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**The Right to Fair Trial: Malawi's Quest to
Meet International Standards**

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SUMMARY

Within twelve years of adopting a new constitution complete with a comprehensive bill of rights, Malawi has been referred to as one of the emerging African democracies. The progress made in the full enjoyment of human rights specifically fair trial rights, is significant though not entirely satisfying.

The present study has discussed the progress Malawi has made in meeting international human rights standards in three specific areas of the right to fair trial, namely use of confession statements obtained through torture, right to trial within a reasonable time and reverse onus provisions in fraud and corruption cases.

In the first Chapter, I introduce the reader to Malawi and the reasons for studying the three areas chosen. In order to understand the performance of Malawi, it has been necessary to highlight in Chapter 1 the historical development of Malawi's constitutional and criminal law framework since independence.

In Chapter 2, the three aspects of fair trial forming the subject of this study have been discussed as they obtain in Malawi. This will guide the reader to appreciate the current situation, progress made and potential areas of difficulties. In Chapter 3, I have looked at international fair trial standards as developed by the African, United Nations and European Human rights systems. The bulk and climax of the study is in Chapter 4 where the situation in Malawi regarding fair trial rights has been weighed against the established international standards. Here, the areas where Malawi has been found wanting have duly been highlighted with possible suggestions of improvements.

In Chapter 5 I have concluded this study with a series of recommendations and conclusions on the way forward in Malawi's quest to meet international human rights standards.

Abbreviations

ACB	Anti Corruption Bureau
ACHPR	African Charter on Human and Peoples Rights
AU	African Union
CAT	Convention against Torture
CPEC	Criminal Procedure and Evidence Code
DPP	Director of Public Prosecutions
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
MRA	Malawi Revenue Authority
UDHR	Universal Declaration on Human Rights
UN	United Nations

INTRODUCTION

1.1 Background

If the needs of the society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain

Justice Duncan Tambala in National Consultative Council v The Attorney General of Malawi

The people of Malawi endured years of autocratic rule from 1964 to 1994, characterised by a general disregard for human rights, particularly the rights of accused persons and persons under detention. The introduction of a new Constitution with a comprehensive Bill of Rights in 1995 brought a loud cheer of hope and marked the dawn of a new era. More than a decade later, Malawi's human rights record has tremendously improved, with a vibrant judiciary and several constitutional human rights institutions standing guard over the rights of the common Malawian. The concepts of constitutionalism and governance based on the rule of law have made inroads in the Malawi psyche, with the country being described as one of the emergent African democracies. In spite of such glowing reviews and prospects, many questions remain whether Malawi has within her limited resources, made sufficient progress in meeting international standards human rights standards, particularly for our purposes, on the right to fair trial. There are significant challenges facing Malawi's quest to accord fair trial rights to accused persons.

Firstly, the criminal justice has been slow to adapt to the demands and standards set in the 1995 Constitution. Institutions such as the Directorate of Public Prosecutions, the Malawi Police Service and even the Judiciary have proved inadequate in terms of institutional framework, structure, attitude and capacity.

Secondly, the strengthening of the justice system is certainly not high on the government's priority list. Malawi has serious social and economic issues to

deal with, such as the HIV/Aids pandemic, high poverty levels and food security. It is therefore felt that more funds should be allocated in those areas. The Malawi Economic Justice Network, a local think tank, took the government to task for classifying allocations to the Ministry of Justice and governance institutions as pro-poor expenditures in the 2006/2007 Budget.¹ As a result, justice institutions such as the judiciary, Ministry of Justice have received miserable budgetary allocations for their operations. This has seriously affected the delivery of justice, with delays in prosecution of cases and slow pace of reform.

Thirdly, most criminal law and procedure pieces of legislation were drafted either during the colonial era or the subsequent dictatorship. While the constitution has set new standards, these laws, which fall short of human rights requirements, have continued to be enforceable. This has created legal gaps, and avenues for continued violations of basic rights, despite their emphatic constitutional guarantee. Such gaps have left crucial issues such as the use of confession statements obtained by duress, unresolved.

Fourthly, a human rights culture, especially the rights of accused persons, is yet to take root. Criminals are viewed as societal pariahs, not worth constitutional protection. It is generally felt that the law overprotects accused persons and not victims of crimes. Such public feelings have inevitably influenced government policies, resulting in the relegation of criminal justice issues from the government's priority list. In 1998, government capitulated to massive public outcry and enacted the Bail Guidelines Act, intended to set clear rules on granting of bail especially in serious offences such as homicides. The Act resulted from complaints that dangerous criminals easily got bail release only to return to the society and commit more crimes. While the law helped in aiding the judiciary to be consistent in bail cases, the long-term impact has been long delays in disposal of criminal cases.

On 6th November 2005, the New York Times published an article entitled *The Forgotten of Africa, Wasting Away in Jails without Trial*. The article, which concentrated on the criminal justice system in Malawi, portrayed a system

¹ Inside the 2006/2007 National Budget, A Pre-Budget analysis by the Malawi Economic Justice Network, June 2006, Recommendation 8, para 3.8.

reeling from enormous and suffocating burdens, ranging from lack of both human and financial resources as well as general ineffectiveness. In my five years as a professional prosecutor in the Directorate of Public Prosecutions, the heart of the criminal justice system, I have witnessed the progress made and the many challenges that remain in Malawi's race to meet international standards on the right to fair trial. The challenges are colossal, for a system described by a European Union study a decade ago as in a state of virtual breakdown so much so that it is difficult to describe it as a functioning system.²

1.2 Scope and Methodology

1.2.1 Scope

Understandably, the right to a fair trial is broad. Consequently, time and space are a constraining factor in according the right to fair trial a full discussion in its entire and broad sense. This study does not seek to indict the entire criminal justice system. Instead, three areas of the right to fair trial have been isolated. These are in no way the only major issues limiting the full exercise of the right to fair trial in Malawi. They are however, a good reflection of some of the main current issues in this area not only from a Malawian perspective, but internationally as well. None of the three issues have received a deep analysis due to the constraints mentioned above. However the discussion herein is sufficient enough to afford the reader a good appreciation of the progress made and the challenges that remain.

This study therefore investigates the progress Malawi has made in meeting international standards in three specific areas of the right to fair trial, since the enactment of the 1995 Constitution. The theme that runs through the thesis is whether the right to fair trial is readily and practically available to the typical Malawian accused person, poor, ignorant of his or her rights and more often legally unrepresented. While the Bill of Rights may present a neat and tidy picture, the practical reality matters. In the words of Bertrand Ramcharan,

² European Union, 1996.

*If you cannot go before the courts and get vindication of your rights then what are you left with? Then the notion of a national protection system will be an artificial notion.*³

It may be asked, why these three aspects of the right to fair trial. In arriving at the chosen topics I used my experience as a public prosecutor to isolate areas considered crucial to criminal justice in Malawi. The first two reflect Malawi's struggle to break from her difficult past and embrace a new era of internationally accepted human rights standards. The third concerns an emerging threat to the new democracy, and Malawi's attempts to address it within the democratic confines and rule of law. In total, the three aspects of the right to fair trial present a practical yard stick with which the country's progress in building a human rights culture can be measured.

The first aspect dealt with in the thesis is the use in criminal proceedings, of evidence particularly confession statements, obtained through torture, cruel, inhuman or degrading treatment or punishment. The inquiry into the use of such evidence in Malawi has necessitated a thorough analysis of Section 176 of the Criminal Procedure and Evidence Code, a piece of legislation enacted several decades before the recent constitution. The use of such evidence has been discussed in view of the constitutional ban on torture and more significantly for our purposes, the *jus cogens* status that has been bestowed on the prohibition of torture by international law.⁴ The purpose is to arrive at a conclusion on whether laws of criminal procedure and evidence in Malawi meet international standards on the use of such evidence. Crucial to this conclusion is an analysis of how the courts of Malawi have treated confession statements so obtained since 1994.

The second aspect of fair trial covered, is the right to trial without undue delay, especially in homicide cases⁵. The mandatory punishment for murder in Malawi is the death penalty. Consequently, the stakes are high for the accused, making it more imperative that his fair trial rights are adequately protected. The

³ For Effective National Protection Systems, Article 2 April 2002, Vol. 1 No 2, page 5.

⁴ International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furandzija*, [1998] ICTY 3, 10 December 1998.

⁵ Also known as the right to speedy trial or the right to trial within a reasonable time. The preferred term in this study is the latter.

demise of the First Republic legal order with its excesses and shortfalls unfortunately has resulted in a backlog of cases, leading to desperate levels of overcrowding in prisons. As at February 2005, there were over a thousand homicide suspects on remand in Malawian prisons.⁶ It is most likely that the number has tremendously increased, as there has been not a single homicide trial in the past year.⁷

The situation arose for two reasons; firstly, the abolition of Traditional Courts in 1993, some of which previously dealt with serious offences meant that all such cases had to be handled by the High Court system. Secondly, since 1994 juries try all capital offences before the High Court. Experience has shown that jury trials are cumbersome. As such the prosecution of serious offences such as homicides depends on special donor funding as the Malawi Government has failed to provide the necessary resources.⁸

In examining the right to trial within a reasonable time, emphasis has been placed on how the disposal of cases largely rests on the foot of the prosecution authorities. The role of the prosecution has been discussed in view of the obligation resting on the courts of law to protect individual rights in this area as well as set clear standards for the state to adhere to when prosecuting cases. The question posed is has the judiciary been bold enough in this regard?

The third issue examined is the limitation to the right to be presumed innocent by reverse onus provisions in fraud and corruption cases. It is a cardinal principle that the burden of proof in criminal cases rests on the prosecution. Reverse onus provisions are considered a useful tool for the prosecution considering that fraud, bribery and corruption cases are universally difficult to prove. The thesis discusses whether such reverse onus provisions in Section 283 of the Penal Code and Sections 25 and 32 of the Corrupt Practices Act are acceptable limitations within international human rights law.

⁶ This estimation was given by the then Director of Public Prosecutions, Mr. Ishmael Wadi. Source: DPP's Office: Malawi.

⁷ See *No Homicide Trials for Two Years*, by Olivia Kumwenda dated 16th October 2006 at www.nationmalawi.com The author indicates there have been no homicide trials for two years, however I vividly recall prosecuting homicide cases in July 2005.

⁸ The prosecution of homicide cases is funded by the European Union under the Rule of Law Programme, and the British Government through the Department for International Development [DFID]

At the heart of the discussion of these three areas is whether the Malawi judiciary has been forthcoming in elaborating international human rights standards through the exercise of its constitutional mandate.

1.2.2 Methodology

This study highlights international fair trial standards, and compares the same with the practical situation in Malawi. The research therefore is not merely an academic or theoretic stroll but an analysis of how Malawi has fared in practically according fair trial rights to accused persons. The thesis has been guided by emerging fair trial standards set by the African Charter on Human and Peoples Rights,⁹ the United Nations standards, particularly under the International Covenant on Civil and Political Rights,¹⁰ and the standards in the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹ The standards set by the European Court on Human Rights have been found instructive and practical considering that the European system is the oldest and most developed. As a result, European case authorities have been quiet useful in analysing whether the Malawi situation meets international standards. Of valuable inspiration have been the decisions of the Constitutional Court of South Africa. Malawian courts have frequently looked to jurisprudence down south for guidance, bearing in mind that the Malawian Constitution is similar in many respects to the South African one. In totality all the national and international standards used are a fair representation of global human rights standards.

⁹ Also known as the Banjul Charter, herein referred to as ACHPR, OAU Doc. CAB/EG/67/3 rev. 5, 21 I.L.M 58 (1982)

¹⁰ International Covenant on Civil and Political Rights herein referred to as ICCPR, UN Doc. A/6316 (1966), 999 U.N.T.S 171. Entered into force 23 March 1976.

¹¹ Popularly known as the European Convention on Human Rights, herein referred to as European Convention, (ETS 5), 213 U.N.T.S 222. Entered into force on 3 September 1953.

1.3 Malawi's Legal System

1.3.1 The First Republican Constitution 1964-1994: Deficits

Malawi became a British Protectorate known as Nyasaland in 1891, and attained independence as a newly constituted nation in 1964. Consequently, Malawi's legal system, especially criminal law has all the hallmarks of the English common law system. At the attainment of her independence, Malawi adopted a British sponsored and negotiated constitution with a full Bill of Rights.¹² This positive start would be short lived, as upon becoming a republic in 1966, Malawi underwent tremendous constitutional and political transformation, none beneficial to the human rights cause. The 1966 Constitution declared Malawi a one party state, thereby concentrating all power and authority in the President, which in turn gave birth to a three-decade long dictatorial rule.¹³ The Bill of Rights in the 1964 Constitution was replaced by lame fundamental principles, which gave a tame mention and recognition of the Universal Declaration of Human Rights and the law of Nations:

*The Government and people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights and of adherence to the law of Nations.*¹⁴

However, it was only in 1993 when the Malawi Supreme Court of Appeal gave a judicial pronouncement that the UDHR formed part of the law of Malawi and the rights guaranteed therein were enforceable in Malawian courts.¹⁵ This generous pronouncement did not have full effect as it was subject to a harsh and broad limitation clause in Section 2 (2) of the constitution:

¹² See Simon Roberts, *Constitution of Malawi*, Journal of African Law, Vol. 8, London 1964, p178.

¹³ Section 4 of the 1966 Malawi Constitution, [Act 16 of 1966].

¹⁴ Section 2(1). The Universal Declaration on Human Rights, herein referred to as UDHR, was adopted in 1948, G.A. res. 217A (III), U.N Doc.A/810 at 71 (1948).

¹⁵ Per Banda CJ, in *Chakufwa Chihana v Republic* M.S.C.A Criminal Appeal Case No. 9 of 1992.

*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question is **reasonably required in the interests of defence, public safety, public order or the national economy.***[emphasis added]

Ambiguous and undefined terms like interests of defence, public safety and order, were creatively introduced into legislation in order to provide the authorities with wide powers and ability to limit or suspend the rights of individuals.

This broad limitation clause led to a culture of frequent and unchecked human rights violations, especially torture and long detentions without trial. The trend was rooted further with the enactment of the Preservation of Public Security Act in 1965. Under the Act, the Minister responsible for internal security could issue unlimited detention orders against persons *on his satisfaction that such action was necessary for the preservation of public security.*¹⁶ Such detention orders were not subject to any review or challenge in a court of law. Indeed the period of detention under this law, depended on the Ministers' whims or the pleasure of the Head of State and varied from a month to a life time.

With the law firmly on their side, the powers of the First Republic moved quickly to impeach any trace of judicial independence and impartiality. This happened with the establishment in 1969 of a Traditional Court system parallel and with concurrent jurisdiction to the High Court. Section 5 of the Local Courts Amendment Act brought about this revolutionary effect:

The President may by order published in the Government Gazette make such amendments to any written Law as may appear to him to be necessary or expedient for bringing the law into conformity with the provision of this act

Indeed the President duly created Regional Traditional Courts and National Appeals Courts under the Traditional Courts Act, with four distinct features. Firstly, unlike the High Court, which mainly had expatriate Judges, the courts were presided by Malawians, namely three traditional chiefs, a qualified lawyer, and a court chairperson. Secondly, the law applied was to a large extent

¹⁶ Section 3 (2) f of Preservation of Public Security Act [1965], Chapter 14:02 of the Laws of Malawi

customary law, thereby enabling the courts to ignore cardinal principles of criminal law derived from the English common law such as proof beyond reasonable doubt. Thirdly, defendants appearing before these courts had no right to defence counsel and fourthly the courts presided over capital offences such as treason and murder. It became apparent that these courts were primarily established to deal with political dissidents who would otherwise have not been convicted under the High Court system.¹⁷

With this background, Malawi did not have any comprehensive constitutional human rights framework. The country did not ratify any of the international human rights instruments during this period and consequently the protection of internationally accepted human rights did not play any significant role domestically.¹⁸ The dismal human rights record during this era is well documented.¹⁹ Such a legacy would eventually play a significant role in shaping the scope and nature of the Second Republican constitution.

1.3.2 The Second Republican Constitution 1995: A New Dawn

The fortunes of Kamuzu Banda's dictatorship drastically diminished in the early nineties, as a direct consequence of the fall of communism and the dismantling of apartheid. During the Cold War, Malawi maintained a pro western stance and was virtually immune from criticism for her appalling human rights record. The indispensability of Kamuzu as a useful western ally in a region littered with socialist republics was shaken with the tumbling of the Berlin Wall. The end of the Cold War meant that his western allies deserted

¹⁷ For a discussion on the events leading to the creation of Traditional Courts see, Mkandawire Charles, *The Malawi Legal System*, Journal of the Commonwealth Magistrates and Judges Association, Vol 15 no. 1 June 2003, page 33.

¹⁸ For a good analysis on the development of the role of international law in Malawi see an article by Maluwa T, *The Role of international Law in the protection of human rights under the Malawi Constitution 1995*, African Yearbook of International Law, vol. 3, 77.

¹⁹ See the 1989 Human Rights Watch Report on Malawi.

Kamuzu, and withdrew all the much needed donor funds.²⁰ This led to the adoption of a pluralistic system of government and of a new constitution.²¹ Two things inspired the nature of the constitution; first Malawi's dictatorial past necessitated a new constitutional order to prevent a repeat of the atrocities of 1964 to 1994. Secondly, the drafters sought inspiration from a new breed of democratic constitutions in Africa such as the Namibian and South African constitutions, as well as major international human rights instruments.

The Constitution made a remarkable departure from Malawi's difficult past by embracing a series of crucial human rights safeguards. The first and crucial aspect was the introduction of constitutional supremacy, binding the executive, legislative and judicial organs of the State at all levels of Government and entitling all the peoples of Malawi to equal protection of this Constitution and laws made under it,²² section 5 stating that:

Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

Secondly, the constitution is embedded with a comprehensive Bill of Rights in Chapter 4. The Bill of Rights drew inspiration from the South African Constitution and major international human rights instruments such as the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights and the African Charter on Human and Peoples Rights. Prominent in the Bill of Rights is the right to life,²³ the prohibition of torture, cruel, inhuman or degrading treatment or punishment,²⁴ and a cluster of fair trial rights in Section 42.

Thirdly, the constitution has set strict conditions for the limitation of rights. Limitations are acceptable:

²⁰ The Paris club withdrew all donor support to Malawi in 1992.

²¹ The constitution provisionally came into force on 18th May 1994 and permanently on 18th May 1995 as Constitution (Amendment) Act No. 7 of 1995. In this thesis, I will be referring to it as the 1995 Constitution.

²² Section 4 of the 1995 Constitution.

²³ Section 16 reads, every person has the right to life and no person shall be arbitrarily deprived of his or her life. This is in recognition of the fact that Malawi retains the death penalty.

²⁴ Section 19 (3)

1. When prescribed by written law of general application
2. when the written laws do not negate the essential content of the right or freedom it seeks to limit
3. when reasonable
4. when recognised by international human rights standards
5. When necessary in open and democratic society.²⁵

In interpreting this provision, Chikopa J, in **John Tembo and Another v the Attorney General**, said:

*.... for a limitation to pass muster it has to pursue a legitimate aim and secondly there has to be a reasonable relationship of proportionality between the means employed to limit the right and the aim sought to be achieved.*²⁶

Fourthly, the constitution in line with prominent international human rights instruments allows for derogation from rights during a state of emergency. The right to be promptly brought before a court of law, and not to be detained without trial, are both subject to derogation. Such derogation however has to be consistent with Malawi's obligation under international law. In addition, all derogation measures such as the detention of suspects without trial are subject to applications and challenges in the High Court.²⁷

Fifthly, the 1995 Constitution enhanced the position of international law regarding its domestic application, something that was totally lacking in the 1966 constitution. The position of customary international law got a clarification in section 211(3):

Customary international law, unless inconsistent with this constitution or an Act of Parliament, shall form part of the law of the Republic

When called upon to interpret the provisions of the constitution, the courts of Malawi shall have regard to *current norms of public international law and comparable foreign case law*.²⁸ Commenting on the domestic application of current norms of

²⁵ Section 44 (2)

²⁶ *John Tembo and Another*, Civill case No. 50 of 2003, High Court of Malawi, Mzuzu Registry, unreported.

²⁷ Section 45.

²⁸ Section 11 (2) c

public international law and comparable foreign case law, the Malawi Supreme Court of Appeal has said:

*“Section 11 of the Constitution expressly empowers this Court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society, we must take full account of the provisions of the fundamental constitutional principles and the provision on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution. There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society.”*²⁹

The judiciary in Malawi therefore is sufficiently empowered to apply international human rights standards.

Sixthly, the constitution has created several independent human rights institutions charged with the task of promoting, protecting and monitoring the enjoyment of human rights and freedoms. Such institutions include the Ombudsman and the Human Rights Commission³⁰ mandated to investigate human rights abuses and make necessary recommendations for redress and effective remedies. Section 129 of the Constitution creates the Human Rights Commission as an independent body, mandated to investigate and make

²⁹Chief Justice Banda in *Gwanda Chakuamba, Kamlepo Kalua, Bishop Kamfosi Mnkumbwe vs. The Attorney General, The Malawi Electoral Commission and the United Democratic Front*, MSCA Civil Appeal No. 20 of 2000 (unreported) pp5-6

³⁰ The institutions are created under sections 120 and 129 of the Constitution respectively.

recommendations reasonably necessary for the effective promotion of human rights. Under the Commissions enabling Act, it has the power to study legislation, judicial decisions, administrative provisions, Bills and administrative proposals, to ensure that they are in conformity with fundamental principles of human rights³¹. In exercising this mandate, the Commission receives complaints and conducts investigations and hearings into cases of human rights abuses. According to its Annual Report in 2004 the Commission received a total of one thousand, one hundred and thirty six (1136) individual complaints of human rights abuses almost sixty percent of which were related to detentions and deprivation of liberty.³²

Section 120 creates an independent Office of the Ombudsman, which has the jurisdiction to investigate allegations of injustice, where the courts cannot entertain such matters or where they cannot offer any effective remedy.³³ In its 2001 Annual Report, the Office investigated two thousand, five hundred (2500) cases, a greater number of them against the Police Service for brutality, failure to investigate deaths or disappearances and arbitrary use of powers.³⁴

1.3.3 Domestic Application of International Human Rights Treaties

The 1995 constitution sought to clarify the domestic application of international human rights treaties in section 211, which states:

1 Any international agreement entered into after the commencement of this Constitution shall form part of the law of the republic if so provided by or under an Act of Parliament.

³¹ Section 12 of Human Rights Commission Act 1998, Chapter 3:08 of the Laws of Malawi and can be found at www.malawihumanrightscommission.org/legislation

³² *ibid.*

³³ The mandate of the office is well provided for in the Ombudsman Act 1996, Chapter 18:01 of the Laws of Malawi.

³⁴ According to the Ombudsman 2001 Annual Report to Parliament accessible at www.ombudsmanmalawi.org

2 *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*

The wording of subsection 1 has been branded somewhat confused by the Malawi Law Commission. It has been read to intend that treaties shall bind Malawi only if ratified by Parliament or through an Act. The Commission has therefore suggested that the subsection be redrawn to read: *Any international agreement entered into after the commencement of this Constitution shall be subject to ratification by an Act of Parliament and shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.*³⁵ Parliament can easily adopt a more clear and straightforward provision on the domestication of international agreements similar to section 231(4) of the South African Constitution, which reads:

Any international agreement becomes law in the Republic when it is enacted by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The position of section 211(2) is clear and less controversial. It simply means that all international human rights instruments Malawi ratified before 1994 are now solidly part of the law of Malawi. Consequently, instruments such as the ICCPR, the African Charter, among others form part of domestic law.³⁶ The challenge that remains is the practical realisation of these international standards in the courts of Malawi. This will need a joint effort between legal practitioners and the judiciary.³⁷

³⁵ Kanyongolo F.E, Malawi, *Justice Sector and the Rule of Law*, A Review by Afrimap and Open Society, 2006.

³⁶ Hansen T, *Implementation of International Human Rights Standards Through the national courts in Malawi*, *Journal of African Law*, 46, 1 (2002), 31 to 42

³⁷ Malawi has ratified or acceded to the following international human rights instruments: African Charter on Human and Peoples Rights in 1989, African Charter on the Rights and Welfare of the Child in 1999, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment in 1996, Convention on the Elimination of All forms of Discrimination against women in 1987, Convention on the Rights of the Child in 1991, International Covenant on Civil and Political Rights in 1993, International Covenant on Economic Social and Cultural Rights in 1993, Optional Protocol to the International

1.3.4 The Judicial System

The role of the judiciary is crucial in sustaining good governance and the rule of law. With memories of a dictatorial past very fresh in the minds of many, the constitution replaced the doctrine of parliamentary supremacy with constitutional supremacy thereby highlighting the role of the courts in the new Malawi as the primary protectors and final arbiters of constitutional interpretation.³⁸ Section 9 states:

*The judiciary shall have the responsibility of **interpreting, protecting and enforcing** this constitution and all laws in accordance with this constitution in an independent and impartial manner with regard only to legally relevant facts and the prescription of law.*

The constitution provides for a judiciary adequately empowered to uphold the supremacy of the constitution, enforce respect for human rights and declare legislation and other governmental acts null and void.³⁹ To effectively carry out this mandate, the courts have to be vigilant and bold. In the words of Kapanda J in **Jumbe and Mvula v Attorney General**:

Unless the courts maintain their vigilance the state will not be stopped in its adventure of trampling on peoples rights.⁴⁰

The jurisdiction granted to the High Court in section 108 (2) is solid and broad:

The High Court shall have original jurisdiction to review any law and any action or decision of the government, for conformity with this constitution, save as otherwise provided by the constitution and shall have such jurisdiction and powers as may be conferred on it by this constitution or any other law.

Covenant on Civil and Political Rights in 1996, Rome Statute of the International Criminal Court in 2002.

³⁸ Ansah Jane Justice, *The 1994 Malawi Constitution and The Role of the Judiciary*, Paper Presented at National Conference of Review of the Constitution, Lilongwe, Malawi 28th to 31st March 2006, on authors file.

³⁹ *ibid*

⁴⁰ *Jumbe and Mvula v Attorney General*, Constitutional Case No. 1 and 2 of 2005, High Court of Malawi, Principal Registry (unreported) at page 33.

The court system in Malawi comprises the Supreme Court of Appeal, the High Court and subordinate courts. The Supreme Court is the highest appellate court in the land.⁴¹ A significant inclusion however towards a strong, robust and independent judiciary is section 103(3):

There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court

It was necessary to include this provision in order to prevent a repeat of the establishment of kangaroo Traditional Courts as described above.⁴²

Magistrate's courts, which are subordinate to the High Court, preside over the bulk of criminal cases in Malawi. Scharf, Banda et al have suggested that Magistrate courts dispose of cases expeditiously; but the ability of such proceedings to adhere to fair trial standards is highly limited.⁴³ Firstly, few magistrates are qualified lawyers, the majority being lay magistrates and not adequately trained. As a result, inappropriate and outrageous orders by such courts are not a surprise. Secondly most accused persons are unrepresented and it depends on the good will of particular magistrates to adequately advise the clueless defendants on how to defend themselves.

1.3.5 Prosecution Authority

The Directorate of Public Prosecutions leads the prosecution of criminal cases in Malawi. The Directorate is a branch of the Ministry of Justice and is headed by a Director appointed by the President under section 101 (1) of the Constitution. There are two types of public prosecutors in Malawi. The first group comprises professional lawyers, and the second group is made of lay police prosecutors. Professional prosecutors include those directly working in the Directorate of Public Prosecution, the Anti Corruption Bureau, and the Malawi Revenue Authority. The prosecutors under the ACB and MRA handle

⁴¹ Section 104 (2)

⁴² See page 10 above. Section 110(3) allows the creation by Parliament of traditional or local courts, but expressly limits their jurisdiction to civil cases at customary law.

⁴³ Access to Justice for the Poor of Malawi, DFID/MASSAJ Research Project June to September 2002 found at <http://gsdrc.ids.ac.uk/docs/open/SSAJ99.pdf> .

matters relating to their organisations only. In contrast, prosecutors in the Directorate are responsible for serious cases across the country. Police prosecutors appointed by the DPP under the Criminal Procedure and Evidence Code handle the bulk of criminal prosecutions in subordinate courts.⁴⁴

The overall authority in criminal proceedings in Malawi vests in the DPP, regardless of who may have instituted the proceedings. Consequently, under section 99 of the Constitution, he or she can take over or discontinue proceedings being handled by the ACB, MRA or indeed police prosecutors.

The ACB is a specialised agency created to handle corrupt practices offences. Despite its intended independence, the prosecution authority of the Bureau is subject to the consent of the DPP. It is clear therefore that the Directorate remains the nerve centre of prosecutions in Malawi. Unfortunately, the Office has throughout the years suffered from immense shortfalls in human and financial resources. Presently, the office has two offices, in Lilongwe and Blantyre with a total of only ten prosecutors. This, coupled with severe budgetary constraints has contributed to the slow pace of prosecutions thereby affecting the general application and enjoyment of fair trial rights.

1.3.6 Key Criminal Law and Procedure Statutes

Malawi's current criminal laws are a combination of the colonial and post independence governments' legacy. First, the laws have all the hallmarks of the English common law courtesy of the British colonisation of the country. Secondly, the laws have not entirely shaken off the marks of the thirty-year autocratic rule. For purposes of the three issues herein, there are three core statutes, which have dominated the discussion. The first is the Penal Code as the main piece of legislation in criminal law, defining the content and scope of criminal offences. Enacted in 1929,⁴⁵ the Code has undergone haphazard amendments through the years. Significantly, since the new constitution came into force in 1995, the Code has not undergone any significant review.

⁴⁴ Such appointment is made under Section 79(2) of the Criminal Procedure and Evidence Code, Chapter 8.01 of Laws of Malawi..

⁴⁵ Penal Code Act, 1929[Act 22 of 1929] Chapter 7: 01 of Laws of Malawi.

Secondly, the Criminal Procedure and Evidence Code consolidate the laws relating to procedure and evidence in all criminal proceedings and matters incidental thereto.⁴⁶ The CPEC just like the Penal Code has not undergone any systematic review for a long time. Part six of the Code deals with admissibility of evidence in all criminal proceedings. Both the Penal Code and the CPEC suffer from the same malaise. Being pre-constitution pieces of legislation, they are littered with provisions, which have laboured in matching the constitutional decencies. As it will be appreciated shortly, this has had an adverse effect on Malawi's quest to advance international standards of fair trial.

Thirdly, the Corrupt Practices Act establishes an autonomous government department called the Anti Corruption Bureau and makes comprehensive provision for the prevention of corruption and matters incidental thereto.⁴⁷ The Bureau is headed by a Director appointed by the President subject to confirmation by a Parliamentary Committee on Public Appointments. Although the Director is not subject to outside control or direction on professional matters, the agency cannot commence criminal proceedings without the consent of the DPP. This has raised doubts about the independence of the office and affected the speed at which corruption cases are dealt with by the agency.

The ACB's unconvincing performance in the first few years of its operations led to the conclusion that the Corrupt Practices Act needed strengthening. The amendment to the Act in 2004 brought in the notorious reverse onus provisions, which are the subject of scrutiny in the thesis.⁴⁸

⁴⁶ Criminal Procedure and Evidence Code, 1946 (Act 36 of 1967) Chapter 8:01 of Laws of Malawi, herein referred to as the CPEC.

⁴⁷ Corrupt Practices Act, [Act 18 of 1995] Chapter 7:04 of the Laws of Malawi.

⁴⁸ Corrupt Practices Act [Amendment] No. 17 of 2004.

2 THE RIGHT TO FAIR TRIAL IN MALAWI

2.2 The Admissibility of Confession Statements Obtained Under Torture, Cruel, Inhuman or Degrading Treatment or Punishment

The Constitution of Malawi prohibits torture, cruel, inhuman and degrading treatment or punishment in section 19(3):

No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment

Furthermore, under Section 44(1) b the prohibition of torture, cruel, inhuman and degrading treatment is not subject to any derogation, restriction or limitation. The prohibition of torture according to the law of Malawi is therefore absolute, in line with international law standards. This position is fortified by section 42 (2) c:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights he or she has as a detained person, have the right.....not to be compelled to make a confession or admission which could be used in evidence against him or her

There is however a gap between the constitutional ban on torture and the Criminal Procedure and Evidence Rules. This lack of clarity has been a recipe for confusion, which unfortunately the courts have not helped to solve. While outlawing torture, cruel and inhuman or degrading treatment, the constitution does not, regrettably include an express exclusionary clause on evidence obtained through torture, cruel inhuman or degrading treatment. The CPEC too does not expressly outlaw the use of confession evidence obtained under torture, cruel or inhuman and degrading treatment or punishment. It would naturally be expected that evidence so obtained would generally violate the broader rights to fair trial. However, practice has tended to pursue another

route. Since Malawi has not domesticated the United Nations Convention against Torture and Other cruel, inhuman or Degrading Treatment and Punishment⁴⁹ which expressly bans the use of evidence obtained through torture, it has been left to the judiciary to interpret the extended meaning and effect of the constitutional ban on torture, on the use of evidence obtained through torture. The law that governs the admissibility of confession statements is section 176 of the Criminal Procedure and Evidence Code:

- 1- *Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.*
- 2- *No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.*
- 3- *Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession. (emphasis added)*

A few crucial points about this provision should be isolated at this early stage. **Firstly**, confession evidence is relevant and generally admissible, except where excluded by another rule of evidence. A good example of such an exclusionary rule is in subsection 2. **Secondly**, confession evidence is admissible regardless of any objection whatsoever. It is important to note that before admission of

⁴⁹ Mostly known as the Torture Convention, herein referred to as CAT, G.A res.39/46, U.N Doc. A/39/51 (1984). Entered into force on 26 June 1987.

such evidence, an accused person is not given an opportunity to persuade the court or jury not to admit the evidence either because it was not obtained voluntarily or that he or she did not make it.

Thirdly, the weight attached to such evidence is not determined by how it was obtained but on the satisfaction of the court beyond reasonable doubt that the confession was made by the accused and that it is materially true. In other words, a confession statement obtained by duress will duly be taken into account provided the jury or court is satisfied that it was made by the suspect and is materially true.

The courts in Malawi have had plenty of opportunity to construe this section in view of the fair trial standards set by the Bill of Rights. Two schools of thought have emerged.

First is the school of thought that believes that section 176 is unconstitutional and in violation of international law, in so far as it allows the admission of evidence obtained involuntarily either through torture or any other treatment. This position is represented by a High Court decision in **Republic v Chinthiti**.⁵⁰ In this case, the court declared section 176 invalid but in my view did not give the main reason for such unconstitutionality. The court rightly pointed out that section 176 violated the right not to self incriminate in section 42 (2) © of the Constitution. The court never considered the relationship between the admission of involuntary confession evidence and absolute prohibition of torture, cruel and inhuman, degrading treatment.

The progressive stance of **Chinthiti** was halted by another High Court decision, **Palitu and Others v The Republic**. The court decided that section 176 was constitutional, as it merely limited the right against self-incrimination, which is derogable under section 44 (2) of the constitution. The judge concluded that:

A rule allowing use of evidence obtained by torture is unconstitutional, unreasonable, does not comply with human rights standards and is not necessary in an open and democratic society.

⁵⁰ *Rep v Chinthiti* criminal case No. 17 of 1997. The case is unreported, but is extensively discussed in *Palitu And Others v The Republic*, Criminal Appeal No. 30 Of 2001, available at www.judiciary.mw/criminal/Palitu_Others_Rep.htm

Section 176 of the Criminal Procedure and Evidence Code only lays a rule and procedure for letting in such evidence (emphasis added)⁵¹

Section 176 is a significant departure from the common law position of admitting confession statements previously followed in Malawi. Under common law, once a suspect objects to the admission of a confession, a trial within a trial is conducted upon which both sides adduce evidence in support or objection of the production of the confession. Such a position has enough safeguards that evidence obtained through duress, torture or inhuman treatment would certainly not be admissible.

Section 176 on the other hand allows the admissibility of evidence regardless of serious objections, including allegations of torture. Section 176 does not have a mechanism for the establishment of whether the confession evidence was obtained through torture. Instead, the accused persons attempts to object the production of such evidence is undermined from the first instance when the law here expressly states that no amount of objection will bar the admissibility of the confession evidence.

The Malawi Supreme Court's post 1995 interpretation of section 176 has been similar to the position taken in **Palitu and Others**, but less analytical. In **Thomson Fulaye Bokhobokho and Another v The Republic**, the Court has stated that **section 176 settles the law** regarding admission of confession statements.⁵² At no point has the Court, unlike the High Court, engaged in a discussion on the effect of the new Constitution on section 176. Confession evidence is admissible regardless of allegations of torture, and upon admission of such evidence, the Judge has to be convinced beyond reasonable doubt that the **confession is materially true**.⁵³ In order to establish whether such confession evidence is materially true, the court has to look for pointers by asking:

...is there anything outside it (the confession statement) to show that it was true? is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the

⁵¹ See note 44.

⁵² *Thomas Fulaye Bokhobokho and Another v Republic*, Malawi Supreme Court of Appeal ,Criminal Appeal No. 10 of 2000, unreported but found at [www.judiciary.mw/criminal/Thomson Bokhobokho Republic.htm](http://www.judiciary.mw/criminal/Thomson_Bokhobokho_Republic.htm)

⁵³ *ibid.*

*prisoner a man who had an opportunity of committing the murder? is his confession possible? Is it consistent with other facts which have been ascertained and which have been ... proved before us?*⁵⁴

This dictum represents the law on admission of confession statements in Malawi as it stands today.

2.2 The Right to Be Tried Within a Reasonable Time In Homicide Cases

Detentions without trial characterised Malawi's first thirty years of independence. The 1995 constitution therefore sought to put an end to this gross violation of detained person's rights by providing in section 19(6) (a) that,

Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be (a) detained without trial

In addition to this, the right to trial within a reasonable is included in a cluster of fair trial rights in Section 42. While the law seems clear, Malawi has struggled to maintain clear standards as to what constitutes a reasonable time to be brought to trial. These difficulties stem from the non-observance of Section 42 (2) (b) which requires accused persons to be brought before court for charging within 48 hours of arrest or as soon as practically possible. The provision is flouted routinely by the state and there is not a single case in which the judiciary has reprimanded the state or indeed granted an effective remedy for such violation. Such a scenario has in turn resulted in a culture where the state is under no pressure whatsoever to prosecute cases within a reasonable time. The closest the judiciary has come to setting standards on the issue is through a series of pronouncements on the right to bail and the period of pre trial detention without bail in homicide cases. In this regard, the Supreme

⁵⁴ *Bokhobokho*, adopting dicta in an English case, *R v Sykes*, 8 Criminal Appeal Report at pages 236-237.

Court has held that the onus is upon the state to convince the court why a suspect should continue being held in custody before his trial.⁵⁵

With this lack of standards, the period an accused person may languish in custody before his case is heard, varies from a year to ten years.

2.3 Burden of Proof in Fraud, Theft and Corruption Cases

It is a cardinal principle of criminal law that the onus is upon the prosecution to prove the guilt of the accused beyond reasonable doubt. Weston J captured the principle well in **Gondwe v Rep** (1971-72) 6ALR (Mal) 33 at 36-37:

Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for an accused to prove his innocence. This has been said so often as to be in danger of losing its urgency.

The principle stems from the right to be presumed innocent until proven guilty. The rationale behind this vital thread of the common law system was well captured in **R v Oakes**:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct... it ensures that until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. The presumption of innocence confirms our faith in humankind, it reflects our belief that individuals are decent and law abiding members of the community until proven otherwise.⁵⁶

The right to presumption of innocence in Malawi is intertwined with the right to remain silent and the right not to self incriminate:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right...as an accused person,

⁵⁵ *Fadweck Mvahe and Others v The State*, Malawi Supreme Court Criminal Appeal No.25 of 2005 (unreported)

⁵⁶ Per Chief Justice Dickson in *R v Oakes*, (1986) 50 C.R. (3rd)1 (S.C.C)

*to a fair trial, which shall include the right... (iii) to be presumed innocent and to remain silent during plea proceedings or trial and not testify during trial,... (iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself.*⁵⁷

These cousin rights however are conspicuously missing from the list of non-derogable and non-limitable rights in Section 44. The rights are therefore not absolute and subject to limitation as noted by the Constitutional Division of High Court of Malawi in **Friday Jumbe and Humphrey Mvula v The Attorney General**.⁵⁸

Written law, specifically the Penal Code and the Corrupt Practices Act, provides for such limitation. The scope of this thesis will concentrate on the reverse onus provisions in relation to theft and fraud by public servants and corruption offences. In regard to theft by public servants section 283 (1) of the Penal Code provides that:

Where it is proved to the satisfaction of the court that any person employed in the public service has by virtue of his employment received or has in his custody or under his control any money or other property, any such person has been unable to produce to his employer such money or other property or to make due account therefore, such person shall, unless he satisfies the court to the contrary, be presumed to have stolen such money or other property, and shall be convicted of the felony of theft.

The provision can be traced back to an amendment to the Penal Code in the sixties. The High Court had an opportunity to comment on the section in the light of the 1995 Constitution in a 1998 decision, **Maggie Nathebe v Republic**.⁵⁹ The court opted to make inconclusive findings as to the constitutionality of the reverse onus provision.

Corrupt practices offences in Malawi are governed by the Corrupt Practices Act. It was enacted in 1995, but amended in 2004, to include reverse onus provisions targeting public officials abusing their powers. This amendment came at a time when the anti corruption agency found problems in securing

⁵⁷ Section 42 (2) (f) iii and iv of the Constitution.

⁵⁸ Principal Registry, High Court of Malawi Constitutional case 1 and 2 of 2005.

⁵⁹ *Maggie Nathebe v Republic*, Miscellaneous Criminal Application No. 90 of 1997, (unreported) but available at http://www.judiciary.mw/criminal/Maggie_Nathebe_Rep.htm

convictions. Corruption and bribery cases are often difficult to prove, and the amendment sought to end the prosecutors' nightmare of utterly failing to prove corruption offences against suspected corrupt government officials.

Section 25 of the Act has been subject to controversy and the Constitutional Division of the High Court had an opportunity in **Jumbe and Mvula** to extensively discuss the constitutionality of the reverse onus provisions in view of the constitutional right to presumption of innocence. The split decision of the Court offered some interesting thoughts on the direction Malawi is taking on reverse onus laws. Section 25B (1) states:

1- Any public officer who uses misuses or abuses his public office or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence

Section 25B (3) when read with the above section, creates the reverse onus:

3- Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for the purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

In addition, section 32 of the Corrupt Practices Act contains another reverse onus provision, creating the offence of possession of unexplained wealth by public officials. Subsection 2 provides that:

Any public officer who after due investigation carried out under the provisions under subsection (1), is found to-

- (a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income,*
- (b) be in control or possession of pecuniary resources or property disproportionate to his present or past emoluments or other known sources of income or*

(c) be in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under the Act, shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such possession, or he came to enjoy the benefit of such services he shall be guilty of an offence..

Reverse provisions are generally acceptable but must pass stringent constitutional tests. This undoubtedly requires great drafting skills and a broad knowledge of international human rights standards. For a country like Malawi, which earnestly needs to fight against corruption, such provisions are a useful tool. However, the war on corruption and fraud must not be blind and oblivious to the dictates of human rights. Reaching a balancing act to achieve both ends remains the challenge.

3 INTERNATIONAL FAIR TRIAL STANDARDS

3.1 African Regional Fair Trial Standards

The African Charter on Human and Peoples Rights is the main human rights instrument in Africa. Drafted in 1981, and entering into force in 1986 under the auspices of the Organisation of African Union [now the African Union], the system anchored in the African Commission, has been subjected to almost universal criticism as being ineffective and inadequate. The dismal human rights record in Africa and the apparent inability of the Commission to improve matters has only heightened calls for urgent reform of the entire system.⁶⁰ This criticism, harsh as it may be is certainly not without basis. The problems that have overwhelmed the system are deep rooted. The Charter was drafted in a difficult era. The cold war was at its peak, and most African countries were under dictatorships. The same dictators presided over the birth of a dodgy human rights system stunted before it took its first steps. The Charter has numerous inherent flaws, which have resulted in the ineffectiveness of its implementing body the African Commission.

The Commission's mandate under Article 45 of the Charter is to promote and protect human rights in Africa, as well as interpret the provisions of the Charter. It also monitors the implementation of human rights standards by considering state parties reports. Claw back clauses remain the Charter's main Achilles heel. Fundamental civil and political rights have been limited by clauses like 'except for reasons and conditions previously laid down by law, subject to law and order, within the law, abides by the law, in accordance with the provisions of the law. States parties have happily capitalised on these to justify restrictions of rights.

Another loophole is the absence of a general derogation clause in the Charter as is the case with other major international human rights instruments. States

⁶⁰ Heyns C, *The African Regional Human Rights System In Need of Reform?* 2 African Human Rights Law Journal, 155 at 156.

have used claw back clauses to suspend defacto many fundamental rights in their municipal laws.⁶¹ The Commission has quite bravely held in **Commission Nationale des Droits de l'Homme et des Liberties v Chad**, which the absence of a derogation clause means that the Charter does not allow derogation under any circumstances. Touted as a sign of the Commissions resolve elsewhere, reality seems to indicate that this is a case of misplaced creativity. Umozurike has suggested that failure to arrive at a unanimous position regarding the inclusion of a derogation clause was responsible for its total exclusion from the Charter.⁶² A review of the Charter therefore, and a clear inclusion of a derogation clause would be a positive way forward. The Commission has held that the limitation of any rights in the Charter is subject to Article 27 (2):

The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Apart from meeting this requirement the following conditions have to be met:

1. Must be through laws of general application.⁶³
2. Must not undermine the constitution and international standards.⁶⁴
3. Must not render the right in question illusory.⁶⁵
4. Must be proportionate, necessary acceptable in a democratic society.⁶⁶
5. The onus is upon the state to prove justification of such limitation.⁶⁷

The decisions of the Commission are not binding and often ignored by states parties. In turn, this has seriously affected the jurisprudence developed by the

⁶¹ Anthony A.E, *Beyond the Paper Tiger: the Challenge of a Human Rights Court in Africa*, 32 Texas International Law Journal 511, 518.

⁶² Umozurike U.O, *The African Charter on Human and Peoples Right*, (1983) 77 American Journal of International Law 902-912. See also Manga C.F, *Cameroon's Emergency Powers: A Recipe for (Un) Constitutional Dictatorship*, Journal of African Law, 48 (1) 2004, 62-81 at 66.

⁶³ *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 1991 (ACHPR) 1998.

⁶⁴ *Ibid.*

⁶⁵ *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR) 1999.

⁶⁶ *Ibid.*

⁶⁷ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR) 2000.

Commission, as its pronouncements are tame, formulaic, nor do they fire the imagination.⁶⁸

There is however, the brighter side to the African Human Rights system. The Commission has progressively enriched the jurisprudence of the Charter, through creative interpretation of provisions and adoption of resolutions.

The creation of the African Court of Human Rights has been as another practical way of strengthening the human rights regime in Africa.

Article 7 of the African Charter enshrines the right to fair trial:

1. *Every individual shall have the right to have his cause heard. This comprises:*
 - a. *the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;*
 - b. *the right to be presumed innocent until proved guilty by a competent court or tribunal*
 - c. *the right of defence, including the right to be defended by counsel of his choice,*
 - d. *the right to be tried within a reasonable time by an impartial court or tribunal*

2. *No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*

In addition to this, Articles 5, 6 and 26 contain provisions relevant to the right to fair trial. Fair trial safeguards in the African Charter have often been criticised as being inadequate when compared to other international human rights instruments, notably the ICCPR and the European Convention. Heyns has stated that issues of detention and trial are not dealt with adequately within the Charter.⁶⁹ However, the African Commission has progressively adopted

⁶⁸ Makau wa Mutua, *African Court on Human Rights, A Two Legged Stool?* Human Rights Quarterly 21.2(1999) 342-363.

⁶⁹ Heyns C, *Civil and Political Rights in the African Charter*, in M. Evans and R Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice, 1986-2000* (CUP Cambridge 2002) 155.

resolutions on fair trial rights that significantly expand on the rights provided for in the Charter.⁷⁰ Article 45 c empowers the Commission,

to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples rights and fundamental freedoms upon which African states may base their legislation

In this regard, the Commission has formulated Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, as well as Guidelines and Measures for Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment, known as the Robben Island Guidelines. These Guidelines have served two purposes, firstly it has filled up the gaps left by the Charter, and secondly, the Guidelines have brought the human rights regime in Africa in line with international human rights standards.

3.1.1 Use of Evidence Obtained By Torture

Article 5 of the Charter states:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

In interpreting this provision, the Commission has held that prison conditions of overcrowding, beatings, excessive solitary confinement, shackling within a cell, all amount to serious contravention of Article 5.⁷¹ The Robben Island Guidelines have certainly expanded the Charter prohibition of torture. The Guidelines urge member states to ratify and implement all the anti torture obligations in international human rights instruments such as the United

⁷⁰ Chenwi L, *Fair Trial Rights and Their Relation To The Death Penalty In Africa*, ICLQ vol 55, July 2006 pp 609-634 at 610.

⁷¹ Communications 64/92, 68/92, 78/92, *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995)

Nations Convention against Torture. It is safe to conclude that the prohibition of torture in the African human rights system is solid and inline with other international human rights instruments.

The Commission has frequently found member states in violation of Article 5 and its stance on the absolute prohibition of torture is solid and quite pronounced.⁷²

Part 2 of the Guidelines contains basic procedural safeguards against torture, cruel and inhuman treatment at the pre trial stage. In Guideline 21, The Commission urges member states to establish regulations in line with the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.⁷³ Principle 21 of the UN Principles states that:

1. *It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.*
2. *No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.*

Non-compliance to these principles is taken into account in determining the admissibility of such evidence against a suspect⁷⁴ Practice has shown that cruel and inhuman conditions and treatment are intended to solicit incriminating evidence to be used in subsequent criminal proceedings. Turning to the Guidelines themselves, Guideline 29 is more specific on the use of evidence obtained through torture, cruel or inhuman treatment:

..... that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.

The African Commission Principles and Guidelines on the Right to a Fair Trial have placed emphasis on the crucial role prosecutors have to play in ensuring that evidence obtained unlawfully should not be used in proceedings:

⁷²Ibid.

⁷³ UN GA/Res. 43/173, 9 Dec. 1988

⁷⁴ African Commission Principles and Guidelines on the Right to Fair Trial, Principle 27.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspects human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.⁷⁵

This is a remarkable development considering that prosecuting agencies wield extraordinary powers capable of determining the course of criminal proceedings. The voluntary refusal by the prosecution to use tainted evidence certainly requires a high level of professionalism, honesty, integrity and a neat measure of good will. These are very rare qualities in run down criminal justice systems.

While the standards for the prohibition of use of torture evidence seem clear, it is doubtful that the Robben Island Guidelines have been adequately publicised in Africa. Such fears are founded on the fact that the Charter itself is not well known in the continent, and the Commission and its decisions even less known. It remains to be seen therefore how such obscure Guidelines can have a significant practical effect.

3.1.2 Trial within a Reasonable Time

The right to be tried within a reasonable time in Article 7 (1) d of the Charter has been further developed by the Commission as meaning the right to a trial which produces a final judgement and, if appropriate a sentence without undue delay.⁷⁶ Hence in **Pagnouille (on behalf of Mazou) v Cameroon**, failure by the Supreme Court to deliver a judgement two years after hearing an appeal, without explaining the reason for such delay, violated Article 7 (1)d.⁷⁷ The

⁷⁵ Doc/OS(XXX)247, Guideline F(1)

⁷⁶ Ibid, N(5) b

⁷⁷ Communication 39/90, *Pagnouille v Cameroon*, (2000) AHRLR 57 (ACHPR 1997).

Commission has not attempted to define what amounts to a reasonable time or undue delay. Factors to be considered as to what constitutes undue delay include, the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings.⁷⁸ While a long delay before trial cannot per se be regarded as an infringement of this right,⁷⁹ the test for establishing whether the delay was reasonable, should not be unduly stratified or preordained.⁸⁰

In **Achuthan and Another v Malawi**, one of the classic decisions by the Commission, Mr Aleke Banda was detained without charge for twelve years. The State admitted that there was no case for Mr Banda, but that he was being held at the pleasure of the Head of State. The Commission found Malawi in clear violation of Mr Banda's right to be tried within a reasonable time. In an armed robbery related case where the suspects were held for two years without even a charge the Commission said:

*In a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimise the negative effects on the life of a person who, after all may be innocent.*⁸¹

The main justification for delays in prosecuting accused persons in Africa is the lack of resources and the overwhelming burdens on both prosecution and judicial bodies. It would of course be unrealistic to ignore the numerous problems these bodies face owing to the economic woes prevalent in the continent. In the same vein, the right for speedy trial does not propose anything revolutionary nor advocate standards of perfection.⁸² As a result,

⁷⁸ Note 42.

⁷⁹ *Zanner v Director of Public Prosecutions Johannesburg*, Case No. 107/05 in the Supreme Court of Appeal of South Africa, dated 3rd April 2006, at para 14.

⁸⁰ *Bruce Robert Sanderson v Attorney General, Eastern Cape*, Case No. CCT 10/97, Constitutional Court of South Africa, at para 30.

⁸¹ Communication 153/96, *Constitutional Rights Project v Nigeria 2*, (2000) AHRLR 248 (ACHPR 1999)

⁸² *Kriegler J in Jennifer Emily Hutchison Wild and Another v AP Hoffert NO, The State, Attorney General*, Case No. CCT 28/97, Constitutional Court of South Africa, 12 May 1998, at para 33.

courts and prosecutors are under a continuing obligation to ensure that they play a practical proactive role in ensuring that this right is duly respected.

3.1.3 Reverse Onus Provisions

The right to be presumed innocent until proven guilty lies at the heart of the broader right to a fair trial. It is best represented by the age-old cardinal rule that the burden of proof in a criminal case lies on the prosecution.⁸³ Enshrined in Article 7 (1)b of the Charter, this right is however not absolute. The African Commission has duly expanded the meaning of the right in its Guidelines:

- 1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution*
- 2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of the suspect.*
- 3. Legal assumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.⁸⁴*

There is a clear recognition that the right to be presumed innocent is subject to limitation by presumptions of fact or law, commonly known as reverse onus provisions. The African Commission has stated that any such limitation of rights should not undermine the constitution and international standards,⁸⁵ must be done through laws of general application,⁸⁶ must be proportionate and acceptable in a democratic culture,⁸⁷ and must generally conform with Article 27(2) of the Charter.⁸⁸

⁸³ *Woolmington v Director of Public Prosecutions* [1935] AC (HL) at 481.

⁸⁴ *Ibid* Note 76, N(6) e.

⁸⁵ *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999).

⁸⁶ *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

⁸⁷ *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

⁸⁸ *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

The jurisprudence of the Commission indicates that there has not been an opportunity for the court to comment on reverse onus provisions. The Constitutional Court of South Africa on the other hand, has ably dealt with the implications of reverse onus provisions in an unparalleled and extensive manner. The jurisprudence of the court in this area is lasting and of high standard.

Reverse onus provisions inevitably impair the presumption on innocence because the overall onus to prove the guilt of the accused beyond reasonable doubt is relieved from the prosecution.⁸⁹ Such provisions are necessary for the prosecution of certain offences. The provisions ought to be subjected to the same standard of inquiry as to whether they are a permissible limitation to rights in line with international standards. Chaskalson P stated in a celebrated decision on reverse onus provisions, **S v Makwanyane and Another**:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.....there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality, the purpose for which the right is limited and the importance of that purpose to such society, the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, where the desired ends could reasonably be achieved through other means less damaging to the right in question.⁹⁰

For reverse onus provisions to survive the constitutional test, they must therefore:

1. be reasonable and necessary in a democratic society
2. must be weighed against competing values
3. be approached on a case by case basis

Meeting this test is certainly a tall order.

⁸⁹ Johan De Waal et al, *The Bill of Rights Handbook*, 4th Ed, 2001 at 634.

⁹⁰ *S v Makwanyane and Another*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 104.

3.2 United Nations Fair Trial Standards

The United Nations human rights standards have throughout the years formed the backbone of international human rights jurisprudence, which has in turn played a significant role in shaping, regional and domestic human rights orders. The legal instruments for fair trial standards under the United Nations include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Torture Convention, and the International Criminal Court Statute. The mainstay of UN standards however remains the ICCPR. The jurisprudence developed by the Human Rights Committee has been vast and instructive.⁹¹ Article 14 of the ICCPR represents the core of the criminal justice system in international law.⁹² It states:

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
3. *in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

⁹¹The Human Rights Committee is a body of independent experts that monitors the implementation of the ICCPR by states parties established under Article 28 of the Convention. For the full mandate and composition of the Human Rights Committee, herein referred to as the HRC, see Part IV of the ICCPR.

⁹² Javaid Rehman, *International Human Rights Law- A Practical Approach*, p 75.

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

In developing the right under Article 14, the HRC has opted to take a practical approach, without delving into facts or making judgements thereof, leaving such a task to national courts.⁹³

3.2.1 Use of Evidence Obtained by Torture

The use of evidence obtained by torture would most probably be against the spirit of fair trial rights in Article 14 of the ICCPR.⁹⁴ The ICCPR however failed to be comprehensively prohibit the use of evidence obtained through torture and anything incidental thereto. The Torture Convention therefore sought to make more effective the struggle against torture. The prohibition of torture is absolute, regardless of a state of emergency. The constitution has placed much emphasis on investigative and interrogation procedures by police officers:

*Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.*⁹⁵

For purposes of the prohibition of the use of evidence obtained through torture, CAT is to date the most clear and emphatic international instrument. Article 15 states:

*Each State Party shall ensure that any statement which is established to have made been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*⁹⁶

The Committee against Torture has consistently held that states are in violation of their obligations under the Convention if they do not pass legislation

⁹³ Scott N. Carlson and Gregory Gisvold, *Practical Guide to the ICCPR*, at p39.

⁹⁴ Article 7 of ICCPR prohibits torture.

⁹⁵ Article 11 of CAT

⁹⁶ Article 10 of the Inter- American Convention on Torture 1985, is drafted in largely similar terms.

expressly prohibiting the use of evidence obtained by torture. The Committee made this clear in its **Concluding Observations and Comments for Yugoslavia, 1998**, that the absence of detailed procedural norms pertaining to the exclusion of tainted evidence would diminish any practical applicability of any other general principles that seek to prevent the use of such evidence:

*Evidence obtained in violation of article 1 of the Convention should never be permitted to reach the cognisance of the judges deciding the case, in any legal procedure.*⁹⁷

The Committee has demanded that states parties clearly outline in their reports, concrete measures and procedures taken to prohibit and exclude torture evidence as well as give examples of cases where such evidence was rejected in criminal proceedings.⁹⁸

The rationale for the exclusionary rule in Article 15 has been ably summed up by Burgers and Danelius in **The United Nations Convention Against Torture**, “that if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have an indirect effect of preventing torture.”⁹⁹

In General Comment 20, the Human Rights Committee has spelt out the scope of the obligations imposed by Article 7 of ICCPR:

*....it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States Parties should inform the Committee of the **legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel and inhuman and degrading treatment in any territory under their jurisdiction.**(emphasis added)*

⁹⁷ A/54/44, paras.35-52 at paragraph 45. The initial report for Yugoslavia is document (CAT/C/16/Add.2).

⁹⁸ The Committee highlighted these as issues to be addressed by Georgia and Guatemala in their 2005 reports, CAT/C/36/L/GEO, CAT/C/GTM/Q/4, respectively.

⁹⁹ 1998 at page 148.

The HRC has also stated that an involuntary confession made as a result of ill treatment is unacceptable as it violates Article 14 (3) (g).¹⁰⁰

3.2.2 Trial within a Reasonable Time

The right to be tried without undue delay is amongst a cluster of rights enshrined in Article 14 of the ICCPR.¹⁰¹ In General Comment No. 13 the HRC has said of the scope of this right:

Relates not only to the time a trial should commence, but also the time by which it should end and judgement be entered, all stages must take place without undue delay.

In construing what constitutes undue delay, the HRC has also adopted a case-by-case approach without labouring to lay down a hard and fast rule. In **Shota Ratiani v Georgia**, the Committee stated that:

*... it recalls its jurisprudence and considers that a period of a year and half does not, of itself, constitute undue delay. The question of what constitutes 'undue delay' depends on the circumstances of each case, such as the complexity of the alleged offences and their investigation.*¹⁰²

The onus is upon the state party to ensure that the accused is tried without undue delay. The exercise of the right does not depend on the accused request that the right be observed.¹⁰³ The reasonableness of the entire period taken to complete the trial, from the commencement of the proceedings to the appeal and final judgement is considered. Where therefore an appeal court took two years and eight months to deliver a final judgement, the Committee held that the unexplained delay was unreasonable and therefore a violation of Article 14(3) c.¹⁰⁴

¹⁰⁰ Communication 139 of 1983, UN.Doc.Supp.40 (A40/40) 1985, *Conteris v Uruguay*.

¹⁰¹ Article 14 (3) c

¹⁰² Communication No. 975/2001 *Shota Ratiani v Georgia*

¹⁰³ Communication No. 210/1986 and 225/1987 UN.Doc.Supp. No 40(A44/40) 1989, *Pratt and Morgan v Jamaica*

¹⁰⁴ *Leon R.Rouse v Philippines*, Communication No. 1089/2002.

Developing countries such as Malawi normally point to their economic miseries as the reason for failing to adhere to the standard to bring suspects to trial without undue delay. It is acknowledged that guaranteeing this right requires significant resources in the significant system. However, economic hardship does not exempt a country from ICCPR obligations.¹⁰⁵ In **Lubuto v Zambia**, a period of eight years passed between the arrest of the complainants charge and the dismissal of his appeal. Zambia brought forth several reasons to justify the delay and argued that the right to trial without undue delay had not been violated. Zambia pleaded that she was a developing country, the complainants case was not an isolated incident but part of a bigger problem, noted the rise in crime and the huge backlog of cases to be tried. The Human Rights Committee rejected these arguments.

On the complexity of the case, the Committee held in **Sextus v Trinidad and Tobago**, that a twenty-two months period between the arrest of a suspect to trial in a straightforward murder case was unacceptable. For any delay, the authorities must give substantial reasons, and the Committee has been strict on this point.¹⁰⁶ In **Barroso v Panama**, general administrative problems following a coup were rejected.¹⁰⁷

It can be noted therefore the HRC has adopted a flexible approach in determining what constitutes a violation of the right to be tried within a reasonable time. The prosecution however has a continuing obligation to ensure that suspects get their day in court as reasonably fast as possible.

¹⁰⁵ *Mukunto v Zambia*, Communication 768/97.

¹⁰⁶ *Sextus v Trinidad and Tobago*, UN Doc. CCPR/C/72/D/818/1998 (2001)

¹⁰⁷ *Barroso v Panama*, UN Doc. CCPR/C/41/D/473/1991 (1995)

3.2.3 Reverse Onus Provisions

The Human Rights Council has held that the presumption of innocence is fundamental to the protection of human rights and should not be expressed in ambiguous terms, which render it ineffective¹⁰⁸:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt

Although the right to fair trial is not listed in Article 4 of the ICCPR as non-derogable, the Human Rights Committee has indicated that certain aspects of Article 14 like the presumption of innocence are obligatory and should be respected even in emergencies or armed conflict.¹⁰⁹ It would seem this means that where the right is subject to limitation the content of the right should not be negated. Consequently it can be deduced that the test to be passed by any legislation limiting the right to be presumed innocent is quite strict.

The Committee has hardly dealt with the right in relation to reverse onus provisions. Consequently, the jurisprudence in this specific area is non-existent. Since reverse onus provisions are a limitation to the right to be presumed innocent, a discussion on the general limitation of rights under the Convention is in good order.

The ICCPR has a clear provision on derogation of rights enshrined in the instrument¹¹⁰. The same is not so for limitation of rights. While Article 29 of the Universal Declaration of Human Rights contains a specific limitation of rights clause, the ICCPR opted to regulate the limitation of rights within specific provisions dealing with particular rights.

For example Article 18 and 21 which deal with right to freedom of thought, conscience, religion and right to peaceful assembly respectively, have expressly provided the circumstances in which these rights can be limited. The limitations have to be prescribed by law, necessary in a democratic society in

¹⁰⁸ Human Rights Committee General Comment 13 para 7.

¹⁰⁹ Human Rights Committee General Comment No. 29, CCPR/C/21/Rev.1/Add.11, para 11, 16 (2001).

¹¹⁰ Article 4 of the Covenant

the interest of national security, safety, order, morals or the fundamental freedoms of others. Elsewhere the convention has provided for the participation in public life and right to vote, without unreasonable restrictions.¹¹¹

Article 14 on the right to fair trial does not contain a limitation element except for the specific right to a public hearing. This right is subject to limitation where the press and public may be excluded for reasons of morals, public order or national security in a democratic society or when the interest of private persons requires or indeed where publicity would prejudice the interests of justice.

In view of this, and drawing on the construction of limitation clauses in relation to other rights in the ICCPR, it can be concluded that any limitation to the right to be presumed innocent, should also be in line with spirit and generality found in the other provisions. In this regard, reverse onus provisions have to be prescribed by law, reasonable and necessary in a democratic society.

3.3 European Fair Trial Standards

The European human rights regime is anchored in the European Convention on Human Rights and the Protocols thereto, and monitored by the European Court of Human Rights. The Court is set up in Article 19 of the Convention:

...to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto

The Courts jurisdiction extends to interpretation, application of the Convention, considering interstate applications as well as individual complaints alleging breach of the Convention.¹¹²

The Convention recognises the derogation of rights where the life of a nation is under threat. However, such derogation is subject to other international law obligations. The right to life, the prohibition of torture, slavery or servitude is absolute and cannot be derogated from.¹¹³

¹¹¹ Article 25 of the Convention.

¹¹² Articles 32, 33 and 34 of the Convention.

¹¹³ Article 16.

Article 6 of the Convention contains a cluster of fair trial rights and is by far the most popular amongst complainants. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment creates a Committee, which by visits to States Parties examines the treatment of persons deprived of their liberty.¹¹⁴

3.3.1 Use of Evidence Obtained Through Torture

The absolute prohibition of torture in the Convention has been hailed in **Soering v United Kingdom** as one of the fundamental values of democratic societies.¹¹⁵ The Convention however just like the ICCPR does not contain an express exclusionary rule on evidence obtained by torture. The jurisprudence of the European Court on Human Rights indicates that the Court has avoided developing a uniform standard of evidential rules to be applied across the States Parties of the Convention. Instead, such a task has been left to the jurisdiction of national laws.¹¹⁶ However the court will not hesitate to intervene where national rules of evidence are so unreasonable and unfair, such that a fair trial would otherwise be impossible. The Court's jurisprudence indicates that illegally obtained evidence is not per se inadmissible. Instead, the Court looks at whether the admission of such evidence on the facts of a particular case can lead to unfairness.¹¹⁷ In **Schenk v Switzerland** evidence obtained unlawfully through wire-tapping, was admissible as overall it did not threaten the fairness of the trial, the court observing that the defence had an opportunity to challenge it.¹¹⁸ This right though not expressly mentioned in Article 6 has been held in **Saunders v United Kingdom** and **Funke v France**, to be implied in the Article, as part of "generally recognised

¹¹⁴ Article 1 of the Convention.

¹¹⁵ *Soering v United Kingdom*, 1999 11 EHRR 439 at 88.

¹¹⁶ *Khan v United Kingdom* 2000, 31 EHRR 1016, at paragraph 34.

¹¹⁷ Lester and Pannick (Eds), *Human Rights Law and Practice*, Butterworth, London, 1999 at p 145.

¹¹⁸ *Schenk v Switzerland*, Judgement of 12 July 1988, Series A, no 140 pp 29-30, para 46-48.

international standards”.¹¹⁹ In addition, confessions extracted through torture or any kind of ill-treatment would be against the broader principle of fair trial in Article 6.¹²⁰

The convention does not have an express exclusionary clause barring evidence obtained through torture or indeed any evidence obtained unlawfully. However, on the strength of the total vilification of torture, cruel, inhuman or degrading treatment or punishment in the Convention, it is inconceivable that evidence obtained through such means would be legally admissible in criminal proceedings at the watch of the ECtHR.

3.3.2 Trial within a Reasonable Time

The right to trial within a reasonable time is enshrined in Article 6(1) of the European Convention, which states:

In the determination of his civil rights and obligations...everyone is entitled to a hearing within a reasonable time....

The European Court of Human Rights has stated through a web of jurisprudence that the determination of what constitutes a reasonable period should be based on the following:

1. Must be on a case-by-case basis.
2. Consider the complexity of the each case.
3. The conduct of the applicant and relevant authorities.
4. What is at stake for the applicant in the dispute.¹²¹

The ECtHR has set down clear guidelines on the practical factors to be considered when determining what constitutes the reasonable time. First to be

¹¹⁹ *Saunders v United Kingdom*, ECHR RJD 1996-VI, 2044 at 2064 paragraph 68, *Funke v France*, ECHR (1993) Series A.No 256-A, at 21-22 paragraphs 41-44 respectively. See also Thienel T, *The Admissibility of Evidence Obtained by Torture Under International Law*, European Journal Of International Law, Vol. 17 No. 2, 349 at 356.

¹²⁰ *Austria v Italy*, 6 YB 740 (1963).

¹²¹ *Nierojewska v Poland*, Application No. 778335/01, dated 22 August 2006, paragraph 33, *Friedlander v France* [2000] ECHR 353.

noted is what triggers time to start running in the race to bring the accused to trial within a reasonable time. In criminal cases, this normally requires that the accused should officially be deemed as answering to a charge. **Engel v Netherlands** established that the determination of what amounts to a charge should be considered in view of three points, the categorisation of the allegation under domestic law, whether the offence applies to a specified group or is of a general binding character, and the severity of the penalty attached to it.¹²² Further to that, the **Özturk Case** defined a charge as

*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, although it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.*¹²³

It has been held therefore that where preliminary investigations have begun, though an accused may not be under arrest, he is deemed to be subject to a charge as long as he has officially learnt of the investigation.¹²⁴ However, a suspect will be under a charge as long as he knows through unofficial means of an investigation against him, or where he begins to feel the effects of the investigation. A first interrogation by police or a search also constitutes criminal charges for purposes of Article 6.¹²⁵

Once it is established that an accused is facing criminal charges, the court determines whether the case has been speedily brought for trial based on the conditions mentioned above. The complexity of the case is decided by looking at issues such as the nature of the offence involved, the size of the case docket, and the number of witnesses involved.¹²⁶

The conduct of the criminal justice authorities is also crucial in ascertaining the reasonableness of time. Periods of inactivity, unexplained delays, and lack of diligence or rigour by the authorities will most likely lead violation of this

¹²² *Engel v Netherlands*, (1976) 1 ECHR 647 at 681.

¹²³ *Özturk v Germany* 1984 6 EHRR 409

¹²⁴ *Kangasluoma v Finland* 2004 ECHR 29.

¹²⁵ *Martins and Garcia Alves v Portugal*, 2000 ECHR 605, *Diamantides v Greece*, 2003 ECHR 533.

¹²⁶ Trechsel S, *Human Rights in Criminal Proceedings*, OUP 2005.

right.¹²⁷ Although the conduct of the applicant also comes into focus, he is under no obligation to cooperate.¹²⁸ Where he causes delays such as filing a string of unnecessary procedural motions, he should not be heard alleging that his case was not tried within a reasonable time.¹²⁹ Indeed, he who pleads the right to trial within a reasonable time must do so with clean hands.

3.3.3 Reverse Onus Provisions

The European Court of Human Rights has stated that the right to presumption of innocence in Article 6(2) of the Convention is one of the elements of a fair criminal trial required by paragraph 1 and must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory.¹³⁰ The right to be presumed innocent is closely related to the right to remain silent during questioning and at trial, as well as the right not to self-incriminate. The ECtHR recognised the close link in **R v Saunders**, stating that the presumption reflects the expectation that the state bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish any involuntary assistance by way of confession.¹³¹ The right not to self-incriminate is however not limited to being compelled to produce incriminating evidence or documents only:

*Testimony obtained under compulsion, which appears on its face to be non-incriminating nature such as exculpatory remarks or mere information on questions of fact, may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence by him during the trial or otherwise undermine his credibility.*¹³²

The right to be presumed innocent and its related rights is not absolute.¹³³ The leading case on limitation of presumption of innocence by reverse onus provisions is **Salabiaku v France**:

¹²⁷ *Slezevicius v Lithuania*, 2001 ECHR 755

¹²⁸ Clayton R, Tomlison H, *The Law of Human Rights* Vol 1, OUP 2000.

¹²⁹ *Eckle v Germany*, 1983 5EHRR 1

¹³⁰ *Alenet de Ribemont v France* 1995, Series A, No. 308, page 16 para 35.

¹³¹ *R v Saunders*, [1997] 23 EHRR 313.

¹³² *ibis* at para 70-71

¹³³ *John Murray v United Kingdom* [1996] ECHR 3, 8th February 1996.

*Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. Article 6(2) requires states to confine presumptions within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defence.*¹³⁴

The operation of reverse onus provisions therefore is governed by three factors. Firstly, it has to be reasonable, undoubtedly within the limits and standards of the convention and international human rights. Secondly, the presumptions have to be weighed in view of what is at stake, the mischief sought to be cured.

Thirdly, the presumptions should respect the rights of the defendant. Three questions are asked in determining the reasonableness of such presumptions. Firstly, what does the prosecution need to prove to transfer the onus on the defence? Secondly, does the burden relate to something the accused may have difficulties to prove or is it something likely to be within his knowledge or to which he has ready access? Thirdly, what is the nature of the threat faced by the society, which the reverse onus provision is designed to combat?¹³⁵

In **X v UK** therefore the court upheld a rebuttable presumption that a man proved to be living with or controlling a prostitute was living off immoral earnings. The court considered the societal revulsion of prostitution and the need to combat it, as well as the fact that the accused had all the means to rebut the presumption.¹³⁶

In **Salabiaku v France** the court upheld a presumption that having come with goods through custom the person in possession of the goods had smuggled them. In **Lingens and Leitgens v Austria** a reverse onus provision requiring the accused in criminal libel case to prove the truth of a statement was upheld by the court as the accused had the knowledge to rebut it.¹³⁷

¹³⁴ *Salabiaku v France* [1988] 13 EHRR 379.

¹³⁵ See Purchase M, and Schutzer-Weissman E, *Human Rights Practice* R10, July 2005 Chapter 6.

¹³⁶ *X v United Kingdom* 42 CD. Coll 135 (1972)

¹³⁷ *Lingens and Leitgens v Austria* (1982) 4 EHRR 373.

4 ANALYSIS OF SITUATION IN MALAWI

4.1 Use of Evidence Obtained By Torture

Levels of torture in Malawi

The advent of democracy in 1994 brought a general improvement of human rights in Malawi. There is no denying that the levels of torture, cruel and inhuman treatment witnessed in the First Republic, have not reoccurred. However, there are indicators that torture has not entirely disappeared.

The Malawi Police Service has been accused of frequently torturing suspects in order to extract confessions and evidence to be used in criminal proceedings. The use of torture and other cruel means by police interrogators is a cause for concern.¹³⁸ Few of such complaints have reached the courts of law as civil suits against the government. The Malawi Ombudsman has reported receiving a large number of complaints about torture in police custody and general police brutality.¹³⁹ An Amnesty International report, **Policing to Protect Human Rights- A Survey of Police Practice in Southern Africa, 1997-2002**, has reported of special places in Malawi where the police take suspects for torture.¹⁴⁰ The Malawi Human Rights Commission has also recently voiced concerns over general police brutality in handling suspects, mainly through beatings, and deaths of suspects in police custody.¹⁴¹

4.1.1 Admission of Confession Statements Under Section 176 of the CPEC

The law governing admission of confession statements in section 176 of CPEC as discussed in Chapter seems to fall short of international standards of admission of tainted evidence. The Supreme Court has refused to engage in a lengthy discussion of section 176 in view of the 1995 constitution. The

¹³⁸ See Amnesty International 2006 Report on Malawi at <http://web.amnesty.org/report2006/mwi-summary-eng>

¹³⁹ See the *Ombudsman Annual Report to Parliament 2001*, at [www.ombudsmanmalawi.org./7%20annual%20report%20\(Edited\).doc](http://www.ombudsmanmalawi.org./7%20annual%20report%20(Edited).doc)

¹⁴⁰ At page 12. Report available at www.amnesty.org

¹⁴¹ See *MHRC Speaks on Police Brutality*, by Steven Pembamoyo Banda, *The Nation*, dated 23 October 2006 at <http://www.nationmalawi.com/articles.asp?articleID=19212>

opinion of the High Court in **Palitu** on the other hand though interesting, analytical and provocative did not go any further to clarify the constitutionality of section 176. The case rightly noted that the admission of an allegedly involuntary confession statement violated of the right against self-incrimination. However, the court went on to say that since this right is subject to limitation, an enquiry had to be made whether section 176 met the constitutional test of limitation of rights.

Limitations and restrictions of constitutional rights in Malawi have to be prescribed by written law, reasonable, recognised by international human rights standards, as well as necessary in an open and democratic society.¹⁴² The Judge rightly observed that section 176 of the Criminal Procedure and Evidence Code is part of written law. He however wrongly in my view concluded that the section is a mere rule of evidence and procedure, and therefore not subject to the constitutional limitation and restriction test. By reaching this conclusion, the court cleverly avoided addressing the issue of whether section 176 meets the standards set by international human rights instruments, as required by section 44(2). He erroneously concluded that:

Section 176 in its present form does not offend or compromise the defendant's rights. It is proportionate and reasonable in its safeguards and rights it gives to the citizen to put to the judge or the jury the fact of the force having been used and what weight to attach to such evidence once it is proved that the statement was obtained by duress.

The court here missed the point as the so-called safeguards within section 176 fall short of the standard and scope of international prohibition of evidence obtained through torture. Article 15 of CAT¹⁴³ states that evidence **established** to have been to have been obtained through torture **should not be admissible**. First, there has to be a mechanism to establish whether the investigators obtained the confession, evidence obtained through torture, cruel or inhuman and degrading treatment. That mechanism is conspicuously missing in Section 176. Evidence is admissible regardless of allegations of torture. International law requires that national laws provide firstly for a

¹⁴² Section 44 (2) of the Constitution.

¹⁴³ As well as Guideline 29 of the *Robben Island Guidelines of the African Commission*.

mechanism where the accused should have an opportunity to challenge the admissibility of evidence well before it is introduced in court.

The Committee against Torture has consistently held that states are in violation of their obligations under the Convention if they do not pass legislation expressly prohibiting the use of evidence obtained by torture. The Committee made this clear in its *Concluding Observations and Comments for Yugoslavia, 1998*, that the absence of detailed procedural norms pertaining to the exclusion of tainted evidence would diminish any practical applicability of any other general principles that seek to prevent the use of such evidence:

*Evidence obtained in violation of article 1 of the Convention should never be permitted to reach the cognisance of the judges deciding the case, in any legal procedure.*¹⁴⁴

The Committee has demanded that states parties clearly outline in their reports, concrete measures and procedures taken to prohibit and exclude torture evidence as well as give examples of cases where such evidence was rejected in criminal proceedings.¹⁴⁵

Another crucial aspect, which the court failed to fully address its mind to in **Palitu**, is the non-derogable prohibition of torture, cruel and inhuman or degrading treatment or punishment. The use of any such evidence would also be in violation of the constitutional ban on torture, cruel, inhuman or degrading treatment or punishment. Faced with a similar situation, the High Court of Namibia in **S v Minnies and Another**, did not only observe that a confession obtained by compulsion violates the right not to be compelled to give evidence, but where it proved that it was obtained through torture, it also violates the non-derogable prohibition of torture. Significantly, it is largely for the latter violation that such evidence is inadmissible. In that case the issue was whether *pointing out* in terms of section 218 of the Criminal Procedure Act 1977,[Act 51 of 1977], was admissible. The section provides that such pointing out is admissible even though it may form part of a confession that is

¹⁴⁴ A/54/44, paras.35-52 at paragraph 45. The initial report for Yugoslavia is document (CAT/C/16/Add.2).

¹⁴⁵ The Committee highlighted these as issues to be addressed by Georgia and Guatemala in their 2005 reports, CAT/C/36/L/GEO, CAT/C/GTM/Q/4, respectively.

inadmissible. The court found that the pointing out resulted from severe questioning and beatings of the accused, amounting to torture. In view of the prohibition of torture in Article 8(2) b of the Namibian Constitution, the evidence could not be admitted.¹⁴⁶ This approach is illustrative and useful in the absence of a clear constitutional exclusionary rule. It is a route, which the courts of Malawi would do well to explore.

4.1.2 Steps Towards An Exclusionary Clause?

As already pointed out, both the constitution and criminal procedure rules do not have an exclusionary clause on unlawfully obtained evidence. Malawi has followed the practice prevalent in most countries that evidence is admissible regardless of how it was obtained provided it is relevant. While this position was attainable before the Bill of Rights, it is certainly not today. In this regard, Malawi has to move in the direction of adopting a constitutional exclusionary rule on the inadmissibility of evidence unlawfully obtained. In order to arrive at the options Malawi has there is need for a comparative analysis of the position attaining in similar jurisdictions.

A few countries have opted for express exclusionary rule, with most rejecting such a rigid approach for a more flexible one where, the court retains the discretion to decide whether the admission of unlawfully obtained evidence is acceptable. The Canadian Charter provides for a flexible clause in section 24 (2) which bar the admission of evidence that would bring administration of justice into disrepute:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

First, a court has to determine whether a constitutional right has been violated when obtaining the evidence. Secondly, the court has to consider all the

¹⁴⁶ *S v Minnies and Another* (1991) 3 (SA) 364 (Nm)

circumstances of the case and ascertain whether the admission of such evidence would bring the administration of justice into disrepute. In arriving at this decision, several factors have to be considered such as what kind of evidence was obtained, what right was infringed, was the violation of the constitution a serious one or a mere technicality? Was the violation deliberate, wilful or flagrant, was it inadvertent, or committed in good faith? Was the violation committed in circumstances of urgency or necessity?¹⁴⁷ The factors to be considered are not exhaustive, and the court holds a flexible parameter to arrive at a decision that would ensure a fair trial.

After the adoption of an interim constitution in South Africa, the courts laboured to find a balance between the common law position and the new standards enshrined in the constitution. The interim constitution did not contain the clause similar to the Canadian exclusionary rule. The jurisprudence developed at that time would be useful to Malawi, in the transition period to clarify the position of illegally obtained evidence particularly confession statements obtained under torture. **Key v Attorney General Cape of Good Hope** stated:

*At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally nevertheless be admitted.*¹⁴⁸

This simply highlights the battle between competing values of ensuring the attainment of fair trial rights, while also ensuring that deserving offenders should not be unduly protected due to technicalities of admissibility of evidence. In **S v Motloutsi**, the constitutional court suggested several factors to be considered when deciding whether to admit unconstitutional evidence with the court retaining the discretion to decide. The factors, somehow similar to the Canadian position, included consideration of what public interest would be served, the nature of the illegal act of obtaining evidence, whether the illegality was intentional, adhoc or represents a deliberate policy, whether there

¹⁴⁷ *R v Stillman* 1997 S.C.R. 607.

¹⁴⁸ *Key v Attorney General Cape of Good Hope* 1996 (6) BCLR 788 at para 13.

were circumstances of emergency or urgency and the nature of the crime investigated.¹⁴⁹

The current South African constitution, which is similar to Malawi's in many regards, has a provision similar to the Canadian Charter in section 35(5):

Evidence obtained in a manner that violates any right in the Bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Where it has been determined that evidence was obtained in violation of a constitutional right, the next question to be answered is whether such violation could still be mitigated under the limitation of rights test. In other words, the mere fact that evidence was obtained unlawfully does not per se lead to its exclusion. Consequently, whilst evidence obtained by forcing a suspect to an identification parade may be well admissible, the admission of evidence obtained under torture is unacceptable, as it would clearly render the trial unfair.¹⁵⁰

In the case of Malawi, the absence of an exclusionary clause especially in the constitution has been a serious loophole. The first option would be to adopt a provision expressly excluding the admission of evidence obtained under torture, cruel and inhuman or degrading treatment. This would be in line with international human rights standards and clear out the uncertainties surrounding the use of such evidence. Considering that the prohibition of torture is *jus cogens* and the right non-derogable, such an exclusionary rule is desirable. It would be a powerful weapon to restrain public officials such as police officers from torturing suspects as it would exclude real, documentary and oral evidence unconstitutionally obtained.¹⁵¹

The second option is the adoption of a broad exclusionary rule similar to the South African and Canadian constitutions, barring unlawfully obtained evidence where the same would lead to bringing justice to disrepute. This

¹⁴⁹ *S v Motloutsi* 1996 1 SACR 78 ©, which adopted an Irish reasoning in *The People v O'Brien* (1965) IR 142 at 170.

¹⁵⁰ De Waal J et al, *The Bill of Rights Handbook*

¹⁵¹ *Der Merwe V, Unconstitutionally Obtained Evidence: Towards a Compromise between the Common Law and Exclusionary Rule* (1992) 3 Stellenbosch Law Review 173 at 175.

would serve the purpose of excluding all evidence obtained unlawfully, of course as discretionally decided by the court.

The need to have such a rule in the constitution in one form or the other is important, as it would effectively fill the lacuna presently existing in this regard. In the absence of such a rule in the constitution as well as criminal procedure rules, the only viable option to ensure that evidence obtained through torture, cruel, inhuman and degrading treatment does not get to the courtroom is a judiciary created exclusionary rule. Such a position is highly controversial and has received its share of criticism.¹⁵² It seems the ability of the judiciary to create laws is certainly not popular, especially with other two branches of government. The advocates for this stance, point to the mandate of the legislature and suggest to the judiciary to leave matters of exclusionary rules, rules of evidence and legislation matters in general to the appropriate arm of the government, the legislature. It must be admitted that judiciary created exclusionary rule can only work where expressly articulated by the highest court of the land,[in the case of Malawi the Supreme Court] as the decisions of the court bind all courts under the principle of precedent. However, the uncertainty surrounding the judiciary created exclusionary rule is clear to see. A subsequent decision by the same highest court can easily set the rule aside.

In spite of this there is a good case for advocating that the Malawi Judiciary should be bold enough and use its constitutional power in the meantime to uphold an exclusionary rule specifically against evidence obtained through torture, cruel and inhuman treatment. This position can be attained through creative constitutional principles, coupled with the unequivocal ban of torture and the precedents being set worldwide by human rights instruments and leading judicial decisions. In the words of the Namibian High Court:

*[A] Constitution is simply not a statute, but it is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.*¹⁵³

The soul of the nation of Malawi, conscious and remindful of her dictatorial past of flagrant tortures and cruel treatment cannot today carry the weight of

¹⁵² Kruger and Currin, *Interpreting a Bill of Rights*, Juta 1994, at page 60.

¹⁵³ *S v Acheson* 1991 (2) SA 805 (Nm)

condoning torture and the use of evidence obtained through it. Mindful of the fact that torture is still used in obtaining confessions, it is only through the effective use of the constitutional ban on torture and cruel practices that the government can be disciplined into abandoning the use of evidence obtained in such heinous circumstances. While it is accepted that the role of enacting clear criminal laws, criminal procedure rules vests in the legislature, it should be borne in mind that the exercise and enjoyment of constitutional rights cannot be put on hold, while waiting for a laid back legislature to get its act together and bring the criminal laws and procedures in tandem with constitutional standards. Judicial activism and alertness in this regard is acceptable since there is, in the words of Michael Kirby:

.....a recognition of the universal failure of legislators in democracies to attend to many urgent tasks of law reform, relevant to the protection of civil liberties.¹⁵⁴

The legislature in Malawi neatly meets this criterion as evidenced by its failure to comprehensively review both the Penal Code and the Criminal Procedure and Evidence Code in the last decade.

Prosecutors also need to play a crucial role in excluding the use of evidence obtained through torture. It is easy to note from the case dockets, interviews with other witnesses and even the suspect, that the evidence gathered was not properly obtained. In such cases, professional ethics and a respect for the rule of law obligate prosecutors to be bold enough and not use such evidence in subsequent criminal proceedings.

¹⁵⁴ *Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, Commonwealth Secretariat Judicial Colloquium Bangalore 24th to 26th February 1988, at page 81.

4.2 The Right To Trial Within A Reasonable Time

4.2.1 Overview

The right to be brought to trial within a reasonable time is strongly protected in the laws of Malawi. Difficulties have arisen in translating the constitutional protection to reality. The reasons for this are many. First, the radical fair trial standards introduced by the 1995 constitution caught the entire criminal justice system unprepared. While that is perfectly understandable, steps taken thereafter to strengthen the capacity of justice institutions to enable them meet the demands and standards of the rule of law have been inadequate. In terms of budgetary allocations, the Judiciary, Ministry of Justice, Police, Anti Corruption Bureau have been overlooked, with government prioritising areas such as education, health and agriculture. Therefore, in terms of resources, these institutions have been poorly equipped to speedily handle cases. For example in the 2004/2005 Budget, the Presidency received the same amount of budgetary allocation as the Ministry of Justice, Anti-Corruption Bureau and the Malawi Human Rights Commission combined.¹⁵⁵

The High Court has observed however those administrative or financial hiccups are no excuse for failure to observe fair trial standards:

*State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritizing and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights.*¹⁵⁶

Secondly, criminal justice institutions needed to undergo through thorough reform in order to exorcise the ghosts of the First Republic. This calls for a systematic review of relevant laws and training of officials to change the institutional mindset and psyche. The Malawi Police Service as the institution that triggers the chain process of criminal proceedings deserves the most

¹⁵⁵ Malawi Economic Justice Network, *Response to the Proposed National Budget 2004/2005*, Lilongwe 16th September 2004, Table 9.

¹⁵⁶ Mwaungulu J in *In the Matter of Charles Khasu and Louis Khasu*, Principal Registry High Court Miscellaneous Application No. 61 of 2003(unreported). The case can be accessed at http://www.judiciary.mw/criminal/Republic_%20Khasu.htm

urgent attention in terms of reform and capacity building. Criminal investigators are yet to understand the significance of the 48 hour rule within which to bring accused persons to court after arrest. Since most accused persons are not brought before within 48 hours, a backlog of cases is created from the outset. The lack of appreciation of the urgency to bring accused persons before court, coupled with a general lack of resources, has culminated into a culture of serious delays in prosecution of cases.

Thirdly, a general lack of cooperation amongst leading criminal justice institutions makes it difficult for coherent handling of prosecutions. For example in homicide cases which are prosecuted by the DPP's office only, it can take three years before a case docket is passed from the police investigators to the DPP for initial determination if an accused person has a case to answer. In most cases, the accused person would have been in custody during this entire period.

Fourthly, the judiciary has not been pro active in setting down clear standards in relation to the right to be brought to trial within a reasonable time. Consequently, it has largely depended on the executive how long it wishes to keep a suspect in custody before commencement of trial. The only remedy offered by the courts where an accused has overstayed in pre-trial detention, is to grant him or her bail. At no point has the judiciary sought to grant the accused more effective remedy like throwing out the charges against him.

4.2.2 Meeting International Standards of Trial within a Reasonable Time

4.2.3 Complexity of Case

International human rights law jurisprudence indicates that the complexity of a case is one of the major factors for consideration when determining whether there has been undue delay in trial. Consequently, a long period before trial does not per se constitute undue delay. Each case is looked at to establish how its complication may or may not justify a long period before the completion of trial. Murder cases are on the face of it complicated, as the cases normally involve extensive investigations, compilation of medical reports, exhibits and

others pieces of evidence. This is true for a country like Malawi with limited forensic expertise for investigations. However, even murder cases have to be analysed on a case-by-case basis, as one murder case would be less complicated than another one. On average, it takes five years from the arrest of a suspect to completion of trial in a homicide case. In over ninety-five percent of the cases, the accused person remains in custody while awaiting trial.¹⁵⁷ Cases that are complicated, or in need of forensic expertise such as DNA tests, are bound to take longer. Malawi does not have DNA testing facilities such that samples are sent to South Africa. A good example is **Rep v Jeremy Dennis Harrage and Two Others**, in which the suspect, a Briton fled Malawi after the murder of his wife Suzan in February 1994. Preliminary investigations indicated that he allegedly hired hit men to kill his wife. Progress in the matter has been halted as Malawian authorities sought to send a hair sample believed to belong to the suspect to South Africa for DNA testing.¹⁵⁸

The need to obtain further expert evidence was held by the European Court of Human Rights in **Wemhoff v Germany** as a justifiable reason for delay in prosecution of a case.¹⁵⁹ However, the complexity of a case does not per se absolve the prosecution from its responsibility to promptly bring an accused to trial. The court decides on how the state has conducted itself in handling such complicated case depending on the circumstances in every particular instance.

For homicide cases in Malawi, the period taken before commencement of trial mainly depends not on the complexity of the case but on the availability of funds. The prosecution of such cases depends on donor funding, which can be erratic or held up for accounting queries. Consequently, the authorities in Malawi cannot point to complexity of homicide cases as a justification for failure to prosecute cases within reasonable time.

Fraud and corruption cases are known for their complexity. Malawi enacted anti corruption laws a few years ago, as such, the relevant agencies are yet to acquire the necessary expertise in investigation and prosecution. The DPP and ACB have continuously pointed to lack of staff and expertise as one reason for

¹⁵⁷ This estimate is according to the Assistant Registrar of the High Court of Malawi, Miss Martha Chizuma.

¹⁵⁸ The case is yet to be heard in court as accused is at large, believed to be in Britain. Source: Criminal Registry, Ministry of Justice Headquarters, Docket Number CN/CR/76/2/94.

¹⁵⁹ *Wemhoff v Germany* 1968 1 EHRR 55.

the slow progress in the prosecution of fraud related cases. This argument is valid though in **Eckle v Germany** the ECtHR threw out lack of expertise as a reason to justify delays. It seems the DPP and ACB need to show measures they have taken so far in order to alleviate the age-old problem of lack of staff and expertise. Otherwise, this excuse is fast running out of any credibility.

4.2.4 Interest of Accused Person at Stake

It is imperative that the accused be tried within a reasonable time where his or her stake in the matter is grave. In capital offences, where the life of an accused is on the line, the authorities are under an increased obligation to bring to closure the case against the suspect. The urgency for trial in capital offences is understood where the whole purpose of the right to a trial within a reasonable time is appreciated:

*..(it) is to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend him or herself.*¹⁶⁰
(Emphasis added)

Where an accused is facing the death penalty he should be accorded every opportunity to robustly defend himself. Long delays greatly impair the guarantee of a fair trial as it becomes difficult to obtain witnesses. It is interesting to note from the Lilongwe District Registry High Court Homicide Return that cases committed more than two years ago, normally ended up with a manslaughter charge.¹⁶¹ The reason for this could be due to reduction of the charge from murder to manslaughter, to facilitate plea bargains especially where the prosecution is unable to obtain witnesses due to lapse of time.

¹⁶⁰ Code M, *Trial Within a Reasonable Time: A short history of recent controversies surrounding speedy trial rights in Canada and the United States* (Carswell Thomson Professional Publishing Scarborough Ontario 1992)

¹⁶¹ See Supplement A on page 95.

In **Republic v Reuben Ziwise and Harry Phiri**, the suspects were arrested for murder on 18th July 2001 and remanded in custody. Prosecution of their case ended on 19th September 2005 with a guilty verdict and a sentence to death. The accused persons did not call witnesses and neither was the issue of delay in their trial raised.¹⁶² The case is just one example of the general practice in the conduct of homicide cases in Malawi.

According to the Legal Aid Department, the failure to call witnesses on behalf of the accused is mainly because of delays in prosecuting homicide cases. It is almost impossible therefore to trace defence witnesses.¹⁶³ In the case mentioned above being a death penalty case, it is arguable that the fair trial interests of the suspects, especially the right to a speedy trial were not adequately safeguarded. The European Court of Human Rights has held in **Portington v Greece** that where the defendant is facing the death penalty, it is imperative that trial be concluded as soon as possible with full regard to fair trial rights.¹⁶⁴

4.2.5 Conduct of the Parties

The conduct of the applicant through out the course of the proceedings against him also comes under scrutiny. It is expected that an applicant ought to claim and push for his right for speedy trial. Indeed, it has been suggested that an applicant waives his right to speedy trial where he does not claim the right and opts to be docile. In an American case of **Barker v Wingo, Warden**, a delay of five years before trial was found to be extraordinary, but the scales tilted against the accused simply because he did not want and push for his speedy trial.¹⁶⁵ However, at all times the obligation rests on the prosecution to respect the suspect's rights. Therefore, even where a defendant may have

¹⁶² Lilongwe District Registry, High Court of Malawi, Criminal Case No. 92 of 2005(unreported). See Supplement A.

¹⁶³ According to Mr Suzgo Lungu, Principal Legal Aid Advocate in an interview, November 2006.

¹⁶⁴ *Portington v Greece*, 1998 ECHR 94.

¹⁶⁵ *Barker v Wingo Warden*, 407 US 514, 532 (1972) at 533-534.

contributed to the delay of his trial, the state is still liable of infringing on his rights. As pointed by Kriegler J of the Constitutional Court of South Africa:

*Even if the accused would rather avoid their contest with the state, they remain capable of suffering prejudice related to incarceration or the stringency of bail conditions or the exposure to a public charge. An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from this right... the question is not whether he wants to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.*¹⁶⁶

In other words, the accused has no duty to bring on his trial.¹⁶⁷ In Malawi's case, this position is understandable considering that most accused persons are illiterate and unrepresented at the pre-trial stage. They are in no position to appreciate their constitutional rights let alone claim the same. It would certainly be unfair to punish such accused persons for failure to exercise rights that they are clearly unaware of. The situation however is different for accused persons represented by counsel. In such a case, the accused shall not be allowed to complain of delays, which he has caused or adjournments he has agreed to.¹⁶⁸

In Malawi, homicide suspects have a mandatory representation by counsel from the Legal Aid Department of the Ministry of Justice. Such representation is unfortunately only available at trial stage. It certainly ought to be available as soon as the suspects are arrested. Due to acute shortage of lawyers in the department, this is practically impossible.¹⁶⁹ Consequently, homicide suspects can languish in custody for years without a single hint of any meaningful legal advice. In practice, where the accused are represented by public defenders instances of defence induced delays are unheard of.

The situation is different where the suspects have hired private legal practitioners. In most cases, trials are adjourned due to numerous pre-trial applications, for either bail or determination of constitutional issues. While the

¹⁶⁶ *Bruce Robert Anderson v Attorney General Eastern Cape*, Case CCT 10/97 at paragraph 32.

¹⁶⁷ Per Brennan J in *Dickey v Florida* 398 US 30, 41 (1970) at 50.

¹⁶⁸ *Kemmache v France (Nos 1 and 2)* 1993 ECHR 51

¹⁶⁹ According the Chief Legal Aid Advocate, Wezi Kayira, there are only 17 Legal Aid advocates in Malawi.

defence is entitled to both, where it is determined that such applications are a mere stunt to delay trial, the defendants' subsequent claim that his right to a speedy trial has been violated will be greeted with very little sympathy by the courts. It has been alleged that:

Most private lawyers would rather fight for bail and delay the matter. They would prefer the matter to delay so that they take advantage of eventualities particularly where the evidence is strong against their clients.¹⁷⁰

In **Rep v Nasser Kara and Two Others**, the suspect, a Member of Parliament accused of murder hired a top lawyer for his defence. Before trial began, the defence made an application contesting the admission of confession statements on allegation that they were obtained through torture. The judge ruled, in the absence of a jury, that the confession statements were admissible courtesy of section 176 of the CPEC. On appeal, the Malawi Supreme Court rejected the defence arguments and sent the case back to the High Court for trial. In the meantime, the suspect was granted bail, and trial did not commence on successive trial dates, because the defence lawyer was allegedly busy with other matters or reportedly outside the country. Only when the trial judge ordered the arrest of the suspect did his lawyer turn up and trial commenced.¹⁷¹

On the other hand it must be pointed out that the legal representation offered by public defenders is certainly inadequate as compared to private lawyers. While public defenders work within a tight time framework and are compelled to represent as many homicide suspects as possible, privately hired lawyers devote time and energy to defend their clients at all costs. To that extent it seems privately represented homicide suspects are more adequately represented. However this is a luxury which only a few homicide suspects can afford.

In practical sense therefore, the conduct of the accused has little effect on whether he can rightly claim violation of his right to speedy to trial. This is so because the courts of Malawi have not in a single case determined that an

¹⁷⁰ Principal Legal Aid Advocate, Suzgo Lungu in an interview dated 26th October 2006.

¹⁷¹ *Rep v Kara and Two Others*, Lilongwe District Registry High Court of Malawi, Criminal Case No.94 of 2003,(unreported).

accused right to speedy trial has been violated let alone grant any effective remedy to cure or compensate for the violation. There is hope however in an ongoing case for corrupt practices offences. In an on going corrupt practice related case, **Republic v Kutengule**, the suspect has remained untried for over a year. The matter has virtually come to a standstill because the President dismissed the Director of the Anti-Corruption Bureau a few months ago. Consequently most operations of the Bureau have been halted. The suspect has applied to the High Court to determine that his right to a fair trial is being violated. Hopefully the court will seize the opportunity and lay down broad and decent standards on the enjoyment of this right.¹⁷²

4.2.6 Whether Accused Person Is In Custody Pending Trial

The rationale for the right to a speedy trial is that the accused person should not be prejudiced in the preparation for his defence. The longer an accused person stays in custody pending his trial, the more likely, that his defence case would seriously be affected. The African Commission emphasised the need to speedily try accused persons in custody in **Achuthan and Others v Malawi**, where one of the accused, Aleke Banda was held for twelve years without trial. In such cases, the blow to the accused rights may be double, his long detention ultimately affects his preparation for defence, and secondly he may after all be innocent. It follows therefore that where a suspect has spent a long time in detention before his trial, courts are likely to rule that his right to speedy trial has been violated.

In serious offences such as murder, it is common practice for accused persons to remain in custody pending trial. In the few instances where an accused is granted bail, it is for two reasons, first where he has been in custody for unduly too long, secondly, where preliminary findings indicate that the case against him is hopelessly weak. There is a general reluctance by the courts to release

¹⁷² *Republic v Kutengule* Criminal Case No. 181 of 2005. The application has been made under Miscellaneous Application No. 91 of 2006, Lilongwe District Registry. My thanks to the applicant's legal counsel, Mr. Alan Chinula.

homicide suspects. In several cases, it has been stated that the interests of justice rarely require that suspects in serious offences be granted bail. Consequently, the level of pre-trial detention in Malawi is quite high. According to University of London's International Centre for Prison Studies, twenty three percent of Malawi's prison population are pre trial detainees and remandees.¹⁷³ The number of homicide remandees keeps rising. Homicide trials were suspended over a year ago and it is likely that the number of suspects in custody has tremendously increased. According to the Directorate of Public Prosecutions as at 11th November 2005, about eighty seven percent of the seven hundred and forty-two homicide suspects were yet to be committed for trial.¹⁷⁴ The suspects have not appeared before a magistrate to be formally charged before the case is forwarded to the High Court for trial. The period of remand in custody varies from a year to nine years. There seems to be no deliberate policy to keep particular accused persons in custody for a long time. The failure to speedily try the suspects is just a sign of an ailing criminal justice system. On this basis, it is justifiable to conclude that most homicide suspects in Malawi have not been adequately accorded with the right to be tried within a reasonable time.

4.3 Reverse Onus Provisions

Reverse onus provisions in fraud and corrupt practices offences were introduced as effective tools to the prosecution in cases ordinarily difficult to prove. An essential element of crimes such as fraud is knowledge of the falsity of the representation by the person making it.¹⁷⁵ It is therefore well recognised in international law that the difficulties faced in proving corrupt practices offences necessitate the use of reverse onus provisions. The United Nations Office on Drugs and Crime has stated that:

¹⁷³ http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa_records.php

¹⁷⁴ See Supplement B at page 101.

¹⁷⁵ Per Langa J in *S v Abraham Coetzee and Others*, Constitutional Court of South Africa, Case CCT 50/95 at para 7.

*Unlike most crimes, corruption offences usually have no obvious or complaining victim. More often than not, those involved are beneficiaries having an interest in preserving secrecy. Clear evidence of actual payment of a bribe can be exceptionally hard to obtain and corrupt practices largely remain unpunished.*¹⁷⁶

While the threat posed by theft of public funds by public officers and corrupt officials is certainly worth combating, there is also a possibility of abuse of individual rights. As clear limitations to the overlapping rights of presumption of innocence and against self-incrimination, reverse onus provisions have to meet limitation tests set by international human rights law. In this regard, Article 14 of the African Union on Preventing and Combating Corruption provides that suspects in corruption and related offences shall receive a fair trial in accordance with minimum guarantees in the African Charter and other international human rights instruments.

4.3.1 Reverse Onus in Thefts by Public Servant

Section 283 of the Penal Code contains reverse onus provisions in cases of theft by persons employed in the public service:

- 1. Where it is proved to the satisfaction of the court that any person employed in the public service has by virtue of his employment received or has in his custody or under his control any money or other property, any such person has been unable to produce to his employer such money or other property or to make due account therefore, such person shall, unless he satisfies the court to the contrary, be presumed to have stolen such money or other property, and shall be convicted of the felony of theft.*
- 2. Where a person employed in the public service is charged with theft, and it is proved to the satisfaction of the court that during a period of that persons employment there has been paid into a bank, Post Office Savings or other account to the credit of that person a greater amount in the aggregate than that person has received by way of lawful remuneration during such period, and the accused person fails to give to the*

¹⁷⁶ United Nations Office on Drugs and Crime, *UN Anti Corruption Toolkit*, 3rd Edition, Vienna September 2004.

court a satisfactory explanation of how he came into possession of such excess amount, the court shall take into consideration such failure in determining whether or not the accused person is guilty of the theft with which he is charged.

3. *Where a person employed in the public service is charged with theft, and it is proved to the satisfaction of the court, that during a period of that persons employment there has been any sudden or substantial enrichment of that person, or of any member of his family or household, in respect of money or other property, and no satisfactory explanation of such enrichment is given to the court, the court shall take into consideration the absence of such explanation in determining whether or not the accused person is guilty of the theft with which he is charged.*

The Supreme Court of Malawi has not ruled on the constitutionality of this section in view of its limitation of fair trial rights. However, the High Court commented on this issue in **Maggie Nathebe v Republic** where the court analysed the constitutional test reverse onus provisions have to pass, but unfortunately did not make a ruling on the status of section 283.¹⁷⁷ Understandably, the court did not hear arguments from the state on the constitutionality of the section and therefore could not appropriately make a ruling on the same. However, the court would have easily asked the state to address the issue in the arguments and make the necessary pronouncement thereafter.

It is important to highlight the three elements of the offence of theft by public servant which must be proved beyond reasonable doubt by the prosecution. First, the accused must be a person employed in the public service. Secondly, by virtue of his or her employment he must receive directly and lawfully, or have in custody or in control some money or property and then lastly, he must fail to produce such money or property to his employer or make due account therefore. It has been held that such accounting must be a bonafide account of what happened to the money.¹⁷⁸

¹⁷⁷ *Nathebe v Republic*, Principal Registry High Court of Malawi Miscellaneous Criminal Application No. 90 of 1997 (unreported) available at http://www.judiciary.mw/criminal/Maggie_Nathebe_Rep.htm

¹⁷⁸ Chief Justice Skinner in *Chabvinda v Rep* 10 ALR 169 at page 171.

Next section 283(1) has to be subjected to the three-pronged test suggested by the European Court of Human Rights:

a. What is the Prosecution Required to Prove?

The prosecution has to prove ALL the three elements mentioned above beyond reasonable doubt. For example failure to prove that the suspect is employed in the public service is fatal to the charge against him. Similarly, where the suspect did not obtain the money or property in the course of his employment the prosecution would have failed to prove a crucial element.

b. Does the burden imposed on the accused relate to something difficult for him to prove or is it something within his knowledge or to which he has ready access?

The accused has to disprove to the satisfaction of the court any of the three points above. He can prove that he is not employed in the public service or that he did not receive money or property in the course of his employment. The crucial aspect, which the accused needs to prove, is that he either produced the money allegedly stolen or that he did make due account of the same to his employers. Is it difficult for an accused to prove how he obtained money or property and make due account of the same? On the face of it is not, although in practice an innocent person who fails to give a satisfactory explanation or simply because the court cannot believe him, can be found guilty and go to jail even though he did not steal the money or property. In **Maggie Nathebe v Republic** the accused left her station of duty to another district to pay salaries to civil servants. She got the money by virtue of her employment and her public service status was never doubted. She claimed that she put up in a rest house and claimed that the money was stolen overnight hence her failure to produce the same. Her explanation did not satisfy the court and she was duly convicted. Having received government money in the course of employment it is surely only the accused person who can explain what happened to the same.

- c. What is the nature of the threat faced by the society which section 283(1) is designed to combat?

The marginal note to section 283(1) reads: stealing by persons in public service. This is the mischief that the legislature sought to deal with when it enacted this law as far back as 1963.¹⁷⁹ It has been the view of the lawmakers that embezzlement of public funds is a serious threat that needs to be severely dealt with. The position is further fortified by section 283(4) of the Penal Code, which lists mandatory periods of imprisonment for specific amounts of money stolen by a public servant. The question to be answered is, does theft of public funds pose a threat to the Malawian society?

In the case of sections 283(2) and 283(3) the prosecution needs to prove the three points in section 283(1) as well as the sudden enrichment of the suspect or his family during the period of the relevant period. Failure by the suspect to explain the sudden enrichment to the satisfaction of the court tilts the scales against him as the court shall take into consideration such failure to determine his guilt.

The onus then shifts to the accused to satisfy the court to the contrary. The phrase *satisfy the court to the contrary* [or unless the contrary is proved] means that the presumption is rebutted by proof on a balance of probabilities.¹⁸⁰ It follows therefore that section 283 infringes on the right to be presumed innocent guaranteed by section 42(2)(f)(iii) of the constitution and all major international human rights instruments. In the words of Dickson C.J in the Canadian case, **R v Oakes**:

*...a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question violates the presumption of innocence...*¹⁸¹

¹⁷⁹ *Hill v Republic* (1971-1972) 6 Africa Law Reports (Malawi) 180 at 183.

¹⁸⁰ *S v Abraham Coetzee and Three Others*, Constitutional Court of South Africa, Case CCT/50/95 at para 5.

¹⁸¹ *R v Oakes* [1986] DLR (4th) 200 at 222.

4.3.2 Does Section 283 Meet International Standards Of Limitation of Rights?

Section 44(2) of the Constitution of Malawi provides for the limitation of rights and freedoms:

Without prejudice to subsection (1), no restrictions or limitations may be placed upon 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 open and democratic society

In addition, such limitation shall not negate the essential content of the right and shall be of general application. In comparison section 36(1) of the South African Constitution, which deals with limitation of rights, provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- b. the nature of the right*
- c. the importance of the purpose of the limitation*
- d. the nature and extent of the limitation*
- e. the relation between the limitation and its purpose; and*
- f. less restrictive means to achieve the purpose*

The South African provision is undoubtedly more comprehensive, but in all fairness in interpreting section 44, the courts of Malawi have not been restrictive and have largely adopted the jurisprudence of the South African Constitutional Court and international standards. The international standards on limitation of rights are practically the same as mentioned above. What emerges is that in considering the constitutionality of limitations of rights,

there is need for an inquiry involving weighing up of competing values[i.e. the accused right to presumption of innocence and the need to protect the society from certain crimes] and ultimately an assessment based on proportionality.¹⁸² This is the approach that has been taken by the Canadian, South African and Malawian courts. The ECrtHR stated in **Salabiaku** that any such limitation of rights through presumptions should be reasonable. It is a credible approach and fully incorporates international human rights standards. It is important therefore to consider whether section 283 meets the test.

4.3.3 Is section 283 a Reasonable Limitation of the Right to be Presumed Innocent in an Open and Democratic Malawi?

In determining whether section 283 is a reasonable limitation of the right to be presumed innocent, a good starting point is an inquiry into the objective of the Legislature in including a reverse onus in section 283. It appears that the intention of the lawmakers was to deal with thefts in the public service. Public officers need to maintain the trust of the people. The alarming extent of the embezzlement of public funds in Malawi is well documented. It is clear this is a situation that needed addressing. The move by Parliament to decrease cases of thefts by public servants seems of sufficient importance to warrant limiting the right to be presumed innocent. The determination to nip such practices in the public service is further fortified by the mandatory sentences imposed on public servants convicted of thefts and fraud. The sentences depend on the amount of money embezzled by the accused. For example an accused convicted of stealing five thousand Malawi Kwacha, [about forty United States dollars] and above, gets a mandatory sentence of fourteen years imprisonment.¹⁸³

Next, it should be established that the means employed by Parliament to deal with thefts by public servants is reasonable and rational in a free and

¹⁸² *S v Abraham Coetzee and Others*, ibid at para 11.

¹⁸³ Section 283 (4) of the Penal Code. This subsection was enacted in 1973. It is clear there is need for urgent amendment as forty dollars is not as valuable as it was in 1973 and not worth sending someone to jail for 14 years!

democratic Malawi. This requires that there must be a rational connection between the basic fact of the accused's failure to account for or produce money or property in his custody or control, and the presumed fact of theft. The rationality requirement is necessary because of the possibility of wrong convictions of theft when in fact the accused had simply lost the money or property due to negligence and not necessarily theft. It must be admitted that the section does not guarantee that innocent suspects can not be convicted. In fact no piece of criminal legislation ever does that.

Does failure to account, produce money or property under ones custody, or control support the inference of theft? It appears the inference that the public servant in sole custody and control of government money and property who fails to account or produce the same must have stolen it, is quite reasonable and rational. The provision has safeguards to guide the court in arriving at a decent conclusion whether the accused's explanation is reasonable thereby discharging the burden placed upon him.

The placing of an onus on an accused public servant to explain and account for money and property he received comes as a result of the uniqueness of those working in public service. Public service embodies a sense of public duty, integrity, accountability and transparency. It reasonably follows therefore that where there is failure to account, the public servant be presumed to have stolen the money or property. Any other assumption would be an invitation to massive plunder of public funds.

Section 283 gives an opportunity to the accused to explain the circumstances surrounding the failure to account for government money or property. This is in consonant with the expectation that public funds have to be duly accounted for.

In that regard the section is a reasonable limitation to the right to be presumed innocent. Any other finding would have serious consequences in the maintenance of public funds. The reverse onus places a sense of responsibility on public servants dealing with public funds and property.

4.3.4 Reverse Onus in Corrupt Practices Offences

The Corrupt Practices Act as amended in 2004, creates reverse onus provisions in section 25B (3) as read with section 25B (1) and section 32. Prior to these amendments, the Bureau managed very few convictions against corrupt practices suspects. It was thought that the standard of proof in such cases should be lowered to increase the chances of successful prosecutions.

4.3.5 Section 25B (1) and (3) of the Corrupt Practices Act

Section 25B (1) and 3 provide:

1. Any public officer who uses misuses or abuses his public office or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence.

3. Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for the purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

The Constitutional Division of the High Court had an opportunity to rule on the constitutionality of this provision in **Jumbe and Mvula v Attorney General** in 2005. The plaintiffs were Minister of Finance and Chief Executive of Shire Bus Lines, a public company respectively. They were charged with misuse of office under section 25B (1) as read with section 25B (3) among other counts. Before the commencement of trial, they sought the High courts ruling on the constitutionality of section 25B (3) in view of the right to fair trial particularly the right to be presumed innocent. The court's analysis of the

international standards on limitation of rights was enlightening and stimulating, coming from a court previously known for unexciting legal excursions. By a decision of two to one, the court declared section 25B (3) unconstitutional. The section has to be looked at and a conclusion made whether the court had justifiable grounds for such a finding.

The court in **Jumbe and Mvula** rightly observed that section 25B (3) does not create an offence but seeks to strengthen Section 25B (1). Both provisions read together create the reverse onus effect which is the subject of this inquiry. The prosecution has to prove firstly that the accused is a public officer. Secondly it has to be proved that the accused used, abused or misused his office or position. Thirdly such use, abuse or misuse has to be for his direct or indirect personal advantage or for the advantage of another person for the obtaining of wealth, property, and profit or business interest. According to section 25B (3) where the prosecution has proved that the accused was part of an arbitrary act that led to loss or damage of government property, he shall be guilty of the offence in section 25B (1) unless he proves the contrary.

4.3.6 Is Section 25B (3) A Reasonable Limitation to the Right to be Presumed Innocent in a free and Democratic Malawi?

In answering this question it must be established as to what was the intention of Parliament in enacting this provision. On the face of it, it is clear that the reverse onus is merely a part in the broader struggle against corruption and related practices. From that point of view, the international community has signalled its seriousness in combating corruption. This is exemplified by the adoption of the United Nations Convention against Corruption as well as numerous regional instruments against corruption.¹⁸⁴ In case of Malawi, the justification for reverse onus provisions in corruption related cases is not difficult to find. The necessity of section 25 was passionately argued by the

¹⁸⁴ These include the African Convention On Preventing and Combating Corruption and Inter American Convention Against Corruption.

Attorney General; in **Jumbe and Mvula** as a useful tool in combating the rampant levels of corruption in Malawi. Indeed the cancerous prevalence of corruption in Malawi is a notorious fact. In 2002, the then Director of Public Prosecutions made a startling declaration that over a third of government budgetary allocations every year go down the drain due to corruption.¹⁸⁵ The Transparency International Corruption Perception Index of 2006 indicates that Malawi is on position 105 as the least corrupt nation in the world, down from 97 in 2005 and 90 in 2004.¹⁸⁶ The problems caused by the high levels of corruption were acknowledged by the court, inspite of the fact that regrettably the State did not furnish any empirical evidence to highlight the extent of the problem. The majority of the court therefore did not think that the urgency to combat corruption per se justified infringing on the accuseds right to be presumed innocent. The majority should have recognised that the use of reverse onus provisions in corruption cases is accepted in many jurisdictions. A blanket rejection of reverse onus provisions in corruption cases seems erroneous. The Salmon Commission in England discussed the merits of retaining reverse onus provisions in corruption cases and concluded that:

*Such a burden can be justified only for compelling reasons, but we think that in the sphere of corruption the reasons are indeed compelling. It is difficult enough to prove the passing of a gift to a public servant from an interested party but when it occurs, it is normally strong prima facie evidence of corruption. If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it, the facts relating to the gift are peculiarly within their own special knowledge. We are satisfied that the burden of proof on the defence is in the public interest and causes no justice.*¹⁸⁷

It seems the court in **Jumbe and Mvula** did not broadly address its mind to corruption cases as such, but limited its scope to section 25B only. In this regard, the dissenting judgement of Mkwandawire J is useful in that he

¹⁸⁵ The then Director of Public Prosecutions, Mr. Fahad Assani as quoted in the Nation newspaper of April 27, 2000.

¹⁸⁶ Transparency International 2006 Corruption Perception Index released on 6th November 2006. Although the formula used by Transparency International has been disputed in certain quarters, the organisation classification of the levels of corruption prevalence worldwide has through the years grown in credibility and stature, and therefore worth relying on. See also Nation Online of 9th November 2006, *Malawi's Corruption Ranking Worsens* at <http://www.nationmalawi.com/articles.asp?articleID=19500>

¹⁸⁷ The Royal Commission of Conduct In Public Life (1976).

appreciated the broad worldwide efforts to combat corruption and the generally accepted limitations to the right to be presumed innocent in corruption cases. In **R v Oakes**, the court acknowledged the threat posed by drugs on the society and in this regard, felt that the threat was serious enough to warrant the reverse onus measure taken by government. It went ahead however to declare the concerned provision void.

The next question to be answered is whether the means employed by the Legislature in combating corruption, i.e. use of reverse onus reasonable and rational. In other words is there a rational connection between the basic fact of acting arbitrary resulting in loss of government property or money and the presumed fact of intentionally using, misusing, abusing ones office or position for an advantage?

To answer this question we may need to find out what arbitrary as defined in Section 25B (4) of the Act means:

For purposes of this section arbitrary in relation to actions of a public officer concerning the duties of his office, or directing the doing of anything contrary to:

- (a) Procedures prescribed by or under any written law or*
- (b) Established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.*

Where therefore a suspect does something contrary to established procedures or practice, he is guilty of misusing, abusing his office or position, unless he proves otherwise. For example where a public officer violates the procedures for procurement of goods and services under the Public Procurement Act, he will be guilty of misuse or abuse of office. The court found and rightly so that such a connection was not rational. Section 25B is similar to a reverse onus provision in a South African case, **S v Bhulwana** where section 21 (1) (a) (i) of the Drugs and Drug Trafficking Act 1992 provided that where an accused has been proved to be in possession of 115 grams of dagga it shall be presumed until the contrary is proved that the accused dealt in such dagga. The court struck down the provision holding that there was no rational connection between the facts that once found in possession of dagga an accused dealt in

such dagga. Indeed it was suggested that such dagga could be purely for personal use and not trafficking. The majority judges in **Jumbe and Mvula** used the **Bhulwana** analogy to determine that section 25B failed the rational connection test.

It is possible for an accused to do an arbitrary act purely out of negligence, and certainly not with intent to abuse, misuse his official position. To that extent, section 25B (3) is not reasonable, rational or proportionate. The conclusion of the court in **Jumbe and Mvula** can therefore not be faulted.

4.3.7 Section 32 of the Corrupt Practices Act

Section 32 of the Corrupt Practices Act contains another reverse onus provision geared towards increasing prosecution chances in obtaining convictions. It deals with the possession of unexplained wealth by public servants. This is also called illicit enrichment, defined as:

*..The significant increase in the assets of a public official or any other person which he or she cannot reasonable explain in relation to his or her income.*¹⁸⁸

The section provides:

1. *The Director, Deputy Director or any officer of the Bureau authorised in writing by the Director may investigate any public officer where there are reasonable grounds to believe that such public officer-*
 - (a) *maintains a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income,*
 - (b) *is in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income or*
 - (c) *is directly or indirectly in receipt of the benefit of any services which he may reasonably be suspected of having received*

¹⁸⁸ Article 1 of the African Convention on Preventing and Combating Corruption. Malawi has not ratified the convention.

corruptly or in the circumstances which amount to an offence under the Act.

2. *Any public officer who after due investigation carried out under the provisions under subsection (1), is found to-*

- (a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income,*
- (b) be in control or possession of pecuniary resources or property disproportionate to his present or past emoluments or other known sources of income or*
- (c) be in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under the Act, shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such possession, or he came to enjoy the benefit of such services he shall be guilty of an offence..*

It is important at this stage to discuss the section more extensively.

(a) What does the prosecution need to prove?

The prosecution has to prove firstly that the accused person is a public officer. In order to trigger the shift of burden to the accused it has to be proved that either he maintains an unusually high standard of living, or is in control or possession of resources and property, above or disproportionate to his official income or other known sources of income. The prosecution can also prove that the suspect has enjoyed the benefit of services reasonably suspected of

having been corruptly obtained. In seeking to prove the above, the state has to establish:

- (1) The amount of pecuniary resources and other assets in the accuseds control at the charge date
- (2) The accused's total emoluments up to the charge date
- (3) A disproportion between (1) and (2) i.e. the disproportion must sufficiently be significant as to call for an explanation.¹⁸⁹

Only when the above have been proved beyond reasonable doubt by the prosecution does the accused have to provide a satisfactory explanation.¹⁹⁰

- (b) Does the burden imposed on the accused relate to something difficult for him to prove or does it relate to something likely within his knowledge?

The accused has to give a satisfactory explanation to the court how he was able to maintain a high standard of living or such property or how he came to enjoy such benefits of services. A satisfactory explanation means that the accused has to convince the court on a balance of probabilities.¹⁹¹ Since the accused has to explain to the court his enjoyment of a particular standard of living or how he himself came into control or possession of such pecuniary resources or property, it is fair to conclude he is required to prove what is within his personal knowledge.

- (c) What is the nature of the threat faced by the society, which the provision is designed to combat?

It is clear that the threat sought to be dealt with by section 32 is the cancerous prevalence of corruption in the public service. Bribery has been described as an

¹⁸⁹ *Attorney General; of Hong Kong v Hui Kin Hong* [1995] 1 HKCLR 227. See also, Fung, Daniel, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience*, Paper Presented at the 8th International Anti-Corruption Conference, Lima Peru, 7th to 11th September 1997. The paper can be found at http://www1.transparency.org/iacc/8th_iacc/papers/fung.html.

¹⁹⁰ De Speville Bertrand, *Reversing the Onus of Proof: Is it Compatible with Human Rights Norms?* Paper presented at the 8th International Anti-Corruption Conference, Lima, Peru 7 to 11th September 1997. The paper can be found at http://www1.transparency.org/iacc/8th_iacc/papers/despeville.html.

¹⁹¹ *S v Abraham Coetzee and Three Others*

evil practice which threatens the foundations of any civilized society.¹⁹² As observed above the battle of combating corruption is a noble cause worth limiting the right to be presumed innocent in order to protect the greater public interest.

4.3.8 Is Section 32 A Reasonable Limitation to the Right to be Presumed Innocent In a Free and Democratic Malawi?

The objective of Parliament in enacting section 32 is clear as indicated above. What has to be shown next is whether there is a rational connection between the proved fact of the accused unexplained standard of living or accumulation of property and the presumed fact that the same were obtained corruptly or at least in general violation of the Corrupt Practices Act.

It should be noted that the primary responsibility to prove the unexplained accumulation of wealth by the suspect squarely rests on the prosecution. Upon proof beyond reasonable doubt that a suspects wealth could not have originated from his official earnings, the suspect is called upon to offer a satisfactory account for his wealth. The burden on the public officer to account for his wealth should be understood from the broader need for transparency in public service. This coupled with the notorious evidential difficulty in proving that a public officer has solicited or accepted a bribe,¹⁹³ justifies a reasonable presumption that a public officer living beyond the dictates of his earnings has been corrupted.

The use of provisions such as section 32 is universally recognised. Illicit enrichment is specifically mentioned as a corruption offence in Article 20 of the United Nations Convention against Corruption, Articles 8 and 9 of the

¹⁹² The Privy Council in *Attorney General of Hong Kong v Reid* [1994] 1 AC 324.

¹⁹³ *Mok Wei Tak v The Queen*, [1971] 1 WLR 1454 at page 1457, A-C. This is a Privy Council decision involving a case from Hong Kong on the legality of reverse onus provisions vis a vis the presumption of innocence in cases of unexplained wealth by public servants under section 10 of the Prevention of Bribery Ordinance.

African Convention on Preventing and Combating Corruption and the Inter-American Convention against Corruption, respectively. In both conventions states parties are urged pass legislation making illicit enrichment an offence. In this regard the use of reverse onus in combating the offence of illicit enrichment is internationally recognised as compatible with human rights standards. Section 32 of the Corrupt Practices Act therefore meets international standards.

In Hong Kong the Prevention of Bribery Ordinance provides for the offence of illicit enrichment in Section 10.¹⁹⁴ Section 34 of the Botswana Corruption and Economic Crime Act 1994 and Section 31 of the Lesotho Prevention of Corruption and Economic Offences Act [No 5] of 1999 also contain similar provisions.

The constitutionality of the Hong Kong provision has been tested in courts of law. Article 11(1) of Hong Kong's Bill of Rights has incorporated the ICCPR provision on presumption of innocence. In **Attorney General v Hui Kin Hong**, the accused, a former public servant being a senior estate surveyor with the Buildings and Lands Department was charged with illicit enrichment under section 10. He sought the nullification of the provision on the ground that it infringed his right to be presumed innocent. The Hong Kong Court of Appeal accepted that section deviated from the principle entrenched in Article 11 of the Bill of Rights. It however upheld the section observing that there are exceptional circumstances compatible with human rights that justify a degree of deviation from the principle of presumption of innocence.¹⁹⁵ The Privy Council went further in **Attorney General v Lee Kwong-kut** by laying down a test to be applied in striking a balance between individual rights and the need for reverse onus provisions in combating serious crimes:

While the Hong Kong Judiciary should be zealous in upholding individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done, the Bill will become a

¹⁹⁴ Prevention of Bribery Ordinance Chapter 201. The provision actually uses the term unexplained wealth as opposed to illicit enrichment.

¹⁹⁵ *Attorney General v Hui Kin Hong*, [1995] 1HKCLR 227 (CA)

*source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislatures attempt to resolve the difficult and intransigent problems with which the society is faced when seeking to deal with serious crime.*¹⁹⁶

On the strength of the international instruments against corruption and the jurisprudence cited above, it is fair to conclude that section 32 of the Corrupt Practices Act, meets the standards set in section 44(2) of the constitution of Malawi. It is a limitation of the right to be presumed innocent that is properly prescribed by law, it is reasonable, recognised by international standards, and necessary in an open and democratic [and corrupt free] Malawi.

For purposes of international human rights standards the section is in consonant with situation prevailing in several democratic countries. In that regard it should be expected to pass the constitutionality test in case of challenge in the future.

¹⁹⁶ *Attorney General v Lee Kwong-Kut* [1993] AC 951

5 RECOMMENDATIONS

4.1 General Recommendations

The problems affecting the criminal justice system in Malawi stem from its dictatorial past and the failure to cope with the demands of the new constitutional and international human rights standard. Any attempts to competently and sufficiently deal with the difficulties highlighted in the thesis, will need a wholistic and comprehensive approach. The reforms can be divided into three broad categories:

- (a) Legal and policy reform
- (b) Institutional restructuring
- (c) Changes in administrative and management practices.¹⁹⁷

(a) Legal and Policy Reform

The major policy change in the right direction is for the government to commit more resources and attention to the justice sector. It is appreciated that Malawi is facing more serious and urgent issues to address such as the HIV/AIDS pandemic, food shortage. However positive steps should be taken to improve funding to justice institutions. The eventual improvements are not expected to be overnight, but this thesis has just added to the many voices that practical steps need to be taken to address the current state of affairs. Enough resources will facilitate reform in all the three categories mentioned above. It is commendable that in the 2006/20007 Budget, allocations to governance institutions such as Ministry of Justice have been classified as pro poor expenditures. However this is may not be enough as the Judiciary itself continues being under funded.

Under legal reform the Executive and the Legislature need to speed up the process of reviewing many old pieces of legislation to bring them in line with

¹⁹⁷ Bazuka Mhango SC. Minister of Justice and Constitutional Affairs at the launch of the **Afrimap Malawi Justice Sector Report** Launch, Lilongwe, June 5 2006.

constitutional and international human rights standards. It is time however major steps were taken to address the unhealthy situation prevailing.

The Penal Code and the Criminal Procedure and Evidence Code have to be reviewed as soon as possible. Although the courts may strike down some provisions for unconstitutionality, as long as they remain on the statute books they will be enforceable thereby violating rights of accused persons.

(b) Institutional Restructuring

The Directorate of Public Prosecutions has to be restructured to reflect the crucial role it is playing in the rights of accused persons not only in murder cases but in cases involving all crimes. The operations of the Office are too concentrated in the major cities of Lilongwe and Blantyre. This largely explains why homicide case dockets have to go through a tedious administrative process before they reach the DPP's office. The effectiveness of the office has been severely affected by the current set up. A decentralised system is a long term solution to more effective and timely prosecution of cases. The Directorate of Public Prosecutions as a department within the Ministry of Justice has often times lost its independence and professionalism in handling cases. A move to autonomise the directorate would be a welcome development. This is the current trend in most Southern African countries.

The Malawi Police Service has to evolve from a poorly trained, understaffed and underequipped force to a human rights conscious service living to its mission statement as provided in section 153 of the constitution:

....to provide for the protection of public safety and the rights of persons in Malawi

There is enough evidence that torture, cruel and inhuman treatment continues to be used by the Malawi Police. Any measures of reform have to ensure that perpetrators of such practices are duly brought to justice.

The judiciary has a solid constitutional mandate to protect and enforce human rights. However the courts need to be more vigilant and should not hesitate to set practical and lasting standards of human rights when interpreting the constitution.

The Legal Aid Department in the Ministry of Justice lacks capacity to vigilantly offer legal assistance to homicide suspects as soon as they are arrested. An ongoing review of the Legal Aid by the Malawi Law Commission to establish an autonomous Legal Aid Board is a step in the right direction.

The Anti Corruption Bureau on its part has to move from a litigation minded approach of combating corrupt practices, to a corruption prevention mechanism.

© Changes in management and administrative practices

The factors that have hindered Malawi from making more progress in attaining international fair trial standards go beyond inadequate legal framework. The management and administrative practices retained in the criminal justice systems have also hindered progress. It is fair to observe that the criminal justice system in Malawi is still haunted by the ghosts of the first republic. Consequently the leading institutions need to be human rights conscious in their operations.

This can be achieved through training and re-orientation of staff, so that they are aware of the human rights standards and what is expected of them. For example the Ministry of Justice does not have human rights units. Consequently the ministry does not have the means or capacity to handle complaints of human rights violations.

4.2 Specific Recommendations

4.2.1 Use of Confession Evidence Obtained Through Torture

It has been demonstrated that section 176 of the CPEC is at odds with the international prohibition of torture, cruel inhuman and degrading treatment in as far as it allows the admission of evidence obtained through such means. The absence of any constitutional or criminal procedure rule specifically excluding

the admission of such evidence as required in international human rights law is a glaring gap in the law that needs addressing.

Understandably it is the sole duty of the legislature to enact legislation that is in line with the constitution. Since Malawi is still in transition from the old legal order to the new constitutional setup, it is understandable that legal gaps exist. However there is little evidence to suggest that the legislature has moved fast to fill such gaps or that there is intention to do so in the near future. This is a regrettable state of affairs, as the enjoyment of individual rights is not supposed to be held ransom by the delays of a slow legislature.

Legal reform is certainly an expensive exercise, but Malawi has to take steps to meet her international obligations to which she subjected herself by ratifications of major international human rights instruments. Of significant importance is the domestication of the Convention against Torture. Presently, torture is not a crime in Malawi such that perpetrators of such a practice would most likely get away with a charge of assault. The state of affairs is in violation of not only the obligations under the Rome Statute, but also section 46(5) of the constitution which provides for the criminalization of any violation of non derogable rights such as torture.

In view of the gap regarding evidence obtained through torture, the judiciary has to take a leading role as the main enforcer and protector of constitutional rights, in pointing out to the legislature those areas of the law falling below the constitutional standards. In the meantime, a strong message to the executive and legislature on the deficiencies of section 176 can be through the adoption of a practical judicial exclusionary rule and a resort to a trial within a trial to establish whether a confession statement has been obtained through torture. .

The long-term solution to the continued use of confession statements obtained through torture is for a clear exclusionary clause in the constitution, modelled along the South African and Canadian provisions. The South African exclusionary clause states:

Evidence obtained in a manner that violates any right in the Bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Such a provision encompasses the rejection of evidence obtained through torture as well as other illegally obtained evidence deemed by the court as likely to render the trial unfair.¹⁹⁸

Another option would be a constitutional provision, which specifically states that evidence obtained through torture, cruel and inhuman treatment is inadmissible. Such a provision is more desirable for two reasons. First, it clearly recognises and reinforces the *jus cogens* prohibition of torture. Secondly it would be necessary for any avoidance of doubt, and in my opinion leaves no room for uncertainty that can be created by the first option above.

4.2.2 The Right to Trial within a Reasonable Time in Homicide Cases

The current set up of homicide trials is a major contributing factor to the failure by prosecution authorities to bring suspects to court within a reasonable time. The conduct of the trials entirely depends on donor funds, a situation which is regrettable and unsustainable. In the words of the Supreme Court and High Court of Malawi Registrar, all problems of delays would not arise if government took its responsibilities of prosecuting and funding the trials.¹⁹⁹ It is time the government of Malawi made a decision to provide sufficient resources for the criminal justice system. This is a positive way of combating crime levels. No country is expected to perpetually cite lack of resources as an excuse for failure to respect the rights of individuals. As the HRC stated in General Comment 31 regarding the nature of obligations imposed on states parties under the ICCPR, the requirement to give effect to Covenant rights [which include the right to be tried within a reasonable time] is unqualified and of immediate effect. A failure to comply with the obligations can not be

¹⁹⁸ Such a broad exclusionary clause has been adopted by the Rome Statute on the International Criminal Court in Article 69(7), [UN.Doc. A/CONF.183/9].

¹⁹⁹ Sylvester Kalembera, Malawi Supreme Court and High Court Registrar, as quoted in answer to a questionnaire by email on 12th November 2006.

justified by reference to political, social, cultural or economic considerations within the state.²⁰⁰

Secondly there is need for a major overhaul in the coordination between police investigators and the DPP's office in handling of homicide case dockets. Presently there is no centralised system to ensure that once investigations are over the case dockets should be quickly sent to the DPP. As a result, the DPP finds problems to guide police investigators on whether the suspect has a case to answer or whether there is the need for further investigations. Normally the case dockets come to the attention of the DPP either when its too late to obtain further evidence or after an innocent suspect has been in custody for a long time, when he had no case to answer in the first place.

Thirdly, the judiciary has to set clear standards on the right to be tried within a reasonable time. The state has so far been getting away with fragrant violations of suspects rights by holding them in custody for long periods before trial. In addition such violations have almost always not been compensated. Unless faced with suits for violation of rights, the state is unlikely to wake up one day and decide to start respecting the right to be tried within a reasonable time.

Fourthly, suspects whose right to a speedy trial has been violated have a right to be granted effective remedies. So far there is no homicide case on record in which the courts of Malawi have thrown out charges against an accused or ordered compensation where there has been an excessive delay in trial. This position is in contrast with that obtaining in South Africa. Acting under the enforcement of rights clause in Article 38, the courts have a variety of remedies where a suspect has suffered great prejudice, the most drastic being a permanent stay of the proceedings against him. Describing the drastic nature of this remedy, Kriegler J stated in **Sanderson v Attorney General Eastern Cape**:

*The relief is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins- and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case- is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct*²⁰¹

²⁰⁰ Human Rights Committee General Comment No. 31, Doc. CCPR/C/21/Rev.1/Add.13 (General Comments).

²⁰¹ Sanderson v Attorney General of Eastern Cape, *ibid*.

Consequently, this is a remedy that is sparingly available, for example where an accused has been irreparably prejudiced by the delay. A permanent stay of proceedings would certainly be very radical in a Malawian case. The constitution in sections 41(3) and 46 (2) b provides for effective remedies where rights have been violated. Unless the courts take up the challenge and grant such effective remedies, this right will be rendered hollow and illusory.

Fifthly it has been suggested that trial by jury in homicide cases should be abolished, as this is an added cost and cause for delays. In terms of costs however, juries do not consume much of the total expenditures.²⁰² It may as well be argued that jury trials are faster, since once it has retired a jury almost always comes up with a verdict immediately. On the other hand judges sitting alone have been known to adjourn matters for long periods to give themselves time to go through submissions and do independent research. On that account, the abolishment of trials by jury can not per se improve things.

4.2.3 Reverse Onus Provisions in Theft, Fraud and Corruption Cases.

The threat posed by rampant plundering of public resources in Malawi through theft and corrupt practices has been well highlighted. This cancer is more acute with the advent of democracy. International human rights standards support the use of reverse onus provisions in combating crimes such as thefts, frauds and corruption mostly perpetuated by public servants. Section 283 of the Penal Code and Sections 25 and 32 of the Corrupt Practices Act are on the face of it acceptable tools in the broader war against these offences. However, a warning has to be made against the overdependence on reverse onus provisions. As noted in the thesis, the test that such provisions have to pass is tremendously high. Reverse onus provisions are certainly an endangered species.

Consequently, the authorities would do well to diversify the means with which to combat these offences. Criminal laws work to a certain extent, but the inadequacies of this route, require a comprehensive approach. In this regard,

²⁰² Each of the twelve jurors gets 200 Malawi Kwacha [about 2 US dollars] per day of trial, with each trial averaging three to seven days.

alternatives such as strict accounting procedures, transparency in budgetary allocations, public procurement, would go a long way in nipping frauds in their infancy. The recent passing of the Money Laundering Act is a welcome development in establishing a comprehensive legal framework for combating corruption and related offences.²⁰³

The government of Malawi does not in the first place appreciate the extent of corruption in the country. Indeed, this was evident when the Attorney General failed to produce evidence or an official picture of the extent of the problem in Malawi in **Jumbe and Mvula**. In essence, apart from the reverse onus provisions and political slogans, there is lack of a clear strategy to combat corruption.

The United Nations Convention against Corruption in Article 7 urges states parties to adopt maintain and strengthen systems that promote transparency.²⁰⁴

The African Convention on Preventing and Combating Corruption has highlighted the adoption of not only legislative but also other measures as well in fighting corruption and frauds especially in public service. Such measures include declaration of assets by public officials at the assumption of office.²⁰⁵

Ultimately the war against corruption can only be won by strong adherence to good governance practices by those in authority. Section 213 of the Constitution of Malawi provides that all senior public officials designated by Parliament should declare their assets three months after election, nomination or appointment. Unfortunately an enabling Act for this requirement is yet to be passed, over ten years after the introduction of the constitution. Unless such broad measures are taken to combat thefts, frauds and lack of transparency in public service, the threat posed by corruption can not be sufficiently dealt with.

²⁰³ The Act provides for seizure of the proceeds of crime. Unfortunately it does not provide for civil forfeiture.

²⁰⁴ United Nations Convention Against Corruption, Article 7(4)

²⁰⁵ African Convention On Preventing and Combating Corruption, Article 7(1)

CONCLUSION

The people of Malawi have cause to celebrate the tremendous progress made in the enjoyment of human rights within twelve years of democracy. The challenges have been huge, and are likely to get monumental. The progress made since 1994 would be of little consequence and value, if more effort is not put in to consolidate and cement the strides taken so far.

As the Minister of Justice put it recently, there are justified calls out there for speedy trials and better rights during and after trial. The first decade of any democracy is crucial, as it generally regarded as a transitional. The period calls for adjustment of the system and government machinery to the demands and higher standards set by democratic principles and the rule of law.

The first decade saw the establishment of several human rights and good governance institutions such as the Malawi Human Rights Commission, the Ombudsman, and the Anti Corruption Bureau. They continue to play a significant role in shaping a democratic Malawi. However the same period has exposed the threats that are facing the infant democracy, the first being the executive and legislative branches of government who have been the slowest to respond to the dictates of this new era. Consequently, they have continuously harboured ambitions of limiting and stepping on individual rights. This has called for a vibrant judiciary to check the wayward tendencies of the other two branches. The task has been done remarkably well by the judiciary, but there is more to be done.

As highlighted in the thesis, the judiciary has failed to take an extra step in rebuking government in clear cases of violations of rights especially in denying suspects trial within a reasonable time. While the courts have been eager to strike down government decisions or legislation, the same has not been true and frequent in case of criminal law legislation inherited from the pre democratic era. In this regard the judiciary needs to become more vigilant.

The dream of a democratic Malawi will only be attained in a culture of full respect for the rule of law. The quest to meet international fair trial standards is truly on its way but will need more effort, resources and focus.

SUPPLEMENT A

HOMICIDE RETURN FOR LILONGWE DISTRICT REGISTRY, HIGH COURT OF MALAWI

	Date Of Trial	Court	Case Number	Name Of Accused	Date Of Arrest	Offence	Finding And Sentence	Remarks
1	4 July 05	Dedza	17/05	Alfred Katchomoza	13 April 04	Manslaughter		Adjourned. Plea of not guilty.
2	4 July 05	Dedza		Maureen Avito	15 July 03	Manslaughter		Adjourned. Accused at Large
3	4 July 05	Dedza	13/05	Basikolo Sandalama	29 April 04	Manslaughter	Guilty	Sentenced to a term resulting in immediate release.
4	5 July 05	Dedza	19/05	Chikalipo Khoswe, Richard Chintengo		Manslaughter		Adjourned. Accused at large. WOA issued
5	5 July 05	Dowa		Petro Kanyama		Murder		Discontinued. Accused dead.
6	5 July 05	Dowa	14/05	Lyson Chitwere and Others		Murder		Accused at large
7	5 July 05	Dowa	18/05	Aledi Chidothi	22 July 04	Manslaughter	Guilty. Sentenced to 25 years IHL.	
8	9 July 05	Dedza	65/05	Pilizani Chambuka		Manslaughter	Guilty. Sentenced to 20 years IHL.	
9	9 July 05	Dedza		Ishmael Gome		Murder	Guilty. Sentenced to death	
10	12 July	Dedza	28/05	Dennis Robeni		Manslaughter		Discontinued in accordance with

	05							section 81(a) of CPEC.
11	12 July 05	Dedza	26/04	Chrissy Jordan		Manslaughter		Discontinued
12	12 July 05	Dedza	27/05	Pangume Mbozi		Manslaughter		Accused at large. WOA issued.
13	12 July 05	Dowa	24/05	Anock Black	16 March 02	Manslaughter	Guilty. Sentenced to 7 years IHL	
14	12 July 05	Dowa	23/05	Enock Masinja		Manslaughter		Accused to be arrested

15	12 July 05	Dowa	14/05	Lyton Chitwere		Manslaughter		Bail revoked.
16	14 July 05	Dedza	29/05	Joseph Nyirenda	29 May 00	Murder	Acquitted	
17	14 July	Dedza	30/05	Benson Kachingwe	25 May 04	Manslaughter	Guilty. Sentenced to 2 years IHL.	
18	14 July 05	Dedza		Samuel Davis	20 May 05	Murder	Acquitted	
19	15 July 05	Dedza	40/05	Richard Chimutu		Murder		Discontinued Accused dead.
20	15 July 05	Dedza	39/05	Laudani Msalira, Mavuto Msalira.		Murder		Adjourned. Accused on bail.
21	15 July 05	Dedza	41/05	Chatinkha Jiya		Murder		Matter moved to Blantyre.
22	19 July 05	Mchinji	59/05	Dickson Ziyaye	17 April 04	Manslaughter	Guilty. Sentenced to 15 years IHL.	
23	19 July 05	Kasungu	33/05	Chiyembekezo Taipi		Manslaughter		Adjourned
24	19 July 05	Kasungu	42/05	Austine Phiri		Manslaughter	Guilty. Sentenced to 5 years IHL	

25	19 July 05	Kasungu	34/05	Andrea Banda		Manslaughter	Guilty. Sentenced to 5 years IHL	
26	19 July 05	Kasungu	35/05	Paul Banda		Manslaughter	Guilty. Sentenced to 5 years IHL	
27	19 July 05	Mchinji	43/05	Francis Saka, Harry Nyirenda		Manslaughter	Ist accused Guilty. 2 nd Accused discontinued	Sentence into Immediate Release
28	19 July 05	Mchinji	36/05	John Sankhulani,		Manslaughter	Acquitted	
29	19 July 05	Mchinji	36/05	Patrick Kafuwa		Manslaughter	Guilty.	Sentence to Immediate Release
30	19 July 05	Mchinji	48/05	Yakobe Taulino		Manslaughter	Acquitted	
31	26 July 05	Nkhotakota	53/05	Manuel Akimu		Manslaughter	Acquitted	
32	26 July 05	Nkhotakota	43/05	Juli Mwenetanga	23 July 03	Manslaughter	Guilty. Sentenced to 2 years IHL	
33	26 July 05	Nkhotakota	18/05	Steria Fuwa Kamanga		Manslaughter		Discontinued.
34	26 July 05	Nkhotakota	55/05	Julius Makalani		Manslaughter		Adjourned
35	26 July 05	Mchinji	48/05	Howard Lingisoni	19 May 03	Manslaughter		Discontinued.
36	26 July 05	Mchinji	50/05	Henderson Dryson Nkhata	29 November 02	Manslaughter		WOA issued.
37	26 July 05	Mchinji	56/05	Zakaria Brahim, Madalitso Yotamu		Manslaughter		WOA issued.
38	26 July 05	Mchinji	57/05	Montfort Phiri, Henry Laisi, Alubino Laisi, Gerald Antonio	23 November 1998	Manslaughter		WOA issued.
39	26 July 05	Mchinji		Zambika		Manslaughter	Acquitted	

9	July 05			Mathews, Masauko Mphande				
40	26 July 0	Mchinji	49/05	Mcsensio Njobvu		Manslaughter	Guilty. Sentenced to 15 years IHL.	
41	26 July 05	Mchinji	51/05	John Elisa Pakulani	26 July 1997	Manslaughter		WOA issued.
42	1 Aug 05	Ntchisi	63/05	Mauka Banda and Others	25 June 2001	Murder	Discontinued	
43	1 Aug 05	Ntchisi	67/05	Chikhulupiliro Katengeza and Another	13 June 2005	Murder		
44	2 Aug 05	Mchinji	62/05	Mickson Lumwira		Murder		Adjourned. Accused at Large.
45	2 Aug 05	Mchinji	74/5	Frackson Jackson	19 Oct. 02	Murder		Adjourned. Accused at Large.
4	2 Aug 05	Mchinji		Jabesi Gilawe	25 February 03	Murder		Adjourned. Accused at Large.
4	24 Aug 05	Mchinji	75/05	Maliko Nkhoma		Manslaughter	Guilty. Sentenced to 8 years IHL.	
4	24 Aug 05	Kasungu	20/05	Thom Pofera Phiri	30 March 03	Murder	Guilty. Sentenced to death.	
4	30 Aug 05	Mchinji	78/05	Filiasi Chendelamwano		Manslaughter	Guilty. Sentence to immediate release.	
5	30 Aug 05	Mchinji	81/05	Chilekeni Mbewe	23 March 03	Murder		Discontinued.
5	30 Aug 05	Mchinji	80/05	Nickson Lumwira		Manslaughter		WOA issued.
5	30 Aug 05	Dowa	14/05	Lyson Chintwere, Mphatso Enock	13 July 04	Murder	Acquitted	
5	6 Sept	Kasungu	84/05	Peter Nkhoma		Murder		WOA issued.

	05							
54	9 Sept 05	Dedza	8/05	Datiele Sabiele	14 July 04	Murder		Adjourned. Accused hires Private lawyer
55	12 Sept 05	Mchinji	37/05	Dakiele Nowa	19 Oct 02	Manslaughter		Adjourned. State Fails to bring Accused.
56	14 Sept 05	Dedza	86/05	Chiwaka Phiri		Manslaughter	Guilty. 5 years IHL	
57	14 Sept 05	Dedza	26/04	Masiye Kachigwada, Laurent Goliati, Michael Laurent.	26 Oct 02	Manslaughter	Ist Accused guilty. 9 years IHL. 2 nd and 3 rd accused acquitted.	
58	19 Sept 05	Kasungu	92/05	Rueben Ziwise	18 July 01	Murder	Guilty. Sentenced to death.	
59	20 Sept 05	Kasungu	91/05	Stanley Milanzi		Manslaughter	Guilty. Sentenced to 15 years IHL.	
60	20 Sept 05	Kasungu	93/05	Jason Mwale		Murder		Accused on bail. Can be traced.
61	20 Sept 05	Kasungu	90/05	Emmanuel Khumbanyiwa and Others		Felony	Guilty. Sentenced to 3 years IHL.	
62	28 Sept 05	Kasungu	102/05	Emmanuel Yianakis, Harrisoni Morroco, Shadreck Sadalaki		Murder		Adjourned. Defence Unavailable.
63	28 Sept 05	Kasungu	103/05	Yahaya Daitoni	27 Jan 01	Murder		WOA issued.
64	28 Sept 05	Kasungu	105/05	Green Zunda, Thomasi Kashoni	30 Nov 99	Murder		WOA issued
65	28 Sept 05	Kasungu	104/05	Enelesi Labiyoni		Murder		WOA issued

66	2 Oct 05	Nkhotak ota	47/05	Mussa Shaibu Nkhoma		Manslaughter	Guilty	
67	12 Sept 05	Mchinji	74/05	Frackson Jakisoni.		Manslaughter	Acquitted	

SUPPLEMENT B

REPUBLIC OF MALAWI
DIRECTORATE OF PUBLIC PROSECUTIONS: HOMICIDE
SUSPECTS IN CUSTODY AS AT 11th NOVEMBER 2005

NUMBER OF SUSPECTS COMMITTED	NUMBER OF SUSPECTS NOT COMMITTED	TOTAL NUMBER OF HOMICIDE SUSPECTS IN CUSTODY
102	640	742

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