more severe punishment than the law and practice provides. Due and appropriate sentences should be meted…As stated above, I substitute the sentence of 10 years imprisonment with one of 3 years."

10 UNDP, HIV/AIDS Group *Global Commission on HIV and the Law: Risks, Rights & Health* (2012) 44-48.

11 Section 9(3) of Act 108 of 1996.

12 Increasingly, however, countries have included a prohibition against discrimination based on sexual orientation in employment-related legislation. See for example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 of South Africa; section 23 of the Employment Law as Amended by Act 10 of 2010 of Botswana; the Employment Equity Act 55 of 1998 of South Africa; section 4 of the Employment Rights Act 33 of 2008 of Mauritius; section 46a of the Employment Act 2006 of Seychelles; and articles 4, 5 and 108 of the Labour Law, 2007, of Mozambique.

13 "HIV Infection Rate in the US Falls" *The Nation* (21 July 2014); UNAIDS *Report on the Global AIDS Epidemic* (2013) 78, http://www.unaids.org.

14 African Commission on Human and Peoples' Rights *Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV* (2010) in C Heyns & M

of all new infections in 2012.[15] The 2009 AIDS Epidemic Update noted that within sub-Saharan Africa, southern Africa is the most heavily affected by HIV.[16]

In Malawi, the estimated HIV prevalence rate in adults, i.e., the 15-49 age bracket, is 10.3 percent.[17] The prevalence rate among women in Malawi is 12.9 percent and 8.1 percent for men.[18] Clearly, HIV prevalence at all levels (global, regional, or sub-regional) has a gendered dimension. HIV is also prevalent in certain groups such as men who have sex with other men (MSM), transgender persons, and people who inject drugs. In Malawi, for example, while the HIV prevalence rate is 10.3 percent in the general population, the estimated prevalence rate among MSM is 21.4 percent.[19]

Sexual orientation and discrimination

The terms 'sexual orientation' and 'gender identity' send shivers down the spine of some people – even some judicial officers and attorneys. As far as they are concerned, it has a negative connotation, particularly associated with gay persons or alleged sexual perverts. This is not supposed to be the case. In human rights discourse, one must be willing to learn, unlearn and relearn certain concepts – and more so when you are a judicial officer or an attorney.

'Sexual orientation' has been defined by many organisations, legal documents and scholars. Cameron J[20] defined sexual orientation "by reference to erotic attraction; in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially, a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex." The definition propounded by Cameron J is the one adopted in this paper.

Persons who are erotically attracted to persons of a different sex from them, i.e., male to female, or vice versa, are the majority in every society. These are called heterosexuals or 'straight' people. They do not suffer discrimination and/or stigma due to their heterosexual identity. That explains why they are not a major concern for this paper, because they are not vulnerable in every sense of the word.[21] People who do not conform to heterosexuality face numerous challenges, as I have tried to highlight in the introduction. It is as if being different is a crime. It is not. Diversity has always been part of human existence. In the words of Sachs J, "[t]he test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting".[22]

Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2013) 437.

15 UNAIDS *Report on the Global AIDS Epidemic* (2013) 12, http://www.unaids.org.

16 *Id* 16.

17 Malawi National AIDS Commission "Malawi's Rate of New HIV Infections Drops" available at http://www.aidsmalawi.org.mw/index.php/8-news/80-malawi-s-rate-of-new-hiv-infections-drops.

18 *Id.*

19 S Baral *et al* "HIV Prevalence, Risks for HIV Infection, and Human Rights among Men Who Have Sex with Men (MSM) in Malawi, Namibia and Botswana" (2009) 4(3) *PLOS One.*

20 E Cameron "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *SALJ* 450, as quoted in *NAZ Foundation v Government of NCT of Delhi and Others* [WP(C) 7455/2001] (HC).

21 See generally S Nyanzi "Unpacking the [Govern]mentality of African Sexualities" in S Tamale (ed) *African Sexualities: A Reader* (2011) 477.

22 *Minister of Home Affairs and Others v Fourie and Others* Case CCT 60/04 at para. 60.

For various biological and social reasons, and without going into a debate about the causes, there are human beings in every society who have an erotic attraction towards persons of the same sex to them. If they are men and they are attracted to fellow men, their sexual orientation is said to be gay. If they are female and they are attracted to fellow females, their sexual orientation is said to be lesbian. Being gay or lesbian is not an illness or a form of disorder, as it once was thought to be.[23] When it finds expression in a conduct or practice, it is just but another expression of human sexuality.

The ambit of prohibited grounds of discrimination in international human rights law

Many international human rights instruments contain provisions on non-discrimination.[24] The United Nations Human Rights Committee (HRC) has defined discrimination as:

> Imply[ing] 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.[25]

Discrimination can be direct or indirect. Direct discrimination is said to have "occur[red] when an individual is treated less favourably than another, in a similar situation, for a reason related to a prohibited ground".[26] Indirect discrimination "refers to laws, policies or practices, which appear neutral at face value, but have a disproportionate impact on the exercise of rights as distinguished by prohibited grounds of discrimination".[27] In human rights law, protection against discrimination extends to both direct and indirect discrimination.

Discrimination clauses are also found in many constitutions.[28] They are variations of article 2 of the Universal Declaration of Human Rights (UDHR), which provides 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* race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*.[29]

Although non-discrimination clauses do not specifically mention HIV status and sexual orientation as prohibited grounds of discrimination, people in these groups are protected. The United Nations Office of the High Commissioner for Human Rights opines that:

23 *NAZ Foundation v Government of NCT of Delhi and Others* [WP(C) 7455/2001] (HC) 55-56.

24 See for instance, article 2 of the Universal Declaration of Human Rights and article 2 of the African Charter on Human and Peoples' Rights.

25 Human Rights Committee, General Comment No. 18 at para. 7.

26 Committee on Economic Social and Cultural Rights, General Comment No. 20 at para. 10(a). See K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" in this publication.

27 *Id* at para. 10(b).

28 See for instance, section 20 of the Constitution of Malawi and section 15 of the Constitution of Botswana.

29 Own emphasis in italics.

> The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for lesbian, gay, bi-sexual, transgender and intersex (LGBTI) people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights. The prohibition against discrimination on the basis of sexual orientation and gender identity is not limited to international human rights law. Courts in many countries have held that such discrimination violates domestic constitutional rights as well as international law ... [T]he principle of non-discrimination is cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity ...[30]

In that regard, it has been argued that the list of categories of discrimination in all human rights treaties is not exhaustive. This is clear from the use of 'such as' highlighted in article 2 of the UDHR above. Similarly, the inclusion of 'other status' is also indicative of that fact. The United Nations Committee on Economic, Social and Cultural Rights (CESCR), in their General Comment No. 20, explains that the nature of discrimination evolves – requiring a flexible approach to "other status" and the recognition of grounds "when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation".[31] The CESCR has included sexual orientation and health status within the category of other grounds.

Thus, grounds that compare favourably with prohibited grounds of discrimination (such as sexual orientation and HIV status) are deemed to be included in the prohibition against discrimination.[32] These are referred to as grounds analogous to the prohibited grounds of discrimination. This is also the position adopted by the other UN treaty bodies, including the Human Rights Committee, Committee against Torture, and the Committee on the Rights of the Child.[33]

Comparative jurisprudence on the ambit of prohibited grounds of discrimination

This section considers how courts in different jurisdictions, and one treaty monitoring body, have dealt with HIV status and sexual orientation as prohibited grounds of discrimination.

HIV Status as a Prohibited Ground of Discrimination

While not all courts have read the non-discrimination clause to include HIV status as an analogous ground,[34] such inclusion has increasingly been seen as the norm by domestic and regional courts and international human rights treaty bodies.

30 UN Office of the High Commissioner for Human Rights *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 10-11.

31 Committee on Economic Social and Cultural Rights, General Comment No. 20 at para. 27.

32 Amnesty International *Making Love A Crime: Criminalisation of Same-Sex Conduct in Sub-Saharan Africa* (2013) 64.

33 For example, sexual orientation is seen to fall within the prohibited grounds of discrimination. See Committee on Economic, Social and Cultural Rights, General Comment No. 20 at para. 32; Committee on the Rights of the Child, General Comment No. 4 at para. 6, General Comment No. 3 at para. 8 and General Comment No. 13 at para. 60.

34 See for example the Nigerian case of *Odafe and Others v Attorney General and Others* (2004) AHRLR 205 (HC) 31 where the Court held that illness is not included in the prohibited grounds of discrimination and thus did not find unfair discrimination based on HIV status. See discussion on this case in P Patel "Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries" in this publication.

In *Hoffmann v South African Airways*,[35] the Constitutional Court of South Africa held that the refusal by South African Airways to employ an HIV-positive person as a cabin attendant violated the right to equality and freedom from discrimination, which is guaranteed by section 9 of the South African Constitution. The Court included HIV status as a prohibited ground of discrimination under the South African Constitution, despite it not being specifically provided for under section 9(3).[36] This is a ground-breaking decision that has been widely reported and followed in many jurisdictions. The Court noted that:

> The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination ... People who are living with HIV/AIDS are one of the most vulnerable groups in our society.[37]

In *Diau v Botswana Building Society*,[38] the Botswana Industrial Court commented *obiter dicta* on the list of prohibited grounds in the Botswana Constitution. It opined:

> In my mind the grounds listed in terms of section 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature – they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. To dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational.

Consequently the ground of HIV status or perceived HIV status must be considered to be one of the unlisted grounds of section 15(3) of the Constitution of Botswana.[39]

In *Banda v Lekha*,[40] the applicant went for an HIV test and was dismissed, without reason, on her return to work – upon disclosing that she had tested HIV positive. The applicant had, at that stage, never been incapacitated for work. The respondent did not defend the proceedings, despite being served with all the relevant court processes. The Malawi Industrial Relations Court held that even though section 20 of the Constitution of Malawi does not specifically mention HIV status as a prohibited ground, the same should be implied as a prohibited ground and that, consequently, the dismissal of the applicant violated the applicant's right to equality and to fair labour practices.[41]

In *Satellite Investments v Dlamini and Others*,[42] the Industrial Court of Appeal in Swaziland noted that section 20 of the Swaziland Constitution does not include health or other status. The Court stated:

> [S]ociety throws up a vagary of new and unprecedented situations that the Legislature, in

35 [2000] ZACC 17. This case is also discussed in P Patel "Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries" and C Bandawe & A Meerkotter "Developing a Conceptual Framework against Discrimination on the Basis of Gender Identity" in this publication.

36 *Id* at para. 40. Compare with *Kanane v The State* 2003 (2) BLR 67 (CA) and *State v Banana* 2000 (1) ZLR 607 (SC).

37 *Hoffmann v South African Airways* [2000] ZACC 17 at para. 28.

38 IC Case No. 50 of 2003. This case is also discussed in H Ruhukya "The Role of International Labour Standards in Decision-Making on the Rights of Vulnerable Groups in Botswana" in this publication.

39 *Id* 37.

40 [2008] MLLR 338. This case is also discussed in K Nyirenda "An Analysis of Malawi's Constitution and Case law on the Right to Equality" in this publication.

41 *Id*.

42 [2011] SZICA 5.

> all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distrain such conduct, turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic No!
>
> If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and the Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before Court. This would amount to the Courts failing to perform their duties. [43]

In *Nanditume v Minister of Defence*,[44] the Namibian Labour Court held that exclusion from employment with the Namibian Defence Force (NDF) – solely on the grounds of HIV status – constituted unfair discrimination, as contemplated in section 107 of Namibia's Labour Act. The Court relied on the fact that the NDF did not dismiss existing HIV-positive employees from employment, but merely required that all prospective employees be tested and denied employment if they were HIV-positive.

Sexual Orientation as a Prohibited Ground of Discrimination

International human rights treaty bodies and courts have increasingly recognised that sexual orientation falls within the prohibited grounds of discrimination – either as falling within the grounds of 'sex' or 'other status' or as an aspect of diversity, akin to the listed grounds, and therefore an analogous ground.

In *Toonen v Austria*,[45] the HRC held that 'sex' includes 'sexual orientation'. The HRC made a similar finding in the cases of *Young v Australia*[46] and *X v Columbia*,[47] which both related to different treatment of pension benefits for same-sex partners, and held that it violated the right to be free from discrimination on the grounds of sex or sexual orientation.

In *Suratt and Others v Attorney General of Trinidad and Tobago*,[48] the Court of Appeal, per Archie JA, held that irrespective of whether same-sex sexual activity is a crime, sexual orientation is not a reasonable basis for distinction:

> The effect of specifically excluding a particular category of persons, on the ground of sexual orientation, from the protection afforded by the Equal Opportunity Act to others, is to deny them a fundamental right on a basis analogous to one of the grounds enumerated under section 4 of the Constitution (i.e. 'sex'). It is a denial of the protection of the law and of equality of treatment under the law.[49]

43 [2011] SZICA 5 at paras. 25-26.

44 LC Case No. 24 of 1998.

45 Comm. No. 488 of 1992 reported in International Covenant on Civil and Political Rights *Selected Decisions of the Human Rights Committee under the Optional Protocol* 5 (2005) 133.

46 Human Rights Committee Comm. No. 941 of 2000 at para. 10.

47 Human Rights Committee Comm. No. 1361 of 2005 at para. 9.

48 Civil Appeal No. 64 of 2004. This judgment was set aside by the Privy Council, [2007] UKPC 55, but on grounds not related to sexual orientation.

49 Civil Appeal No. 64 of 2004 at para. 43.

In *Salgueiro da Silva Mouta v Portugal*,[50] the European Court of Human Rights held that sexual orientation is a concept that is undoubtedly covered by the open-ended prohibited grounds of discrimination listed in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In *Egan v Canada*[51] and *Vriend v Alberta,*[52] the Supreme Court of Canada held that sexual orientation was a prohibited ground of discrimination analogous to the grounds listed under section 15 of the Canadian Charter of Rights and Freedoms. In *Vriend*, the appellant was employed as a laboratory coordinator at a college. His performance appraisal was highly satisfactory – such that he received salary increments and promotions. When Vriend disclosed to his employers that he was a gay man, however, the college requested him to resign. When he refused to resign, he was dismissed. At issue was whether the omission of sexual orientation as a prohibited ground of discrimination in Alberta's Individual Rights Protection Act infringed the appellant's right to equality and, if so, whether the infringement was justified.

The Court followed a two-stage inquiry to determine whether there was a violation of the right to non-discrimination, looking at whether there was a distinction which resulted in the denial of equality before or under the law, or of equal protection or benefit of the law; and whether this constituted discrimination on the basis of an enumerated or analogous ground.[53]

The Court held that the exclusion of sexual orientation from protection in the Individual Rights Protection Act, was offensive in that it "in effect, stated that 'all persons are equal in dignity and rights' except gay men and lesbians".[54]

In his minority opinion, L'Heureux-Dube J, emphasised that the question of whether discrimination falls within a prohibited or analogous ground of discrimination is not a rigid and formulaic question:

> Section 15(1) is first and foremost an equality provision. Its primary mission is the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration. A section 15(1) analysis should focus on uncovering and understanding the negative impacts of a legislative distinction (including, as in this case, a legislative omission) on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. Integral to an inquiry into whether a legislative distinction is discriminatory within the meaning of section 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and of the interest which is affected in terms of its importance to human dignity and personhood. Section 15(1) is engaged when the impact of a legislative distinction deprives an individual or group who has been found to be disadvantaged in our society of the law's protection or benefit in a way which negatively affects their human dignity and personhood. Although the presence of enumerated and analogous grounds may be indicia of discrimination, or may even raise a presumption of

50 European Court of Human Rights, Application No. 33290 of 1996 at para. 28.
51 [1995] 2 SCR 513.
52 [1998] 1 SCR 493.
53 *Id* 496.
54 *Id* 497.

> discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined.[55]

The Hong Kong Court of Appeal arrived at the same conclusion as the Canadian Supreme Court in holding that sexual orientation is a proscribed ground for discrimination that is analogous to race and sex.[56]

Conclusion

Discrimination based on sexual orientation and HIV status has become so prominent that it requires protection by our judicial systems, especially in sub-Saharan Africa.

Consensus has emerged from treaty-monitoring bodies (using an expanded interpretation of the equality and non-discrimination clauses) that HIV status and sexual orientation are prohibited grounds of discrimination in their own right. A quick survey of the emerging jurisprudence reveals that national courts are now more inclined than ever before to ensure protection on the basis of HIV status and sexual orientation.

The list of prohibited grounds of discrimination specifically mentioned in the equality and non-discrimination clauses of constitutions and international treaties are only illustrative and not exhaustive. Our courts have a solemn responsibility to protect persons infected with HIV and to ensure that people are not discriminated against because of their sexual orientation. We can all make a difference and ensure that people infected with HIV and those belonging to sexual minority groups feel protected and secure in our communities.

55 *Id* 499.

56 *Secretary for Justice v Yao Yuk Lung Zigo and Lee Kam Chuen* [2007] 10 HKCFAR 335.

RESOLVING THE TENSION BETWEEN GENDER EQUALITY AND CULTURE: COMPARATIVE JURISPRUDENCE FROM SOUTH AFRICA AND BOTSWANA

Chipo Mushota Nkhata[1] *and Felicity Kayumba Kalunga*[2]

Introduction

Issues of gender equality and cultural diversity are highly contested the world over. Some of the complex questions that arise out of enquiries on gender equality and cultural rights include:

- Where the rights of the individual and those of a collective conflict, which rights should take precedence over the other, and why?
- In terms of the customs and traditions of a particular tribe, should a female be appointed as the chief (leader) of a tribe that favours male succession to the chieftainship?
- Should a man be allowed to invoke his traditional custom of 'marriage by capture' to a charge of rape?
- Should a rapist or child defiler escape criminal liability by offering or being made to marry the victim?
- Should the system of male primogeniture be upheld regardless of whether it meets its traditional purposes or not?

The word "culture" is defined in the Oxford Advanced Learner's Dictionary as, *inter alia,* "the custom and beliefs, art, way of life and social organisations of a particular country or group".[3] Cultural practices would thus be those things which members of a particular cultural group do to express their way of life. As culture is a way of life of a group of people, this means that cultural practices are associative – that is, they can only be enjoyed in communion with other members of a particular group or community.[4]

The aim of this paper is to illustrate how an aspect of attaining justice in society - by resolving the inherent tension between gender equality and cultural diversity - can be achieved, with a focus on the role the judiciary can play in resolving this tension. This paper reviews the tension between gender and culture and then discusses how courts have sought to resolve tensions that arise when the pursuit for gender equality comes into conflict with cultural practices using the South African

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3 Seventh Edition (2006) 357. It should be noted that the word "culture" is very difficult to define. However, the definition herein cited is a working definition for the purpose of this paper.

4 *MEC for Education, KZN and Others v Pillay* 2008 (1) SA 474 (CC). It should be noted that "culture" is not an uncontested concept. For some, culture is static and bounded, whilst for others it is fluid and open to change as society changes. Legal scholars and courts have increasingly adopted a context-sensitive approach to resolving the tension between gender quality and culture. Such an approach acknowledges that society, and culture, adapts over time.

Constitutional Court and Botswana Court of Appeal as case studies.

Tension between gender and culture

It is generally agreed that there are moral implications of ascribing rights to groups – rights are asserted in order to protect marginalised groups (often regarded as minority groups) from interference by the majority. This is not a new phenomenon, as human rights are viewed as 'tools' that are used to protect those things which are considered as being fundamental to the enjoyment of human life. The argument has thus been that – if subscribing to a particular way of life in one's community is important to the enjoyment of human life – then the rights-based approach must be adopted in order to safeguard such a lifestyle. Jones[5] writes to this effect:

> [I]n moral philosophy and political life we commonly assert rights in relation to matters that we reckon to be of fundamental significance. Yet some of what is fundamentally important for people relates to identities that they can possess and to practices in which they can engage only in association with others. Consequently, it can seem merely arbitrary to insist that people can have rights only to goods that they can enjoy individually and never to goods that they can enjoy only collectively.[6]

The fact that groups are capable of possessing rights does not mean that they should infringe on the rights of individual members of that group. Our contention is that group rights are, in fact, only recognisable to the extent that the members of the group value the said individual rights. It is trite however that groups do indeed trample on the rights of their members in certain instances.[7] This is particularly true where women's rights and children's rights are concerned.

Okin[8] highlights two very important connections between culture and gender. The first connection is the sphere of personal, sexual, and reproductive life functions. She refers to these as the "central focus of most cultures, a dominant theme in cultural practices and rules".[9] She goes on to state that religious and cultural groups are often concerned with "personal law" – laws of marriage, divorce, child custody, division, and control of family property and inheritance – the areas in which the rights of women and girls are often grossly violated. Okin states that the defense of "cultural practice" advanced by collectives has a much greater impact on the lives of women and girls than it does on their male counterparts – because the former pour most of their "time and energy ... into preserving and maintaining the personal, familial, and reproductive side of life."[10]

The second connection Okin identifies is the control of women by men – what she declares as being the principal aim of most cultures (traditional or religious). These points substantiate, to a great extent, the claim made by feminists that multi-culturalism poses a threat of assimilation of

5 P Jones "Group Rights and Group Oppression" (1999) 7(4) *J Pol Phil* 353.

6 *Id* 353.

7 C Albertyn "'The Stubborn Persistence of Patriarchy?' Gender Equality and Cultural Diversity in SA" (2009) 2 *Const Ct Rev* 165, 179.

8 S Okin "Is Multiculturalism Bad for Women?" in Cohen, Howard & Nussbaum (eds) *Is Multiculturalism Bad for Women?* (1999).

9 *Id* 13.

10 *Id* 13. See L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

women's interests into majority cultures. Oloka-Onyango and Tamale[11] justify resistance to multi-culturalism by stating that:

> The real objective of the culturalist argument is the maintenance of structures of dominance and control and ... has little or nothing to do with the "cultural" wrappings of the argument. The one element that all the arguments have in common is the suppression of the human rights of women.[12]

Considering the above discussion, it is important to acknowledge that cultural beliefs and practices (and thus customary law) significantly influence public opinion on different aspects of life – including perceptions of fundamental rights. This has the ultimate effect of upholding or denying human rights. If indeed the real objective of culturalists is to maintain structures of dominance and control, the result will inevitably be that women's human rights will never be fully achieved. If culture is, however, allowed to develop with national and international human rights norms, the realisation of women's human rights will become a reality.

There are several notable benefits to belonging to a cultural group, such as the self-worth and self-identity that come with belonging to and upholding cultural practices, and the social capital of community life. However, feminists and some advocates of human rights have been concerned that if cultural groups are able to live according to their own value systems – without any challenge or change – these systems will continue to ignore the negative effects they have on women and they will perpetuate gender inequality.

Resolution of conflicts between gender and culture

If conflict arises between gender equality and cultural rights, it is the duty of judges, among other things, to ensure that they give effect to the rights of those most vulnerable – by respecting, protecting, and fulfilling their rights. This is the ultimate purpose of human rights.[13] This section critically discusses the approaches open to the courts for resolving such conflicts.

South Africa

Both the right to (gender) equality and culture are guaranteed rights under the Constitution of South Africa. The Constitution, however, does not explicitly state which right takes precedence over the other, where a conflict arises. Thus the government (all wings of government: executive, legislature, and judiciary) as principal duty-bearer for human rights, has to explore ways in which both these rights are respected, promoted, and protected in the manner contemplated by the Constitution.

Section 9 of the Constitution of South Africa provides for the right to equal treatment and protection from unfair discrimination from the state and private entities. The starting point in determining equal treatment is ascertaining whether similarly placed people are treated in a similar way. Discrimination occurs when a difference in treatment occurs. Among the prohibited

11 J Oloka-Onyango & S Tamale "'The Personal is Political,' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism" (1995) 17(4) *Hum Rts Q* 691.

12 *Id* 708-09.

13 KA Bentley *Whose Right is it Anyway? Equality, Culture and Conflicts of Rights in South Africa* (2003) 3.

grounds of discrimination is that of gender. Thus, no one may be unfairly discriminated against on account of their gender. Section 9(2) of the Constitution recognises that there may be occasions when differential treatment may be necessary to fulfill the substantive right to equality. Such differentiation will not amount to unfair discrimination.[14]

It should be noted that the right to equality – as contained in section 9 of Constitution of South Africa – is a non-derogable right. This means that as long as it is proved before a court of law that a statute or conduct unfairly discriminates against a complainant, based solely on the grounds of gender (or any of the other prohibited grounds of discrimination), such statute or conduct would be deemed to be in violation of the right to equality.

Sections 30 and 31 of the Constitution of South Africa provide for cultural rights. In terms of section 30, everyone has the right to speak any language and live the cultural life of their choice, as long as such cultural practice is consistent with the other rights contained in the Bill of Rights. Section 31, on the other hand, guarantees "the right of persons belonging to a cultural, religious or linguistic community to enjoy their culture, practice their religion and use their language: and to form, join and maintain cultural, religious and linguistic associations and with other organs of civil society"[15] - as long as these are done in a manner consistent with the provisions of the Bill of Rights. Section 30 ascribes cultural rights to individuals, so as to enable them to freely choose which way of life they want to follow. Thus, no person can be coerced to subscribe to a way of life that they do not want. However, beyond having a choice to decide on the cultural life one will live, it is difficult to see how an individual can enjoy a cultural life in the absence of a community to share practices with. For example, the Constitution guarantees the right of individuals to use the language of their choice, but in the absence of others to speak the language with, the right becomes meaningless. Section 31 is therefore critical. It ascribes cultural rights to individuals, but these can only be enjoyed in association with other members of a cultural group.

Furthermore, section 31 protects a community from interference with its cultural life, either by persons who are not part of that group or by those who want to divert from the core purposes of the cultural community.[16] Claims under section 31 of the Constitution can only be brought by individuals who are part of a cultural group and who are claiming a violation of a cultural right that is practiced in association with other members of the group. Both sections of the Constitution reinforce the celebration of the cultural diversity of South Africa, as espoused in the Preamble of the Constitution.[17]

The Constitutional Court of South Africa, in the ground-breaking cases of *Bhe and Others v Magistrate Khayelitsha and Others*, *Shibi and Sithole and Others*, and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*,[18] considered the conflict between gender equality and culture. In the *Bhe* and *Shibi* cases, the estates of the

14 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 239.

15 Constitution of South Africa section 31.

16 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 625.

17 *Id.*

18 2005 (1) SA 580 (CC). This case is also discussed in E Macharia Mokobi "Lingering Inequality in Inheritance law: The Child Born out of Wedlock in Botswana" in this publication.

deceased had devolved to their relatively distant male relatives, without considering the rights of the surviving direct relations, on account of the latter being female. In *Bhe*, a mother brought an action on behalf of her two minor daughters against her father-in-law (the paternal grandfather of her daughters) to enable them to inherit their late father's house. *Shibi*, on the other hand, brought an action against her cousin who had inherited the estate of her late brother, who had been providing for her and another minor relative. In both cases, the system of male primogeniture – inherent in the cultures of the parties – enabled the male relatives to inherit the property of the deceased. In discussing the interpretation of the customary law and practice, Langa DCJ, as he then was, stated as follows:

> Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights ...
>
> [C]ustomary law is subject to the Constitution. Adjustments and developments to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated.[19]

Langa DCJ found that the customary law rule on male primogeniture did not reflect changes in society and did not justify the violation of rights of women and children. He wrote to this effect:

> The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.[20]

Interestingly, despite the apparent conflict between gender equality and certain notions of culture, the Court did not shy away from declaring the rule of male primogeniture to be incompatible with the Bill of Rights:

> The exclusion of women from inheritance on the grounds of gender … is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.[21]

Subsequently, the Constitutional Court of South Africa, in the case of *Gumede v President of the Republic of South Africa*,[22] held that a customary law which provided that women had no right to property upon divorce discriminated against them on the basis of gender. The Court recognised

19 *Id* at paras. 41, 44.
20 *Id* at para. 95.
21 *Id* at para. 91.
22 2009 (3) BCLR 243 (CC).

that the customary law rule was based on traditional gender roles which ignored women's value and agency in society and marital relationships, and perpetuated their poverty and dependency.[23] Interestingly, in that case, the Department of Home Affairs and MEC for Traditional and Local Government Affairs had opposed Gumede's claims on the basis that the Court was constitutionally obliged to apply customary law as is – thus applying a static view of culture.[24]

Moseneke DCJ noted that customary law, in itself, has been influenced by the colonial history in many countries, and was often codified at a time when women's rights in general were not acknowledged:

> This grudging recognition of customary marriages prejudiced immeasurably the evolution of the rules governing these marriages. For instance, a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.[25]

In contemplating a remedy, Moseneke DCJ described the benefit of adapting customary law in line with constitutional imperatives:

> The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be "united in our diversity." In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights. Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.[26]

In analysing the above judgments, Albertyn notes that:

> [T]he Constitutional Court has generally accepted an approach that results in important norm-setting judgments about the place of women in families and communities. These judgments are not mere impositions of constitutional standards, but attempt to affirm customary practice as reflected in 'living law'.[27]

23 *Id* at para 36. C Albertyn "'The Stubborn Persistence of Patriarchy?' Gender Equality and Cultural Diversity in SA" (2009) 2 *Const Ct Rev* 165, 198-199.

24 C Albertyn "'The Stubborn Persistence of Patriarchy?' Gender Equality and Cultural Diversity in SA" (2009) 2 *Const Ct Rev* 165, 199.

25 *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) at para. 17.

26 *Id* at para. 22.

27 C Albertyn "'The Stubborn Persistence of Patriarchy?' Gender Equality and Cultural Diversity in SA" (2009) 2 *Const Ct Rev* 165, 206.

Botswana

Botswana – like Zambia and other countries with older, post-independence constitutions –exempts customary law from the application of the prohibition on discrimination.[28] Increasingly, however, as human rights norms and treaties gain credence in countries, courts have sought to interpret such exclusion clauses in constitutions in a manner that does not approve of discrimination.[29] The examples are numerous throughout Africa, but Botswana is discussed here as an example of this movement towards recognition of women's rights in customary law matters.

The case of *Ramantele v Mmusi and Others*[30] in Botswana is a good illustration of how recognition of women's rights in customary law matters can be achieved. In this case, Mmusi and her sisters sought a declaration that the customary rule practiced amongst her tribe, which arguably qualified only the last-born son of deceased parents to inherit the family home as intestate heir – to the exclusion of his female siblings – was contrary to sections 3 and 15 of the Constitution of Botswana. Section 3 of the Constitution provides for equal treatment before the law, while section 15 prohibits discrimination on the basis of sex, among other prohibited grounds of discrimination. The applicants (Mmusi and her sisters) therefore alleged that this customary law subjected women to discrimination. In opposition to this argument, the Attorney General argued that this type of discrimination against women was permitted under section 15 of the Constitution of Botswana, which provided for an exception in matters of laws relating to inheritance.

The Court of Appeal emphasised, with regard to interpreting rights, that it must adopt a generous approach "to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed".[31]

In reading sections 3 and 15 together, Lesetedi JA, in the Court of Appeal, found that the section 15 limitation was not beyond reproach and stated that:

> [A] derogation as contained in section 15(4) does not permit unchecked discrimination which is not consistent with the core values of the Constitution. Where there is a derogation the Court must closely scrutinise it, give it a strict and narrow interpretation and test whether such discrimination is justifiable having regard to the exceptions contained in section 3 of the Constitution. It is only when the Court is satisfied that a discrimination passes that test that the Court can find that the derogation is constitutionally permissible.
>
> I therefore agree with the respondents (Ms Mmusi and others) that the derogations contained in section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others *or* as being in the public interest.[32]

28 See Constitution of Botswana, section 15, and Constitution of Zambia, article 23.

29 M Ndulo "African Customary Law, Customs and Women's Rights" (2011) 18(1) *Ind J of Global Legal Stud* 87, 91. A number of cases have established the right to gender equality under customary law. See for example: *Muojekwu v Ejikeme* [2000] 5 NWLR 402 (CA); *Mojekwu v Mojekwu* [1997] 7 NWLR 283 (CA); *In Re the Estate of Andrew Manunzyu Musyoka* (2005) eKLR (HC); *Ephraim v Pastory* (2001) AHRLR 236 (HC).

30 CAGCB-104-2012 (CA).

31 *Ramantele v Mmusi and Others*, CAGCB-104-2012 (CA) at para. 69.

32 *Id* at paras. 71-72. Here, the Court's decision was very similar to that of the Kenya Court of Appeal in *Rono v Rono* (2005)

The Court of Appeal's method of determining the dispute is worth considering. In essence, the Court held that it is important to determine, factually, what the customary law in issue is – looking not just at past texts on customary law, but also contemporary records, case studies, and oral evidence to ascertain the current state of customary law. The Court held that the evidence suggested that the customary law in issue was flexible:

> It is axiomatic to state that customary law is not static. It develops and modernises with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times … For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion.[33]

The Court further held that – irrespective of the constitutional provisions – for a customary law to achieve the status of law, it must be compatible with morality, humanity, and natural justice, as set out in the Customary Law Act. The customary law must accordingly comply with "any notion of fairness, equity and good conscience".[34]

The Court concluded that "there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems",[35] and declared that the customary law of inheritance at issue does not prohibit the female or elder children from inheriting as intestate heirs to the family homestead of their deceased parents.

Conclusion

From the above discussion, it is clear that when interpreting constitutional provisions that seemingly conflict with each other, the courts can take an approach that best gives effect to the protection of the fundamental rights of the weaker party. In doing so, courts in Botswana and South Africa have been attentive to the fact that customary law is not static and have taken extra precaution to establish what the lived customary law actually is.

Specifically, regarding the resolution of the tension between cultural rights and gender equality, it should be noted that some cultural practices will be masked under the aegis of rights, when in fact they seek to preserve inequality and dominion. In such cases, the courts have a duty to promote and protect the rights of the weaker party and safeguard against unfair discrimination.

AHRLR 107 (CA), where it also declared a customary law unconstitutional despite a similar clause in its Constitution excluding customary law from the prohibition against discrimination. The *Rono* case is discussed in more detail in L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

33 *Id* at para. 77.

34 *Id* at paras. 49-50.

35 *Id* at para. 80.

LINGERING INEQUALITY IN INHERITANCE LAW: THE CHILD BORN OUT OF WEDLOCK IN BOTSWANA[1]

Elizabeth Macharia Mokobi[2]

Introduction

In Botswana, the possibility of a child born out of wedlock inheriting from his or her father's estate continues to cause disquiet in legal circles. Judgments of the High Court have repeatedly restated the position in common law and customary law alike: that the extra-marital[3] child is not entitled to inherit from his father, and that the extent of the extra-marital child's interest in his father's patrimony is maintenance alone. However, Botswana is continually changing and with it her societal norms and practices. Indeed, the traditional home with mother, father, and siblings is now just one of the many styles of family living in our communities. In Botswana, a currently common family type is the single parent family – where children are raised primarily by their mother, often with the assistance of close relatives. The father of the children in a single parent home may be absent or sometimes simply excluded, despite his best intentions and efforts.

It has been argued that discrimination on the basis of illegitimacy differs little from discrimination on the basis of race or sex. This is because illegitimacy is a tag that is affixed to the child at birth.[4] In many jurisdictions worldwide, the belief that the child of a non-marital union should be branded for life as an unwanted non-person has been replaced with the idea that equal protection of the law must be afforded to all persons, regardless of the circumstances of their birth.

This paper considers the right of the extra-marital child to inherit from his or her father. The paper first outlines the current position of the law and then considers the impact of the new Children's Act.[5] To offer a comparative perspective, the paper considers how these issues have been treated in South Africa, the United States, and Europe. Lastly, the paper makes recommendations for reform of the law in Botswana based on the 'best interest principle', which may ensure recognition of the duty not to discriminate against the extra-marital child.

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana on 28 and 29 March 2014.

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3 In this paper, the term "extra-marital" is preferred over the term "illegitimate" to describe a child born out of wedlock.

4 WP Hirczy De Mino "From Bastardy to Equality: The Rights of Nonmarital Children and their Fathers in Comparative Perspective" (2000) 31(2) *J Comp Fam Stud* 231, 236.

5 Act No. 8 of 2009.

Inheritance rights of the extra-marital child[6]

The Position under Common Law

Roman-Dutch law does not recognise the relationship between a child born out of wedlock and his father. Barring the duty placed on the father to maintain the child, the law recognises the relationship between the child born out of wedlock and his mother and maternal relations – to the exclusion of his father and paternal relations.[7] With regard to matters of succession, the child born out of wedlock in Botswana has no statutory right to inherit from his father in intestacy.[8] The common law rule – set out in *Green v Fitzgerald and Others*[9] – which provides that the extra-marital child cannot inherit from his father and paternal blood relations, still holds true in Botswana.

This was illustrated in the Botswana High Court decision of *Samsam v Seakarea*,[10] when the Court was required to determine whether children born out of wedlock to an unmarried couple had the right to inherit from their deceased father. Lesetedi J held, as follows:

> But can the children having been born out of wedlock, be entitled to reside in the Gaborone property belonging to the deceased by virtue of them being his children and she alongside as their guardian? It is common cause that the deceased died intestate. As a common law principle, children born out of wedlock do not succeed *ab intestatio* to their father and his relations but to their mother and her relations ... On the other hand a child born out of wedlock is entitled to maintenance from both its parents according to their means. See, *Moremi and Others v Mesotlho* [1997] BLR 7, and on their father's death, from his estate. See, *Lamb v Sack* 1974 (2) SA 670 (T); *Spies' Executors v Beyers* 1908 TS 473. This is now a settled principle of our law. In the light of the above authorities therefore, although the two children are not entitled to inherit from their father, they are entitled to claim maintenance from his estate in so far as they may be dependants. A right to maintenance is however distinct from a right to inherit and it certainly does not confer on a dependant a right to possession or occupation of any property of the estate.[11]

The application for the children to be recognised as heirs of the deceased father failed. The children were only entitled to claim maintenance.

The Botswana Court of Appeal weighed in on this debate in *Tape v Matoso*[12] – where the respondent married the deceased in community of property and bore him four children. The marriage broke down following an adulterous relationship that the deceased had with the appellant. The respondent left the matrimonial home. The deceased purported to marry the appellant and had ten children with her over a period of thirty years of cohabitation. Upon the death of the deceased, a dispute arose regarding who were his rightful heirs. The Court of Appeal found that since the

6 Throughout this paper, the male gender is used to refer to an extra-marital child. This is merely for convenience: 'his' should be construed to apply equally to a female extra-marital child.

7 E Spiro *Law of Parent and Child* Fourth Edition (1971) 450.

8 The situation in testate succession is different, because the doctrine of freedom of testation, codified in section 5 of Botswana's Inheritance Act, ensures that the unwed father is free, should he choose, to nominate his child born out of wedlock as his heir or legatee.

9 1914 AD 88.

10 2004 (1) BLR 378.

11 *Id.*

12 2007 (1) BLR 512.

deceased had never divorced the respondent, his supposed marriage to the appellant was bigamous and void.[13] The Court then determined that the children the deceased had with the appellant, with whom he had cohabited for over thirty years, could not inherit from his estate in intestacy. Citing *Green v Fitzgerald and Others*[14] as authority, Twum JA affirmed the position in common law in Botswana, i.e., that the extra-marital child cannot inherit from his father.

The Position under Customary Law

The legal position of a child born out of wedlock is no less thorny under customary law. In *Hendrick v Tsawe*,[15] the applicant, a child born out of wedlock, claimed the right to inherit from his father and sued his father's widow to enforce the right he asserted. The Customary Court of Appeal, which was the court *a quo*, ruled that the applicant was not entitled to inherit from his father, as he had never been formally adopted under customary law. The High Court adopted a similar view. Nganunu J, citing the customary law of the parties,[16] held that a man could not claim a child he fathered out of wedlock, nor could such a child have any claim against his father, unless certain legal conditions had been fulfilled. He identified these legal conditions as marriage and payment of *bogadi*.[17] He held that only from these conditions did the rights of inheritance flow. A second route indicated by the learned judge was adoption of the extra-marital child in lieu of marriage.[18] The Court ruled that Hendrik had not discharged the burden to prove that he was legitimised by marriage or that he was adopted, and, therefore, that he was not entitled to inherit from his late father.

In another decision on the same question, in *Lesomo and Another v Otukile and Another*,[19] the applicants sought an order declaring them to be the heirs of the estate of their late father, Lesomo Mokganedi. They claimed that he was married to their mother by customary law and that, in the alternative, they were adopted by the deceased according to customary law. The High Court ruled that in order for their application to succeed, the applicants had to prove that a *patlo* (the ceremony during which a young man's family requests the hand of a woman in marriage and delivers *bogadi*) had been conducted. Evidence from maternal uncles, who play a critical role in the marriage of a young woman, was absent. The Court also stated that evidence of adoption was also lacking – i.e., payment of cattle or other livestock to maternal relatives of their mother. The claim that the applicants were heirs of their mother's late husband therefore failed.

The precarious position that the child of an unwed father faces was illustrated to great effect in the Botswana High Court case of *Mosienyane NO v Lesetedi and Fifteen Others*.[20] The applicant – a young man pursuing university education – sued sixteen members of his late father's extended

13 *Id* 520.

14 1914 AD 88.

15 2008 (3) BLR 447.

16 Customary law in Botswana is not a single homogeneous body of rules, but will vary from tribe to tribe and sometimes from location to location within tribes. However, the rule regarding illegitimacy and inheritance is constant amongst tribal communities in Botswana.

17 2008 (3) BLR 447, 450.

18 *Id*.

19 2008 (2) BLR 192.

20 Miscellaneous No. F 257 of 2005 [unreported].

family, claiming the right to maintenance and tuition from his father's estate. The deceased had never married the applicant's mother. The evidence however suggested that deceased did not deny that the applicant was his son and had participated in his son's life. The deceased had funded the applicant's education. The deceased died unmarried and intestate, and the Court determined that the estate of the deceased would devolve under customary law rules of succession. In an *obiter* statement, the Court lamented the sad state of affairs that rendered the applicant unable to inherit from his late father's estate. Masuku J stated:

> There is one issue that I must address as an *obiter dictum,* which has caused me spasms of disquiet. This related to the customary law position that the applicant is not entitled to benefit from his father's estate because he was born out of wedlock. In some other countries, in the region, the distinction of children on the basis of whether or not they were born out of wedlock has been removed in relation to their right to inherit from their fathers. This is an issue worth considering in this country.[21]

Indeed, Botswana had an opportunity to consider this issue when promulgating the new Children's Act. Sadly, the opportunity was missed.

The Effect of the New Children's Act

Discussion of the position of the extra-marital child in Botswana with regard to inheritance is incomplete without considering section 27(4)(g) of the new Children's Act.[22] This provision states that a parent has a duty to ensure that a child inherits adequately from his parents' estate. Section 27(4)(g) is amplified by section 27(6), which states that where a biological parent dies intestate or fails to ensure adequate provision for the child in the will, the child shall be awarded such portion of the estate as is required by the Administration of Estates Act,[23] or any other relevant law.

At first glance these provisions may seem adequate to ensure that every child – whether legitimate or illegitimate – inherits from his father's estate. The provisions may appear to banish the shroud and shame of illegitimacy. However, a closer reading of these provisions reveals that they do nothing to assist the extra-marital child to inherit from his father. Section 27(4)(g) states that every parent has a duty to ensure that their child inherits from their estate, and given that a parent is defined in section 2 to include a "biological parent", it would seem that this provision serves to amend the common law to include extra-marital children as heirs. However, this is not the case, because, when read with section 27(6), section 27(4) ceases to have any real substance.

Section 27(6) states that where a biological parent dies intestate, such a child shall be awarded such portion as they are entitled to under the Administration of Estates Act or any other law. The Succession Act,[24] for its part, makes no mention of extra-marital children. In any event, the Administration of Estates Act and the Succession Act do not apply to children of deceased tribesmen, which must be dealt with under rules of customary law.[25] Thus, this portion of section

21 *Id* at para. 74.

22 Act No. 8 of 2009.

23 Cap 31:01 of the Laws of Botswana.

24 Cap 31:03 of the Laws of Botswana.

25 A tribesman is defined in section 2 of the Administration of Estates Act as a member of a tribe or tribal community in

27(6) is unhelpful. Section 27(6) also provides that a child not provided for in intestacy may receive that portion of their biological parents' estate as they may be entitled to under any other law. As established above, the extra-marital child is entitled to nothing under the common law and customary laws of Botswana. The Children's Act has therefore failed – whether by design or error – to remedy the age-old exclusion of a child of an unwed father from his father's estate. The limits of the child's rights with regard to his unwed father, are simply a claim for the provision of maintenance.

There is clearly no equality of outcomes in the law of inheritance relating to the extra-marital child. A child born to a married couple inherits from his or her mother and father to the fullest extent possible in intestacy. The child born to an unwed father inherits nothing from his father in intestacy. There is thus a need to abolish the concept of illegitimacy and to seek substantive equality in inheritance rights of children born out of wedlock as has been done in other jurisdictions.

A comparative perspective

South Africa

In South Africa, the inability of the child born out of wedlock to inherit from his father was dealt a death blow in *Bhe and Others v Khayelitsha Magistrate and Others*, *Shibi v Sithole and Others*, and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another.*[26] These three cases dealing with largely similar issues were brought before the South African Constitutional Court and decided jointly in the *Bhe* case. The first issue was the constitutional validity of section 23 of the Black Administration Act,[27] which gave effect to the customary law of succession in South Africa. The second issue was the constitutional validity of the principle of male primogeniture in the context of the customary law of succession.

In the first application – *Bhe and Others v Khayelitsha Magistrate and Others*[28] – an application was brought by the applicant, Nontupheko Maretha Bhe, and the Women's Legal Centre Trust. In the application, Bhe sought an order from the court securing the property of her deceased partner for her daughters, whom he had fathered. Because the applicant had never married the father of her children, the deceased's estate stood to be inherited by the eldest male relative who was the deceased's father – to the exclusion of his extra-marital children – in application of the customary law rule of male primogeniture.

In the second application – *Shibi v Sithole and Others*[29] – the applicant sought to be declared the sole heir of her late brother, who had died intestate and without children. Customary law regarding

Botswana. The estates of deceased tribesmen may not be administered under the Administration of Estates Act but are administered under customary law. The Administration of Estates Act therefore creates a parallel system of succession for estates of deceased tribesmen. Unless a tribesman writes a will, there is no legal mechanism by which he can exclude the customary law from applying to his estate.

26 2005 (1) SA 580 (CC). This case is also discussed in C Mushota Nkhata & F Kayumba Kalunga "Resolving the Tension between Gender Equality and Culture: Comparative Jurisprudence from South Africa and Botswana" in this publication.

27 Act No. 38 of 1927.

28 Case CCT 49/03.

29 Case CCT 69/03.

male primogeniture prevented the applicant from inheriting the estate of her deceased brother.

The third application was filed jointly by the South African Human Rights Commission and the Women's Legal Trust,[30] acting in their own interest and in the public interest. This application sought a declaration that section 23 of the Black Administration Act was unconstitutional, because of its inconsistency with the Constitution's equality provisions. The Commission for Gender Equality filed an *amicus curiae* brief.

In a majority decision in *Bhe*, written by Langa DCJ, the Court held that, in the context of its history, section 23 of the Black Administration Act was an anachronistic law that served to violate the rights of black Africans. It created a parallel system of succession for black Africans, with no regard for their wishes or circumstances. Section 23 was held to be discriminatory and a breach of the right to equality (guaranteed under section 9(3) of the Constitution) and the right to dignity (guaranteed under section 10 of the Constitution). The Court found that the customary law rule of male primogeniture discriminated against women and extra-marital children and declared the rule unconstitutional.

The decision in *Bhe* is laudable. The Constitutional Court advanced the position of extra-marital children by decades – by leapfrogging the slow development of the living customary law and declaring exclusion of extra-marital children from inheritance (on the basis of the customary law rule of male primogeniture) unconstitutional. Had this decision not been taken, thousands of children would have continued to suffer the injustice of being treated as second class citizens in terms of their position in their family and in society.

The dissenting decision of Ngcobo J proposed a more cautious approach.[31] While accepting that the principle of primogeniture discriminates against women, he opposed it being struck down as unconstitutional. Instead, Ngcobo advocated that the principle of male primogeniture be developed by the Constitutional Court to bring it in line with the right to equality. His position did not triumph – perhaps because change was long overdue, society had moved on, and the rule of male primogeniture was increasingly losing its relevance.

Europe

The landscape of decisions regarding the question of illegitimacy was irrevocably changed by the decision of the European Court of Human Rights in *Marckx v Belgium*.[32] A child was born out of wedlock to Paula Marckx in 1973. In terms of Belgian law at the time, the birth of a child out of wedlock created no legal bond between an unmarried mother and her child. In order to establish such legal bonds, the mother of the child had to recognise the child as her own, or through a judicial process instituted by the child or its legal representative. Even after such maternal recognition was obtained, the extra-marital child would remain a legal stranger to her maternal relatives. The applicant and her extra-marital daughter applied to the court, arguing that that Belgian law violated the European Convention on Human Rights (ECHR) in the nature of the relationship

30 Case CCT 50/03.

31 2005 (1) SA 580 (CC) at para. 139.

32 Application No. 6833/74 Judgment of 13 June 1979.

created between a mother and her child, and that it limited the patrimonial rights afforded to the extra-marital child.

The Court ruled in favour of the applicant. It held that article 8 of the ECHR, which required the state to protect family life, made no distinction between a marital family and a non-marital family. Furthermore, the Court held that the state had a duty to abstain from arbitrary interference in family life as well as a positive obligation to respect family life. This positive duty entailed a duty on the part of the state to ensure that its domestic legal system contained a legal safeguard that made it possible for a child to be fully integrated into his family from the moment of birth. A law that prevented such integration was in breach of article 8 of the ECHR.[33] This decision resulted in courts in the Netherlands and Belgium striking down national statutes that were found to be in violation of article 8 of the ECHR.[34]

United States

The first decision that challenged illegitimacy in the United States was *Levy v Louisiana*.[35] In this case, the Supreme Court struck down a Louisiana statute that prevented extra-marital children from recovering compensation for the wrongful death of their mother. The rationale for the original prohibition – as articulated by the Court of Appeal – was one rooted in public morals and the need to discourage the birth of children out of wedlock.[36]

In the next decision, *Labine v Vincent*,[37] the Supreme Court was concerned with Louisiana laws that prevented an extra-marital child from inheriting from her father's estate. The child concerned had been acknowledged by her father who had died intestate. Her father's relatives inherited his entire estate, although she was his only child. In this case, the Court upheld the Louisiana law finding that the *Levy* decision did not mean that the state was barred from treating an extra-marital child differently from legitimate ones. The Court held that only the state's legislature had the power to enact laws protecting the extra-marital child.[38]

A turning point in United States jurisprudence was *Trimble v Gordon*.[39] In this case, the Supreme Court struck down a Louisiana workmen's compensation statute that allowed legitimate and extra-marital children of the deceased to recover equally, but relegated extra-marital children who were not acknowledged by their father to the status of "other dependents". The Court stated as follows:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

33 *Id* at para. 31.

34 See M Salzberg "The *Marckx* Case: The Impact on European Jurisprudence of the European Court of Human Rights' 1979 *Marckx* Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights" (1979) 13(2–3) *Den J Int'l L & Pol'y* 283, 294-99.

35 (1968) 391 US 68.

36 *Id* 70.

37 (1971) 401 US 532.

38 *Id* 538.

39 (1977) 430 US 762.

> responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalising the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent.[40]

It is difficult, if not impossible, to ignore the patent injustice done to the extra-marital child by the state when it refuses to recognise him as an equal citizen, with rights equal to those of a legitimate child. The case law discussed above has illustrated that it is possible to view the question of the right to inherit from a perspective that seeks to protect the child from punishment and discrimination that is undeserved.

A way forward for Botswana

In the case referred to earlier, of *Mosienyane v Lesetedi NO and Fifteen Others*,[41] Masuku J lamented that the deceased's nephews, nieces, and cousins would have the benefit of his estate to the exclusion of "his own flesh and blood" – i.e., his extra-marital son.[42] He restated that the object of the law is to achieve justice in each case and stated that the time had come for steps to be taken to remedy the injustice perpetrated by the law.[43] It is high time that Botswana shrugs off the vestiges of the past and abandons the discrimination against the extra-marital child in inheritance matters, under both common law and customary law.

Botswana's courts have already achieved a similar milestone with regard to the rights of access of a father to his extra-marital child. In *Ndlovu v Macheme*,[44] the High Court had occasion to consider the right of a father to have access to his child who was born out of wedlock. Dingake J noted that there were authorities that suggested that the father of a child born out of wedlock had no right of reasonable access to his child – citing that the notion of the best interests of the child, under Roman Dutch law, was subordinate to parental interests. Dingake J then argued that the best interests of the child were paramount.[45] The Court then went on to rule that the Roman Dutch common law rule – that a father does not have a reasonable right of access to a child born out of wedlock – was a violation of section 3, as read with section 15 of the Constitution. This was to the extent that it afforded irrational differential treatment between parents of a child simply on grounds of sex or marital status, holding that it was unconstitutional to discriminate on the basis of marital status. This decision was upheld by the Court of Appeal.[46]

Given that the Court of Appeal has struck down the common law rule denying a father access to his extra-marital child as being unconstitutional, nothing stands in the way of a similar decision regarding the right of an extra-marital child to inherit from his father.

With respect to the common law rule that an extra-marital child should not inherit from his father, it is proposed that the Succession Act be amended to abolish the operation of this common law rule in Botswana. In South Africa, this was achieved by enacting section 1(2) of the Intestate

40 *Id* 769-70.
41 Miscellaneous No. F 257 of 2005 (HC) [unreported].
42 *Id* at para. 75.
43 *Id*.
44 [2008] 3 BLR 230.
45 Citing *Modisenyane v Modisenyane* [2006] 2 BLR 65 (HC) with approval.
46 *Macheme v Ndlovu* [2009] 1 BLR 120 (CA).

Succession Act,[47] which states that illegitimacy shall not affect the capacity of one blood relation to inherit from another blood relation. In the alternative, the same result can also be achieved by the High Court, at an opportune time, by striking down this common law rule – as was done in *Ndlovu v Macheme* – and adopting a position that protects the right to non-discrimination in matters of inheritance guaranteed by our Constitution.

With regard to customary law, it is submitted that the rule excluding the extra-marital child from the estate of his deceased father, is inconsistent with the provisions of section 2 of the Customary Courts Act,[48] which states that:

> "[C]ustomary law" means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

This customary law rule can be dispensed with in a single judgment, were a court to accept that the rule falls foul of the criteria set out above for validity of a customary law rule. A rule falling foul of this minimum standard of morality, humanity, and natural justice should not qualify as a rule of customary law.[49] The rule that a child born outside of wedlock cannot inherit from his father is in fact contrary to morality, humanity, and natural justice. The rule breaches the basic moral tenet that we should do unto others what we would have done unto us. The rule dehumanises the extra-marital child – branding him as a mistake to be ignored, hidden, and forgotten, and does him a great injustice by excluding him from the benefit of his father's estate. It is discriminatory and therefore unconstitutional. Equality, dignity, and justice demand that the principle of illegitimacy and the injustice it begets be banished from the Botswana legal system.

47 Act No. 81 of 1987.

48 Cap 4:05 of the Laws of Botswana.

49 See *Ramantele v Mmusi and Others* CAGCB-104-12 at para. 49. In that case, the Court of Appeal of Botswana stated that, for a customary law to be recognised as law, "[i]t must not be unconscionable either of itself or in its effect. Nor should it be inhuman. Customary law must be applied in accordance with the set out principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants."

DEVELOPING A CONCEPTUAL FRAMEWORK AGAINST DISCRIMINATION ON THE BASIS OF GENDER IDENTITY

Dr Chiwoza Bandawe[1] *and Anneke Meerkotter*[2]

Introduction

The African Commission on Human and Peoples' Rights (African Commission) recently adopted a resolution on the protection of persons against violence and other human rights violations, based on their real or imputed sexual orientation or gender identity.[3] The resolution is an important recognition of the need to protect the rights of those marginalised and vulnerable groups within society who are at increased risk of abuse and human rights violations due to their perceived or actual status.[4]

While mainstream media in southern Africa increasingly vilifies and stigmatises persons based on their perceived or actual sexual orientation or gender identity, international and regional human rights bodies and courts have adopted a more nuanced understanding of the rights of persons who face such discrimination.

The United Nations High Commissioner for Human Rights remarked in 2006 that:

> Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provide public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.[5]

This paper examines how courts in various jurisdictions have emphasised the universality of rights – irrespective of a person's sexual orientation or gender identity. The paper focuses on transgender and intersex persons and presents the African philosophical framework of *ubuntu* as a conceptual framework through which the rights of such persons should be respected and protected.[6]

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3 Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014, available at http://www.achpr.org/sessions/55th/resolutions/275/.

4 Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT and Human Rights, Montreal, 26 July 2006, available at http://www.unhchr.ch/huricane/huricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument.

5 Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT and Human Rights, Montreal, 26 July 2006, available at http://www.unhchr.ch/huricane/huricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument.

6 C Bandawe "Psychology Brewed in an African Pot: Indigenous Philosophies and the Quest for Relevance" (2005) 18 *Higher Educ Pol'y* 289.

Understanding terminology

Society tends to categorise persons based on their sex (male or female), gender (masculine or feminine), and sexual orientation (heterosexual, bisexual, asexual, or homosexual).[7] The assumption in society is that a person's sex and gender is the same and that a person's default sexual orientation is heterosexual (being sexually attracted to the opposite sex).[8] Often, there is very little discussion and understanding of what these categories mean, or acceptance that not everyone fits neatly within them and that the categories are, in fact, far more flexible than we perceive them to be.

A person's *sex* is biologically determined – it depends on a person's genetics, hormones, anatomy, and physiology.

Whether a person is classified as male or female at birth depends on whether the predominant anatomical and physiological characteristics of the person, at that time, are either male or female. This is not a simple matter and there are cases when persons have been incorrectly labelled male or female because they presented ambiguous genitalia at birth, or because their sexual and/or reproductive features and organs were not clearly male or female. It is estimated that in about 1 in every 5000 births, the distinction between male and female is not clear.[9] In such cases, a person is often allocated a specific sex, and it only becomes apparent upon puberty or later that the person also carries biological characteristics of the other sex. Such persons are referred to as being *intersex*.

A person's *gender* is socially constructed. Society tends to ascribe certain roles, behaviours, and attributes to a person, as being either male or female. Over the years, some of these roles and attributes have been challenged. For example, women are increasingly challenging traditional notions of femininity, which preclude them from wearing pants or miniskirts or working in certain sectors – while men are challenging notions of masculinity which absolve or preclude them from playing a more active role in raising their own children.

Gender identity refers to a person's deeply felt internal and individual experience of being male or female and how they choose to fit within society's construction of gender roles and attributes. Often, if a person's sex is male, that person also takes on a gender identity that is, to a greater or lesser extent, masculine. For example, the person might choose to wear clothes or have a hairstyle that corresponds with that society's construction of gender.

In some cases, a person's gender identity is not entirely congruent with their sex. A person can be born a man, but may feel inherently female, and feel unhappy being classified as male. A *transgender* person is someone who has a gender identity that is different from his or her birth sex.[10] A transgender person who has undergone or who wants to undergo medical procedures such as gender-affirming surgery or hormone treatment – so that the body is more aligned to the

7 See "What Do We Mean by 'Sex' and 'Gender'" World Health Organisation, available at http://www.who.int/gender/whatisgender/en/index.html.

8 See MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

9 See M Blackless "How Sexually Dimorphic Are We? Review and Synthesis" (2000) 12 *Am J Hum Biology* 151; K Haas "Who Will Make Room for the Intersexed?" (2004) 30(1) *Am JL & Med* 41.

10 See American Psychological Association *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression* (2011) 1, available at http://www.apa.org/topics/lgbt/transgender.pdf.

gender identity – is sometimes described as a *transsexual*.

Sexual orientation refers to a person's enduring pattern of emotional, romantic, and/or sexual attractions.[11] Notably, a person does not choose to be homosexual (attracted to the same sex – gay or lesbian), heterosexual (attracted to the opposite sex – "straight"), bi-sexual (attracted to both sexes), or asexual (not attracted to any sex).[12]

Acknowledging difference

Instead of acknowledging sexual and gender diversity within all societies, many societies respond negatively to persons whose sex, gender, or sexual orientation is perceived to be different from the norm. Gays, lesbians, intersex persons, and transgender persons are at risk of stigma, violence, and persecution in many societies. People – including children – who experience discrimination because of their gender identity, are often alone, lack family support, and are at risk of depression, trauma, and even suicide. Such persons are also more likely to experience difficulties in accessing services, including healthcare services.

Studies show that transgender persons – particularly persons who are born male but present a female gender identity (male-to-female persons) – have a high rate of HIV,[13] and a high level of risk of HIV transmission.[14] Yet, transgender persons experience significant barriers in accessing healthcare services that are safe, that protect confidentiality, and that respect their dignity.[15]

What is important to recognise is that an individual is much more than purely his or her sex, gender, or sexual orientation. For the most part, it should not matter how a person looks or who they are attracted to. Nor does a person's sex, gender identity, or sexual orientation reveal anything about the morality or religious beliefs that the person holds.

The recognition of a human being as a person with inherent dignity is a fundamental tenet of human rights discourse – a discourse rooted in the notion of universality of rights. However, while the right to be treated with dignity and equality is entrenched in international human rights law, it is far from secure. Increasingly, states, politicians, religious leaders, and the media counter the human rights discourse with arguments against the acceptance of persons whose sexual orientation or gender identity is deemed unacceptable. Such arguments claim validity by relying on rhetoric about religious and cultural values, but this rhetoric is often misplaced. Instead of responding to this rhetoric, we seek to put forward an alternative view which suggests a less anachronistic way

11 Definition of the American Psychological Association – see http://apa.org/topics/lgbt/index.aspx. The Yogyakarta Principles defines it as follows: "Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender." This latter definition was cited with approval in *Naz Foundation v Government of NCT of Delhi and Others*, 7455/2001 (HC). E Cameron "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *SALJ* 450.

12 American Psychological Association *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality* (2008) 2, available at http://www.apa.org/topics/lgbt/orientation.pdf.

13 C Beyrer "LGBT Africa: A Social Justice Movement Emerges in the Era of HIV" (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 177.

14 GA Jobson *et al* "Transgender in Africa: Invisible, Inaccessible, or Ignored?" (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 160.

15 C Beyrer "LGBT Africa: A Social Justice Movement Emerges in the Era of HIV" (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 177.

of perceiving each other, while at the same time explaining how this interrelates with a human rights-based approach.

Conceptual framework against discrimination

Despite the variety of different cultures in Africa, there are commonalities that unite the African experience. Philosophers highlight a theme in the African experience that commonly defines the purpose of life and the nature of human conduct – *ubuntu.*[16]

The very fabric of traditional African life centres on community and belonging to a community of people. The concept of *ubuntu* is captured in the Sotho saying: "*Umuntu ngumuntu ngabantu*" (a person is a person through persons). In Western philosophy, human identity lies in its individualistic approach, as captured in the philosophy: "I think, therefore I am". *Ubuntu,* on the other hand, posits, "I am because you are, and because you are, therefore I am".[17] The communal embeddedness and connectedness of a person to other persons is illuminated by this saying. Hence, the individual is affected by what happens to the whole group, as the whole group is affected by what happens to the individual.[18]

It follows then that discrimination against gays, lesbians, transgender persons, and intersex persons violates this concept of *ubuntu*. South African philosopher, Shutte,[19] writes:

> The concept of *ubuntu* embodies an understanding of what it is to be human and what is necessary for human beings to grow and find fulfilment. It is an ethical concept and expresses a vision of what is valuable and worthwhile in life.[20]

A person cannot develop to their full potential when confronted with discrimination. *Ubuntu* asserts, therefore, that any discrimination against a member of the community is discrimination against all. If I discriminate against you, because you are different, I have dishonoured not only you, but also myself and the community. The community's well-being and mine are dependent on your well-being. Archbishop Tutu writes: "My humanity is caught up, is inextricably bound up, in (yours). We belong in a bundle of life."[21] *Ubuntu* encourages us to value others, because in doing so, we value ourselves.

Traditional African morality is known for its concern with human welfare, and hence *ubuntu* also means humanness. South African writer Letseka[22] argues that individuals who strive for and fully embrace the notion of *ubuntu* as their goal – are driven by a humanist concern for treating others with fairness, which is crucial to personal well-being. Acknowledging and understanding the difference of transgendered persons, for example, is therefore consistent with the principles of *ubuntu*.

16 See F Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* First Edition (2011).

17 JS Mbiti *African Religions and Philosophy* Second Edition (1989) 219.

18 HJ Sindima *Drums of Redemption: An Introduction to African Christianity* (1994).

19 A Shutte *Ubuntu: An Ethic for a New South Africa* (2001).

20 *Id* 2.

21 DM Tutu *No Future without Forgiveness* (1999) 31.

22 M Letseka "African Philosophy and Educational Discourse" in P Higgs *et al* (eds) *African Voices in Education* (2000) 179.

Entitlement to rights without discrimination

> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.[23]

The African Charter on Human and Peoples' Rights (ACHPR) is a living example of the tone of *ubuntu*, as discussed above. The ACHPR explicitly provides in article 2 that "*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*."[24] Article 3 states that *every* individual shall be equal before the law and entitled to equal protection of the law. Articles 4 and 5 emphasise that *every* human being is entitled to respect for the integrity of his person and the dignity inherent in a human being and recognition of his legal status. Similar rights are contained in most national constitutions.

Significantly, the African Commission's resolution on sexual orientation and gender identity, cited earlier, places gender identity and sexual orientation in the list of grounds upon which discrimination is prohibited under article 2 of the ACHPR. This approach was also followed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which recognised several other prohibited grounds in a non-exhaustive list.[25] These included health status, age, disability, nationality, marital and family status, sexual orientation, and gender identity.[26]

While some people are quick to retort that discrimination based on sexual orientation and gender identity is not prohibited in national constitutions, comparative jurisprudence suggests a more cogent approach to this question. Courts have recognised that the list of grounds upon which discrimination is prohibited is not a closed list, and that discrimination on analogous grounds is also prohibited.[27] The Canadian Supreme Court, for example, explains the thread running through analogous grounds as follows:

> [W]hat these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[28]

The South African Constitutional Court, in *Hoffmann v South African Airways*,[29] explains that

23 Article 28 of the African Charter on Human and Peoples' Rights.

24 Own emphasis in italics.

25 See K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" and MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

26 CESCR General Comment No. 20 at paras. 28-35.

27 The Hong Kong Court of Appeal held that sexual orientation is a proscribed ground for discrimination analogous to race and sex. *Secretary for Justice v Yao Yuk Lung Zigo and Lee Kam Chuen* [2007] 10 HKC FAR 335 (CA); *Leung TC William Roy v Secretary of Justice* [2006] 4 HKLRD 211 (CA).

28 *Corbiere v Canada* [1999] 2 SCR 203 at para. 13.

29 [2000] ZACC 17. This case is also discussed in M Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" and P Patel "Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries" in this publication.

cases of alleged discrimination require an inquiry into the extent to which the discrimination interfered with the person's inherent dignity:

> The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.[30]

Essential to jurisprudence on equality and non-discrimination, is the notion of universality of rights. The South African Constitutional Court, in *Minister of Home Affairs and Another v Fourie and Another*,[31] reasoned as follows:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society ... The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.[32]

Discrimination against transgender and intersex persons and the role of the courts

Discrimination against transgender and intersex persons occurs throughout the world. Such discrimination is largely rooted in ignorance and prejudice. We note a number of recent examples below which illustrate the nature of discrimination faced by transgender persons and the role that the courts can play to ensure redress when their rights have been violated.

Discrimination in Schools

Two cases emphasise the difficulties transgender children experience in school.

In *Doe v Yunits and Others*,[33] the Superior Court of Massachusetts in the United States upheld the right of a person to wear a school uniform that matches her gender identity, as part of the right to freedom of expression. The case concerned a teenager who was biologically male, but who wore female clothes to school. A psychologist found that the teenager had gender identity dysphoria, and that preventing her from wearing clothes consistent with her gender identity could harm her mental health:

30 *Id* at para. 27.
31 [2005] ZACC 19.
32 *Id* at para. 60.
33 2000 WL 33162199 (Mass Super Ct).

> [B]y dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity.[34]

In January 2014, the Maine Supreme Court in the United States handed down its decision in a case brought by the parents of a transgender student.[35] At issue was whether or not a statutory provision regarding access to sanitary facilities in schools conflicted with the Maine Human Rights Act. The judgment summarises the facts as follows:

> [3] Susan Doe is a transgender girl. She was born male, but began to express a female identity as early as age two. Beginning in the first grade, she attended Asa Adams School in Orono. Susan generally wore gender-neutral clothing to school until her third-grade year, when her identity as a girl became manifest. At that time, the school principal first became aware that Susan was transgender.
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> [4] All third and fourth grade students at Asa Adams used single-stall bathrooms. Susan used the single-stalls girls' bathroom with the support and encouragement of school staff. In the third grade, teachers and students began referring to Susan as "she". By fourth grade, Susan was dressing and appearing exclusively as a girl
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> ...
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> [6] By the time she was preparing to enter the fifth grade, Susan had received a diagnosis of gender dysphoria, which is the medical term for psychological distress resulting from having a gender identity different from the sex that one was assigned at birth. School officials recognised that it was important to Susan's psychological health that she lived socially as a female. They did not interpret 20-A MRS section 6501,[36] or any other law, as prohibiting a person with Susan's diagnosis from using the girls' bathroom.

In middle school, after an incident in which a boy mockingly followed Susan into the girls' bathroom, she was told to refrain from using the girls' bathroom and to use the staff bathroom instead. The matter received media attention and the family subsequently moved from the district. The Court held that – by excluding Susan from the girls' bathroom – the school treated her "differently from other students solely because of her status as a transgender girl", and that this amounted to discrimination.

Mead J, who concurred with the finding, but who dissented on the remedy, held:

> [30] A civilised society protects its citizens from discrimination that is based on petty prejudices and mean-spirited exclusionary practices. The [Maine Human Rights Act] identifies classes of persons who are entitled to specific protections from such discrimination. The Legislature has included sexual orientation as one of the categories entitled to protection, and rightfully so. Considering the issue presented here, transgendered persons who live their lives as a member of the sex with

34 *Id* at *3.

35 *John Doe et al v Regional School Unit 26* 2014 ME 11 (Maine SC).

36 The section provides that schools must provide clean toilets in school buildings, which shall be separated according to sex, and accessible only by separate entrances and exits.

> which they identify face unique challenges with regard to public multiple-user bathrooms. It is simply unreasonable to expect a transgendered person to enter a bathroom designated for use by the sex with which they do not identify. Doing so is likely to provoke confrontation, or even violence. If transgendered people are prohibited from using bathrooms designated for the sex with which they identify, they are left with no practical recourse in most public settings. This result is simply untenable.

The failure to recognise a person's gender identity at school can also have consequences for an individual later in life. This was the case in *Republic v Kenya National Examinations Council and Attorney General, Ex Parte AMI*,[37] where the applicant brought a judicial review application against the Kenya National Examinations Council for its refusal to effect a change in name and gender marker on the applicant's Certificate of Secondary Education. In October 2014, the Kenya High Court ordered that a new certificate be issued without a gender marker.

Discrimination in Society

In April 2014, the Supreme Court of India, in *National Legal Services Authority v Union of India and Others*,[38] recognised the rights of transgender persons. The case related to members of the broader[39] transgender community who claimed that non-recognition of their gender identity violated their right to equality before the law, their right not to be discriminated against based on sexual orientation and gender identity, their right to freedom of expression, including expression of their self-identified gender, and their right to personal autonomy.

Radhakrishnan J recognised the prejudice and discrimination faced by transgender persons in society:

> [1] Seldom, our society realises or cares to realise the trauma, agony and pain which the members of transgender community undergo, nor appreciates the innate feelings of the members of the transgender community, especially those whose mind and body disown their biological sex. Our society often ridicules and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change
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> ...
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> [55] [D]espite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity ... non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field

37 JR Case No. 147 of 2013.

38 Writ Petition 400 of 2012 and 604 of 2013 (SC), available at http://supremecourtofindia.nic.in/outtoday/WC40012.pdf.

39 The case dealt with persons whose gender identity, gender expression, or behaviour does not conform to their biological sex. The case included persons who do not identify with being either male or female, and who describe themselves as a third gender – these are hijras, who do not have reproductive capacity as either men or women and include: intersex persons, and persons who strongly identify with the gender opposite to their biological sex.

> of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often.

The judgment emphasised that gender identity is one of the most fundamental aspects of life that relates to a person's intrinsic sense of being male, female, transgender, or transsexual, and that a person's self-identified sexual orientation or gender identity is integral to his or her personality and is one of the most basic aspects of self-determination, dignity, and freedom.[40]

The Court held that the right to freedom of expression includes "the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc".[41] The Court held that "recognition of one's gender identity lies at the heart of the fundamental right to dignity".[42] Finally, the Court reaffirmed its holding from 2008 in *Anuj Garg v Hotel Association of India*[43] that:

> [P]ersonal autonomy includes both the negative right of [*sic*] not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty ...[44]

Two similar cases were adjudicated in Pakistan and Nepal. In 2009, the Supreme Court of Pakistan, in *Dr Mohammad Aslam Khaki and Another v Senior Superintendent of Police (Operation) Rawalpindi and Others*,[45] dealt with a constitutional petition filed on behalf of hijras (individuals who identify as transgender). The case was significant, because the Court identified the discrimination, stigma, and exclusion faced by this group within society, and ordered social-welfare mechanisms to respond within a month to recommendations made by the Court to improve their situation. The judgment looked at problems faced in the areas of inheritance, registration of identity, voting, employment, and schooling.

The Supreme Court of Nepal, in *Sunil Babu Pant and Others v Nepal Government*,[46] dealt with the denial of civic rights to men who dress and identify as feminine, and also the targeted police abuse experienced by this group because of their non-conforming gender expression. The Court emphasised the right to non-discrimination, the right to privacy, and the universality of rights.

It is important to note that historical and anthropological research across Africa has shown that cultures across the continent historically recognised – and often accepted – gender non-conforming individuals as members of their communities.[47]

40 *National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at paras. 19-20.

41 *Id* at para. 25.

42 *Id* at para. 69.

43 (2008) 3 SCC 1.

44 *National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at para. 69.

45 Constitution Petition No. 43 of 2009 (SC).

46 Writ Petition No. 917 of 2007 (SC).

47 See GA Jobson et al "Transgender in Africa: Invisible, Inaccessible, or Ignored?" (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance 160*.

Discrimination and Freedom of Association

The Supreme Court of Justice in Argentina has held that failure to allow registration of an organisation for transgender persons amounted to discrimination. In *Asociación Lucha por la Identidad Travesti-Transexual v Inspección General de Justicia*,[48] the Court held that a limitation of the right to freedom of association risked isolating social groups that already had difficulty integrating into society. The Court held that there was no rational connection between the differential treatment imposed on the plaintiff and a legitimate state objective.

Similarly, the High Court of Kenya, in *Non-Governmental Organisations Co-ordination Board and Attorney General v Transgender Education and Advocacy and Others*,[49] held that the refusal to register a transgender organisation amounted to discrimination on the basis of gender or sex and thus constituted an unreasonable exercise of discretion[50].

Discrimination, Privacy, and Bodily Integrity

The High Court in Kenya has emphasised the right to dignity in cases relating to transgender and intersex persons. In the case of *ANN v Attorney General*,[51] a transgender woman was stripped in public by police, in order to determine her sex. Ngugi J held that, despite a person's choice in relation to his/her mode of dressing and gender identity, the person retained the inherent worth and dignity to which all humans are entitled.[52] The police action was found to have violated her right to dignity and privacy.

In *Muasya v Attorney General and Others*,[53] an intersex person who was born with both male and female genitalia, was convicted of robbery and sent to a male-only prison. The Kenya High Court held that invasive body searches and the manner of examination in prison amounted to inhuman and degrading treatment. The Court ordered that the applicant be accommodated separately from male convicts in prison.

Discrimination and Hate Speech

The South African Equality Court, in *Lallu v Van Staden*,[54] held that a neighbour's verbal abuse of a transgender person amounted to harassment, hate speech, and unfair discrimination. The Court awarded damages for infringement of the plaintiff's dignity and also costs for remedial psychological counselling.

48 CS 21/11/06 (SCJ).

49 JR Miscellaneous Appl. No. 308A of 2013 (HC).

50 See also *Rammoge and Others v Attorney General*, Case No. MAHGB-175-13, where the High Court of Botswana held that the refusal to register an organisation which lobbied for the rights of gays and lesbians violated the right to equal protection of the law as well as the rights to freedom of expression, association and assembly.

51 [2013] eKLR, Petition No. 240 of 2012.

52 *Id* at para. 52.

53 Petition No. 705 of 2007.

54 Roodepoort Equality Court Case No. 3 of 2011.

Legal recognition of gender identity

Some of the tools used by society to grant status and recognition to a person, are the identity document and birth certificate. Increasingly, courts and legislatures have recognised that failure to recognise a person's gender identity, where it is different from that person's biological sex, is harmful to the person and deprives him or her of a range of rights, including the rights to privacy, self-determination, and dignity.

The legal issues discussed by the courts in such cases have included whether:

- A person whose gender identity differs from their biological sex can request a change in the gender marker on their identity documents;
- A person should be required to undergo a medical procedure, such as gender-re-assignment surgery[55] or sterilisation,[56] prior to such a change in gender marker, or whether self-identification in that gender is sufficient;[57]
- The change in gender marker would apply to all identity documents, including the birth register;[58] and
- A person who does not identify fully as either male or female, can be classified as "unspecified" or "other", as opposed to "male" or "female".[59]

Whether a person can change the gender marker on an identity document has been a pertinent issue for a number of courts. The issue was succinctly framed as a rights issue in Argentina in *In Re KFB*.[60] In that case, the applicant had filed a petition requesting that the sex and name on his birth certificate be amended to match his gender identity. The Family Tribunal held that the right to privacy includes the right to define a person's personal identity. The Tribunal continued that a person's psychological sex was part of his/her identity and superseded his/her biological sex. Grappling with a remedy, the Tribunal ordered that a note be made in the margin of the original birth certificate and register, noting the change of sex, and that all other identity documents could be changed accordingly.

55 Various courts have ruled that a requirement of surgery prior to allowing a change in gender marker violates the right to self-determination and physical integrity. *Michael v Registrar General Births, Deaths and Marriages* FC FAM-2006-004-02325 (New Zealand FC); *AB v Western Australia*, 244 CLR 390 (HC).

56 Forced sterilisation, as a requirement for legal recognition, was challenged in the Swedish Administrative Court of Appeal, in Stockholm in *Swedish Social Insurance Agency v NN* Case No. 1968-12 (ACA). The Court ruled that the requirement of sterilisation in the Swedish Gender Recognition Act violated the rights to dignity and non-discrimination in the European Convention on Human Rights.

57 Argentina passed a law in 2012 that recognises the right of all persons to recognition of their gender identity. Article 3 of the Gender Identity Law, 2012, states that, "all persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity." Gender re-assignment surgery is not a pre-requisite for such a request.

58 In South Africa, the Alteration of Sex Description and Sex Status Act, 2003, allows transgender persons and intersex persons to apply for an alteration in the sex description in the birth register, after which they can be issued with a new birth certificate and identity document. The Act does not require any specific medical intervention.

59 In Germany, the Civil Status Act, 2013, allows parents to register intersex children as "not specified". The law also added category "X" to "M" and "F" under the gender classification in passports.

60 Sup. Const 19/10/2001, 2 (30 April 2001) (FT).

In *In Re Change of Name and Correction of Family Register*,[61] the Supreme Court of Korea held that a family register was supposed to reflect a person's true gender, which is not only determined by biological factors. The Court thus allowed an amendment to the family register – even though the law only allowed for changes in the case of error or omission. Notably, that case, and others, were limited to instances where the transgender person had completed genital reconstruction surgery.

Over the years, however, courts and legislatures have recognised that the notion that a person must have undergone genital reconstruction surgery, before being allowed to change his/her gender marker, infringes on various human rights. In 2008, for example, the New Zealand Family Court, in *Michael v Registrar-General of Births, Deaths and Marriages*,[62] recognised that gender re-assignment surgery carries risks and could not be imposed on someone. In that case, the applicant was classified as female, but had lived as a male from a young age. Doctors, psychologists, and psychiatrists testified that the applicant was a man in terms of his identity, appearance, manner, and outlook. Similarly, the Tribunal of Justice of Rio de Janeiro, in Brazil, in the 2010 case of *In Re Gesa*,[63] held that where a person's sex is not congruent with his/her gender identity, failure to change the person's gender marker on the identity documents would expose them to discrimination and this warranted a change – irrespective of whether or not reconstructive surgery had taken place.

The European Court of Human Rights (ECHR) has, similarly, held that failure to change a person's gender marker violates his/her right to privacy and exposes the person to discrimination.[64] The ECHR reasoned that gender recognition resulted in no concrete or substantial hardship or detriment to the public interest, and that "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost".[65]

The importance of a person being able to choose his/her gender identity has increasingly been recognised by the courts – including in recent cases relating to intersex persons and persons whose gender identity is not strictly male or female.

The Supreme Court of the Philippines, in *Republic of the Philippines v Cagandahan*,[66] recognised the importance of an intersex person determining the most suitable gender. The case involved a person who was born with female sex organs, but whose body produced male hormones and never developed breasts or a menstrual cycle. The applicant was identified as female at birth, but in adulthood identified as being male – and requested a change to the gender marker on the birth certificate. A medical expert testified that the plaintiff's condition was permanent and that he had adjusted to his preferred gender identity. The Court granted permission for a change to the gender marker.

61 [2004] Seu 42 (SC).

62 FC FAM-2006-004-02325, June 2008 .

63 Case No. 0162607 (TJ).

64 In *B v France* Case No. 13343/87 (1992), the European Court of Human Rights held that the refusal to amend the civil status register to recognise the applicant's gender identity, placed the applicant in a daily situation which was not compatible with respect for her private life. In *Christine Goodwin v United Kingdom* Case No. 28957/95 (2002-VI) the European Court of Human Rights said the failure to recognise a change in gender violated the right to respect for private life.

65 *Christine Goodwin v United Kingdom* Case No. 28957/95 (2002-VI) (ECHR) at para. 91.

66 GR No. 166676 (SC).

In April 2014, the Australia High Court in *New South Wales Registrar of Births, Deaths and Marriages v Norrie*,[67] held that "[n]ot all human beings can be classified by sex as either male or female".[68] The case concerned the applicant, Norrie, who was born with male reproductive organs and was listed as male on a birth certificate. The applicant does not self-identify as male and uses female pronouns to refer to herself. The applicant applied to the New South Wales Registrar for the sex classification on her birth record to be registered as non-specific. The Court found that the law does not give the Registrar the authority to insist that someone be registered as "male" or "female" when they do not identify with either of these categories, and that the Registrar can indicate a person's sex as being "non-specific".

Conclusion

Every person has the right to recognition before the law, the right to non-discrimination and equality before the law, the right to dignity, the right to privacy, the right to health, and the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment. The human experience should be one in which individuals are able to realise their full potential and contribute meaningfully to their community.[69] Transgender and intersex persons may not conform to the gender roles of society, but the concept of *ubuntu* is one in which their very humanity needs to be upheld, respected, and protected.

The law should be guided by principles of fairness that are consistent with international human rights regulations. The discussion on comparative jurisprudence suggests that, increasingly, domestic and regional courts are acknowledging that transgender and intersex persons are entitled to live according to the gender identity of their choice, and that any failure to recognise this right constitutes unfair discrimination.

67 [2014] HCA 11.

68 *Id* at para. 1.

69 World Health Organisation *Promoting Mental Health: Concepts, Emerging Evidence, Practice* (2005).

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