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title of dissertation

MANAGEMENT OF REVIEW CASES BY THE JUDICIARY:
THE IMPACT AND IMPLICATIONS ON OVERCROWDING IN
MALAWI PRISONS

by

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Submitted in part fulfilment of the requirement for the degree

MASTERS IN LAW

in the subject

CRIMINAL JUSTICE

at the

UNIVERSITY OF CAPE TOWN

SUPERVISOR: MS. KELLY PHELPS

FEBRUARY 2013

Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the LLM Criminal Justice in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the LLM Criminal Justice dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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word count: 24 647 (excluding bibliography and preliminary pages)

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Abbreviations

CHREAA	Centre for Human Rights Education Advice and Assistance
HC	High Court
HCPR	High Court of Malawi Principal Registry
ICCPR	the International Covenant on Civil and Political Rights
LLDR	High Court of Malawi Lilongwe District Registry
MLR	Malawi Law Reports
MWHC	Malawi High Court
SCA	Supreme Court of Appeal
SMR	the United Nations Standard Minimum Rules for the Treatment of Prisoners

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Acknowledgements

I would like to express my gratitude to many people for the support and encouragement that they have rendered me in the course of preparing this dissertation. I would like to thank my supervisor Ms. Kelly Phelps for her guidance and critique that encouraged and facilitated the research work.

I am indebted to the government of Malawi for the scholarship which enabled me to meet the expenses for my studies.

I am also grateful to my family for their moral support.

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Chapter 1

Introduction to the study

1. INTRODUCTION

Three visits by the head of state of the Republic of Malawi to prisons last year helped the media expose the conditions of detention in Malawi into the public limelight. The president undertook her first visit to Maula Prison on 21 March 2012 to provide moral support to a political detainee.¹ The second visit was undertaken to the same correctional centre on 11 May 2012.² During the visit she had an audience with all the prisoners, listened to issues from the inmates and donated hampers containing a variety of groceries worth 4.5 million kwacha.³ A third visit was to Mzuzu Prison on 22 July 2012.⁴ These visits are a recognition by the head of state that prisons are critical state institutions in the administration of penal justice and need to be adequately resourced. One major issue that was raised during the visits relates to the conditions of detentions in the prisons, especially in regard to the poor standard of accommodation and the lack of adequate space for inmates resulting in overcrowding.⁵ The state committed to construct a new prison in Lilongwe⁶ and a new cellblock in Mzuzu⁷ although it is doubtful whether additional holding facilities will effectively and efficiently alleviate the problem of prison overcrowding in the long term.

¹M Thom 'Veep condemns Atupele's arrest' *The Daily Times* 22 March 2012 at 1; L Sichali 'JB visits Atupele Muluzi in 'solidarity'' *Nyasa Times* 21 March 2012 available at <http://www.nyasatimes.com/malawi/2012/03/21/jb-visits-atupele-muluzi-in-%e2%80%98solidarity%e2%80%99/> accessed on 5th August 2012.

²D Mababa 'JB cheers inmates at Maula' *Zodiakonline* 11 May 2012 available at http://zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=4950:jb-cheers-inmates-at-maula-prison&catid=1:latest-news&Itemid=109 accessed on 3 August 2012.

³ *Ibid.*

⁴L Sichali 'JB says Malawi prisons should not be "hell on earth"' *Nyasa Times* 22 July 2012 available at <http://www.nyasatimes.com/malawi/2012/07/22/jb-says-malawi-prisons-should-not-be-hell-on-earth/> accessed 5 August 2012.

⁵ Mababa op cit (n2).

⁶ M Kutengule and K Jali 'Maula prison to have a new cell block by February this year' *Malawi News Agency* 31 January 2013 available at <http://www.manaonline.gov.mw/index.php/national/general/item/2071-maula-prison> accessed on 2 February 2013.

⁷ *Nyasa times* 'Malawi VP, Harry Mkandawire pledges K35m prison block' *Nyasa Times* 22 July 2012 available at <http://www.nyasatimes.com/2012/07/22/malawi-vp-harry-mkandawire-pledges-k35m-mzuzu-prison-block/> accessed 5 August 2012.

From January 2012 the conditions of detention for prisoners and the role of the courts in the criminal justice system had been the focus of media attention.⁸ The media frenzy was triggered by the industrial action that members of staff of the Malawi judiciary undertook from 9 January 2012 to 25 March 2012 that affected the right of access to the justice delivery system.⁹ The media reported that the end of the three month strike by the judiciary would ‘effectively decongest the country’s police cells and prisons as hundreds of suspects had been denied justice due to the strike’.¹⁰ The focus of the media is largely on constitutional rights of remand prisoners whose population is being reduced in response to commencement of trials by the magistrates’ courts after the industrial action.¹¹ The above statement is remarkable because the media are able to gauge that there is a link between the performance of the judiciary and the number of offenders in the prisons and police cells.

In the course of the strike an additional 974 remand prisoners increased the prison population from 12 450 to about 13 424.¹² The national inmate population statistics for May 2012 show that convicts (at 9 447 inmates), who are the subject matter of this study, consists of the majority (79 per cent) of the total prison population of 11 959 with the remand prison population at 2 481.¹³ Chichiri Prison in Blantyre district is as one of the prisons that is experiencing prison overcrowding with population ranging from 1 729 prisoners in May 2012, 1 692 in June 2012 and 1734 in August 2012.¹⁴ This prison is accommodating a majority of offenders whose cases are pending review at the High Court, Principal Registry.¹⁵ In May 2012 Chichiri Prison detained 1 077 convicted males while one-third of the remand

⁸ S Khunga ‘Govt bodies consult on judiciary strike’ *The Daily Times* 11 January 2012 at 1; S Maganga ‘Court strike may spark lawlessness’ *The Daily Times* 5 March 2012 at 3; M Musa ‘Police bail on ‘sale’’ *The Daily Times* 14 March 2012 at 3.

⁹ A Jere, S Khunga and M Musa ‘Judiciary staff want 50% hike’ *The Daily Times* 10 January 2012 at 1,3; C Somanje and P Pemba ‘Lawyers give govt ultimatum will act if Judiciary strike is not resolved – Mwakhwawa’ *The Nation* 8 February 2012 at 1-2; S Khunga ‘Courts reopen today’ *The Daily Times*, Monday 26 March 2012 at 3; M Musa ‘Autocracy fuels judiciary strike –Kapito’ *The Daily Times* 23 January 2012 at 1, 3.

¹⁰ Zodiac online ‘Judiciary strike ends’ 25 March 2012 available at http://zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=4662:judiciary-strike-ends&catid=42:banner-stories&Itemid=102 accessed on 3 August 2012.

¹¹ K Munthali ‘Govt risks costly lawsuits as Judiciary strike may violate constitutional rights - lawyers’ *The Nation* 16 January 2012 at 1-2.

¹² The Nation ‘Comment: Judiciary strike getting out of hand’ *The Nation* 8 March 2012 at 2.

¹³ Malawi Prison Service ‘Malawi prison population’ (2012)

¹⁴ Malawi Prison Service op cit (n13); CHREAA (2012) .

¹⁵ CHREAA (2012) .

prisoners (634) constituted of homicide suspects (236).¹⁶ The prison population drop between May 2012 and June 2012 was due to the reduction in number of remand male prisoners, which was reduced by 100 (from 373 to 263).¹⁷ On the other hand the convicted male population increased from 1077 in May 2012 to 1 158 in June 2012.¹⁸ The drop in the remand population explains the sudden increase in the convicted prison population, which is an indication that trials are in progress. However, the resumption of work by the judiciary staff would only impact on the convicted prisoner population if qualifying criminal cases are processed speedily by the High Court of Malawi either by way of review or appeal. The question that arises then is, how likely is the convicted prisoner population going to be affected by orders in confirmation? This question became the motivation to conduct this study.

The High Court of Malawi, hereinafter the High Court,¹⁹ under the Courts Act²⁰ has general powers of review and supervision over subordinate courts²¹ in criminal cases. The scope of these powers is delineated by s15 of the Criminal Procedure and Evidence Code, hereinafter the CPEC.²² The criminal review mechanism complements the right to appeal that all convicted prisoners have.²³ Criminal review of convictions and sentences of subordinate courts is important for several reasons. First, it is a means by which the appellate court can verify that a convicted offender was subjected to a fair trial by the court of first instance.²⁴ Secondly, the court driven appellate procedure provides access to justice for poor and vulnerable defendants.²⁵ Thirdly, the procedure confirms the appropriateness of punishment and develops sentencing consistency for like cases.²⁶

Fourthly, review is a viable strategy for controlling the prison population through early releases. This is because the review process may reverse a finding of conviction

¹⁶ Malawi Prison Service op cit (n13).

¹⁷ Malawi Prison Service op cit (n13); CHREAA (2012) .

¹⁸ Ibid.

¹⁹ Section 2 of the Courts Act.

²⁰ Act 1 of 1958.

²¹ Malawi has a three tier system of courts of Supreme Court of Appeal, High Court and subordinate (magistrates) courts; WLSA *In search of justice: women and the administration of justice in Malawi* (2000) at 55.

²² Acts 23 & 24 of 1968.

²³ *Republic v Nhlema* HCPR confirmation case no. 502 of 1994.

²⁴ WLSA op cit (n21) 70.

²⁵ S Gloppen and FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5(2) *International Journal of Constitutional Law* 258 at 268.

²⁶ *Republic v Matiya* HCPR confirmation case no. 806 of 1995 at 1-2; *Republic v M'munda* HCPR confirmation case no. 5 of 1996 at 2; *Republic v Seleyasiyo* HCPR confirmation case no. 1204 of 1997 at 2.

resulting in discharge of the offender and the modification of the sentence may result in a non-custodial sentence or a reduced period of imprisonment.²⁷ This dissertation argues that the efficient and consistent implementation of the criminal review system holds the potential to sustainably facilitate the control of the convicted prisoner population and thereby address issues of prison overcrowding in a cost effective manner.

2. RESEARCH OBJECTIVES AND METHODOLOGY

In terms of research design the objectives, assumptions and research questions largely determine what methodology will be used. This is a work-based study relying on desk-top research. The specific objectives appearing below have guided this study in assessing the effectiveness of implementing the convicted prisoners' right to review by the judiciary and its potential to impact on the size of the prison population. The objectives are as follows:

1. To identify means of reducing the convicted prisoner population through early releases.
2. To evaluate the caseload disposal rate of review matters by the judiciary.
3. To assess the number of sentenced prisoners awaiting review of conviction and sentence.
4. To discuss the challenges in handling review matters by the judiciary.

The objectives will be attained by conducting a literature review, relying on library research and browsing on the internet for relevant information on the topic. The method underlying this study begins with an examination of the position of law and literature in the area of prison overcrowding and prisoners' right to review of their criminal cases. There will be an analysis of primary sources such as international human rights instruments, legislation, case law and court statistics. Relevant published and unpublished secondary sources are also considered, such as, books, journal articles and seminar papers.

The dearth of local literature on the right to review confirmed that very little attention has been given to this appellate procedure within the criminal justice

²⁷ Section 353(2)(a) of the CPEC.

system.²⁸ This gap in information prompted the researcher to rely on her work experience in formulating the following research assumptions to guide this study:

- a. That most convicted prisoners have cases pending review.
- b. That prisoners live in overcrowded conditions of confinement.
- c. That magistrates delay transmitting criminal case records to the High Court for review.
- d. That the High Court reviews the majority of criminal cases summarily.

The research assumptions prompted the preparation of corresponding questions to guide this study. The following research questions helped to identify the data that will be required to address each research assumption for this study:

- a. How many convicted prisoners have cases pending review?
- b. What are the conditions for accommodating prisoners and how can overcrowding be mitigated?
- c. What is the period of time for transmitting files from magistrates' courts to high court?
- d. What is the case disposal rate for review cases?
- e. What are the challenges in handling review matters by the judiciary and what consequences does case management have on the sentenced prisoner population.

This study of assessing the efficacy of implementing the right to review and its possible impact on the convicted and sentenced prisoner population is relevant for the penal and criminal justice system in Malawi for the following reasons. First, convicted prisoners are a group of particularly vulnerable people in the criminal justice system and in society because having being tried, convicted and sentenced for a criminal offence they are castigated and regarded as criminals who deserve 'just deserts'²⁹ for their action.³⁰ The political support for retribution disregards prisoners'

²⁸ CM Johnson 'Post-trial judicial review of criminal convictions: a comparative study of United States and Finland' (2012) 64 *Maine Law Review* 425 at 427.

²⁹ RS Frase 'State sentencing guidelines: still going strong' (1994-1995) 78 *Judicature* 173 at 175; M Biggs *Judicial Discretion in Sentencing: Contrasting Reform in Foreign Jurisdictions with the South African System* LLM (University of Cape Town) (1999) at 2.

³⁰ W Kaguongo *Prisoner's Rights: The Role of National Human Rights Institutions in Africa* LLM (University of Pretoria) (2003) 3,10; A Rutherford *Prisons and the Process of Justice: The Reductionist Challenge* (1984) 14; A Von Hirsch 'Proportionate sentences: a desert perspective' in A Von Hirsch and A Ashworth (eds) *Principled Sentencing: readings on theory and policy* 2 ed (1998) 166 at 169.

rights as human beings and considers imprisonment as a deterrent for a criminal career.³¹ As a result, prisoners are dumped in deplorable prison conditions to serve their punishment. The treatment of prisoners disrespects the legal principle of residuum that entitle prisoners to all their rights, except that of liberty or those curtailed by the deprivation of liberty.³² The circumstance of incarceration not only incapacitates the offender but also constrains prisoners from fully exercising other human rights such as the right to appeal which holds the potential to change their status through reversing the trial court's finding and sentence.³³ However, access to legal assistance is severely constrained in situations of imprisonment that makes the enforcement of the right to appeal difficult.³⁴ Automatic review is a parallel system to appeal and holds the same potential of prisoners' regaining their status of liberty earlier than the imposed prison term, as would be a favourable outcome on appeal. The central argument in this dissertation is that the timely implementation of review is a critical factor in facilitating prisoner population turnover so that inmates can enjoy the right to adequate accommodation.

Secondly, this dissertation will bring to light the implementation challenges faced with the procedure of the right to review and suggest that convicted prisoners' right to adequate accommodation can only be enhanced where there is a 'caseflow management'³⁵ system that speedily disposes of review cases. Thirdly, this study shows the inter-linkages and inter-dependency that exists among the various key stakeholders in the administration of criminal justice that are dealing with prisoners and will contribute towards the improved understanding of the current case management of sentenced prisoners. It is expected that this research will reveal the urgency of the judiciary and prison authority in procuring modern case management systems that will facilitate the improved realisation of the right to review by convicted prisoners.

³¹ P Burton, E Pelser and L Gondwe *Understanding Offending: Prisoners and Rehabilitation in Malawi* (2005) 37; MS Vaughn 'Listening to the experts: a national study of correctional administrators' responses to prison overcrowding' (1993) 18 (1) *Criminal Justice Review* 12 at 23.

³² Kaguongo op cit (n30) at 17.

³³ FE Kanyongolo *Malawi Justice Sector and the Rule of Law: A Review* (2006) 118.

³⁴ Kaguongo op cit (n30) at 3.

³⁵ SL Wasby 'Appellate delay: an examination of possible remedies' (1981) 6(3) *The Justice System Journal* 325 at 332.

3. LIMITATIONS OF THE STUDY

This study focuses on whether the implementation of the right to review offers prospects for consistently and sustainably controlling the convicted prisoner population. Four challenges related to this area of research that have been identified are as follows: first, with its narrow area of focus on convicted prisoners the study does not discuss the challenges that remand prisoners or offenders who are tried by the High Court at first instance face at prison and at court, although their issues also remain quite critical. Secondly, accessing local information, whether published or unpublished, on the topics of inmate population and conditions in prison as well as the right to review was quite challenging. The data from manual confirmation case registers was in raw format which prolonged its preparation for processing in appropriate computer software for analysis.³⁶

Thirdly, court hearings for criminal cases take place every day of the working week and the convicted prisoner population and case disposal rates are bound to change rapidly. Consequently some of the data inevitably will change in the course of writing the thesis and thereafter. Fourthly, the researcher's employment position as registrar has enabled her to access data on review cases that is not usually disseminated to the court users, however, conducting a study that entails evaluating the performance of the registry, that she supervise, and judges, whom she obediently serve, raises issues of objectivity of the research findings. This work-based study is an opportunity for the researcher to reflect on her performance as a registry supervisor as well as the performance of the judges of the High Court, Principal Registry. It is hoped that this study also act as a reference point for further discussion and empirical research which can identify challenges and possible solutions for effective and efficient implementation of the right to review. There is need for in-depth 'participatory action research'³⁷ that will critically examine the exact nature of the linkages between criminal review of conviction and sentences and prison overcrowding.

³⁶ GJ Mwase 'Electronic case management: case study from Zomba registry' (2011) at 2; H Mia 'Draft record keeping handbook for the justice sector in Malawi' (2010) 17.

³⁷ K Udas 'Participatory Action Research as Critical Pedagogy' (1998) 2(6) *Systemic Practice and Action Research* 599-601.

4. OVERVIEW OF CHAPTERS

This dissertation is divided into five chapters. Chapter one is the introduction to the study and presents the research methodology used in this study. This will be followed by a discussion of the problem of prison overcrowding in chapter two. Recourse is made to statistical data on prisoner population to evaluate how effectively and efficiently the right to review has impacted on prisoner population. Chapter three gives an outline of the legal framework and the courts response to the implementation of the right to review. It will be contended that the flexible procedure of review offers the potential to control the convicted prisoner population in a transparent and independent manner. This argument will be based on an examination of case law to appreciate how the right to review has been interpreted by the judiciary. Chapter four will examine case registers and case law in order to assess the challenges affecting the management of review cases. Chapter five will provide the conclusion and recommendations on how best to expedite the process of review.

Chapter 2

Problem of prison overcrowding

The major challenge with the governance of prisons is that the number of prisoners keeps on increasing without a corresponding increase in prison cell capacity, thereby causing overcrowding problems.³⁸ This chapter will discuss legal commitments to manage prison conditions and the practical conditions of controlling prison population.

1. LEGAL COMMITMENTS

The current challenges that the Malawi Prison Service is experiencing in managing inmate population largely arises from the failure by the state through the prison authority to implement legal commitments at the international, regional and national levels. On the international level the relevant instruments that stipulate conditions for basic treatment of prisoners are: the International Covenant on Civil and Political Rights (ICCPR);³⁹ the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR);⁴⁰ the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules);⁴¹ the United Nations Body of Principles for Protection of all Persons under any form of Detention or Imprisonment⁴² and the Basic Principles for Treatment of Prisoners.⁴³

Article 10(1) of the ICCPR provides that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. Although incapacitation, deterrence, rehabilitation and retribution are advanced as the four purposes of incarceration,⁴⁴ article 10(3) of the ICCPR states the objective of imprisonment as the ‘treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. The challenges of prison

³⁸ Rutherford op cit (n30) at 97.

³⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

⁴⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁴¹ Adopted by General Assembly Resolution 45/110 of 14 December 1990.

⁴² Adopted by General Assembly resolution 43/173. 9 December 1988.

⁴³ Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

⁴⁴ S Krantz and LS Branham *Cases and materials on the law of sentencing, corrections and prisoners rights* (1991) 270-271.

overcrowding undermines the attainment of this objective of punishment due to the increased demand on under resourced rehabilitation programmes.⁴⁵

The SMR sets out what is ‘generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions’.⁴⁶ The particular rules that are relevant to this discussion are rules 9, 10, 19 and 60 which provide for minimum standards regarding accommodation for prisoners. Prison overcrowding has not been defined in the SMR but it is ‘understood to cover situations where the number of prisoners in a cell or dormitory exceeds the maximum capacity planned for it’.⁴⁷ However, several rules under the SMR regarding accommodation for prisoners are intended to prevent situations of overcrowding.⁴⁸ According to Dankwa⁴⁹ these include rules for selection of dormitory inmates,⁵⁰ health requirements,⁵¹ sanitary installations⁵² and bathing and shower installations.⁵³

The prison cells in Malawi are of a dormitory structure,⁵⁴ which makes rule 9(2) of the SMR pertinent. This rule requires that inmates for dormitories be carefully selected as being suitable to associate with one another. Further, rule 10 requires that all sleeping accommodation should ‘meet all requirements of health, due regard being paid to climactic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation’.⁵⁵ The measurement of the environment variables help to determine whether the prisoners are subjected to overcrowding. Rule 19 provides that prisoners be kept under hygienic conditions by supplying them with a separate bed and sufficient clean bedding. In regard to the condition of prison overcrowding rule 60 (1) is critical as it requires that prison regimen ‘should seek to minimise any differences between prison life and life at

⁴⁵ J Sarkin ‘Prisons in Africa: an evaluation from a human rights perspective’(2008) 9 *Sur-International Journal on Human Rights* 23 at 31; Kaguongo op cit (n30) at 9; CM Harris ‘Prison overcrowding-the time for policy change has come!’ (1990-1991) 18 *Florida State University Law Review* 489 at 489; Mercy Solijala ‘Reform and rehabilitation: the aim of punishment’ (1999) 4 *New Hope* 6 at 7.

⁴⁶ Rule 1 of the SMR.

⁴⁷ V Dankwa ‘Overcrowding in African prisons’ in J Sarkin ed *Human Rights in African Prisons* (2008) 83 at 83.

⁴⁸ *Ibid* at 84.

⁴⁹ Dankwa op cit (n47) at 84.

⁵⁰ Rule 9(2) of the SMR.

⁵¹ Rule 10 of the SMR.

⁵² Rule 12 of the SMR.

⁵³ Rule 13 of the SMR.

⁵⁴ *Masangano v The Attorney General* [2009] MWHC 31.

⁵⁵ Rule 10 of the SMR.

liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings’.

In the African regional context the instruments which set out the minimum standards for humane treatment of prisoners and better facilities for their conditions are the Kampala Declaration on Prison Conditions in Africa;⁵⁶ the Arusha Declaration on Good Prison Practice;⁵⁷ Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa.⁵⁸ These instruments are attempts to make provisions for reform of the penal and prison system. After noting the level of overcrowding in prisons the Kampala Declaration on Prison Conditions in Africa⁵⁹ recommends that prisons should have living conditions that are compatible with human dignity. Paragraph one of the plan of action recommends that imprisonment should only be imposed when there is no other appropriate punishment.⁶⁰ Incarceration should be restricted to serious offences or where the protection of the public requires it. The document emphasises that human rights should be safeguarded and the conditions of imprisonment should not aggravate their suffering.⁶¹ The Ouagadougou conference’s⁶² plan of action contains strategies for reducing prison population through alternative sentencing, review of sentencing practice and de-criminalisation of certain offences.⁶³ In terms of enforcement, judiciaries in the SADC region have upheld prisoners human rights in a number of cases.⁶⁴

a. National level commitments

On the national level the Constitution of the Republic of Malawi,⁶⁵ hereinafter the Constitution, and several other statutes provide for conditions for detention of prisoners and mechanisms for controlling the size of the prison population. This

⁵⁶ Adopted at the Kampala Seminar on prison conditions in Africa, September 1996 .

⁵⁷ 27 February 1999

⁵⁸ African Commission on Human and Peoples’ Rights, Burkina Faso, September 2002

⁵⁹ Adopted at the Kampala seminar on prison conditions in Africa, September 1996

⁶⁰ Paragraph 1.

⁶¹ Paragraph 5.

⁶² September 2002 - was set up to assess progress made since the Kampala seminar of September 1996.

⁶³ Paragraph 1; S Maganga ‘MHRC wants alternative sentencing’ *The Daily Times* 5 July 2012 at 3.

⁶⁴ *Conjwayo v Minister of Justice and Others*[1992] (2) SA 56 the South African court stated that prisoners do not forfeit their personal rights and that courts have a responsibility to enforce the constitutional rights of all persons including prisoners; *Mothobi v Director of Prisons and another*[1992] LSCA 92, the Lesotho High Court held that the living conditions of an awaiting trial prisoner are justiciable and have to comply with human rights provisions.

⁶⁵ Act No 20 of 1994.

section will provide an outline of the provisions in the Constitution that sets out the minimum standards for detention of convicted prisoners. This will be followed by an examination of the Prisons Act⁶⁶ and the Advisory Committee on the Granting of Pardon Act⁶⁷ in order to argue that criminal review of convictions and sentences can effectively complement the executive powers of regulating the prisoner population.

i. The Constitution

The Constitution as the supreme law of the land provides for the minimum standards in regard to the administration and management of conditions of detention for convicted prisoners.⁶⁸ These include the entrenchment of the right to be detained in conditions of human dignity as a fundamental human right of all persons in detention.⁶⁹ All legislation, procedure and practice relating to treatment and handling of convicted prisoners must therefore comply with the provisions of the Constitution.⁷⁰ In regard to conditions for prisoners s42 (1)(b) provides that

- (1) 'Every person who is detained, including every sentenced prisoner, shall have the right—
 - (b) to be held under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;'

Section 19 of the Constitution provides for the right to human dignity and personal freedoms by stipulating that:

- (1) 'The dignity of all persons shall be inviolable.
- (2) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (3) No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.'

The court in the case of *Masangano v The Attorney General*,⁷¹ hereinafter *Masangano case*, interpreted the right to human dignity under s19 of the Constitution as including the right of prisoners not be subjected to conditions of prison overcrowding. The High Court presiding over the abovementioned constitutional case had to determine whether the applicant's human rights as a prisoner had been infringed upon by the respondents by subjecting the applicant to torture and cruel, inhuman and degrading treatment or punishment. Gable Masangano, a convicted

⁶⁶ Act 9 of 1955.

⁶⁷ Act 9 of 1995.

⁶⁸ Kanyongolo op cit (n33) at 121.

⁶⁹ DM Chirwa *Human Rights under the Malawian Constitution* (2011) 419-420.

⁷⁰ Kanyongolo op cit (n33) at 122.

⁷¹ [2009] MWHC 31.

prisoner serving a sentence of 12 years imprisonment at Domasi Prison in Zomba District, commenced judicial review proceedings in October 2006, on his own behalf as well as on behalf of all prisoners in Malawi.⁷² The applicants averred that the respondents had failed to meet the minimum constitutional and statutory obligations in respect of the management of the prisoners and prison conditions.⁷³ The prisoners complained about deplorable prison conditions relating to: lack of a sufficient and nutritious diet;⁷⁴ lack of physical exercise;⁷⁵ lack of socialisation with fellow prisoners and access to communication;⁷⁶ lack of appropriate and adequate accommodation;⁷⁷ lack of clothing;⁷⁸ harassment and physical torture by prison warders; lack of access to medical attention.⁷⁹ The applicants contended that the overcrowding that they complained of must be interpreted by the court as degrading treatment as 'there is no other way of interpreting a situation where there are half naked prisoners surviving on a single meal of [pap] and beans or peas a day and living in overcrowded conditions'.⁸⁰

The respondents did not dispute the allegation of the constitutional violations but contended that they did not 'have the resources to comply with prescriptions of the Prisons Act at once'.⁸¹ The respondents asserted that the prisoners raised violation of socio-economic rights which involve the allocation of state resources through budgetary and policy decisions and are non-justiciable.⁸² The respondents submitted that the application for judicial review should be dismissed for the reason that the government had already devised and was implementing programmes aimed at progressively decongesting and improving the living conditions in prisons.⁸³ These plans include the completion of the construction of a new prison facility in the district of Mzimba;⁸⁴ the proposed re-opening of Mikuyu and Nsanje prisons after the completion of renovation works;⁸⁵ work plans for the construction of 300

⁷² Ibid at 3.

⁷³ Ibid at 5.

⁷⁴ Ibid at 3.

⁷⁵ Ibid at 5.

⁷⁶ Ibid at 4.

⁷⁷ Ibid at 4.

⁷⁸ Ibid at 4.

⁷⁹ Ibid at 4-5.

⁸⁰ Ibid at 13.

⁸¹ Ibid at 12.

⁸² Ibid at 18-19, 28.

⁸³ Ibid at 8.

⁸⁴ Ibid at 8.

⁸⁵ Ibid at 7.

capacity cell blocks in four prisons across the country;⁸⁶ and plans to construct two new prisons in the districts of Ntchisi and Mwanza.⁸⁷

The High Court noted the observations of the Malawi Prison Inspectorate in its annual report of 2004 that the condition of overcrowding was the most serious problem in the prisons and that while prison populations continue to grow the prison structures had remained static.⁸⁸ On the levels of congestion the court was given an example of a cell with the capacity to accommodate 80 prisoners, which housed 120 prisoners.⁸⁹ The chief commissioner of prisons conceded the situation of overcrowding and that in some prison centres the prison population was almost double the number of prisoners the prison was designed to hold.⁹⁰ The affidavit evidence revealed that due to overcrowding there were about 12 deaths per month in the prisons in 2004.⁹¹

The court held that the state had breached the prisoners' constitutional rights and that overcrowding and poor ventilation in the prisons amounts to inhuman and degrading treatment of the inmates.⁹² Apart from lack of adequate fresh air in the prisons, the 'inmates become packed like sardines, which made the sleeping conditions unbearable for the inmates'.⁹³ The court was compelled to find that

'such kind of conditions in relation to overcrowding and poor ventilation are not consistent with treatment of inmates with human dignity. Put simply, the overcrowding and poor ventilation in our prisons amounts to inhuman and degrading treatment of the inmates and therefore contrary to Section 19 of the Republic of Malawi Constitution'.⁹⁴

The court noted that prisoners' rights must be understood to mean the rights that prisoners have as human beings as they remain incarcerated in a prison.⁹⁵ The court

⁸⁶ Ibid at 8 & 53.

⁸⁷ Ibid at 8 & 53.

⁸⁸ Ibid at 15.

⁸⁹ Ibid at 4 & 52.

⁹⁰ Ibid at 41.

⁹¹ Ibid at 55.

⁹² Ibid at 59.

⁹³ Ibid at 55.

⁹⁴ Ibid at 55-56.

⁹⁵ Ibid at 37.

affirmed the principle of residuum in stating that even though prisoners are lawfully deprived of liberty, they are still entitled to basic or fundamental human rights.⁹⁶

This landmark ruling confirmed the position in international law that prisoners are entitled to be accommodated in conditions of human dignity while incapacitated.⁹⁷ This judgment will be socially transformative if the respondent complies with international minimum standards for adequate accommodation within the court given timeframe.⁹⁸ The ruling compels the respondents to undertake massive costly measures to create adequate accommodation space for the prisoners, through the construction of new prisons and refurbishment of the dilapidated structures.⁹⁹ The construction of new modern prisons to comply with minimum physical standards and improve the general condition of prison environment is long overdue, however, scarce financial resources constrain the undertaking of immediate construction projects.¹⁰⁰ The prison budget cannot be expected to be cost-effective and efficient because in a ‘decentralised criminal justice system’¹⁰¹ the prisons are on the receiving end and the courts have the mandate to determine the nature and length of sentence.¹⁰²

The construction of new prisons is one short-term strategy for alleviating overcrowding but it does not promote the prison ‘reductionist agenda’.¹⁰³ Reducing the physical capacity of the prisons and complying with the legal commitments on minimum standards is one mechanism for avoiding prison overcrowding and encouraging the implementation of alternative sanctions.¹⁰⁴ Prisons do not have the capacity to ‘adequately deter criminal activity nor rehabilitate offenders s effectively as alternative options’.¹⁰⁵ This dissertation argues that recourse to criminal review, as a statutory mechanisms of controlling convicted prisoner population, would be more effective in reducing prison growth in a sustainable manner. If the courts and the prison authority complied with s15 of the CPEC the implementation of the human

⁹⁶ Ibid at 59-60; D van Zyl Smit ‘Prisoners’ rights’ in Yvonne Jewkes ed *Handbook on prisons* (2007) 566 at 566.

⁹⁷ Chirwa op cit (n69) 420.

⁹⁸ Gloppen & Kanyongolo op cit (n25) at 272.

⁹⁹ Chirwa op cit (n69) 420.

¹⁰⁰ VM Mwale ‘Prison and budget’ (1999) 4 *New Hope* 29 at 30; *Masangano case* supra (n54) at 21.

¹⁰¹ KL Avio ‘The economics of prison’ (1998) 6 *European Journal of Law and Economics* 143 at 146.

¹⁰² Ibid at 147; Vaughn op cit (n26) at 13.

¹⁰³ Rutherford op cit (n30) at 175.

¹⁰⁴ Ibid at 175-176.

¹⁰⁵ Harris op cit (n45) at 494.

rights provisions for prisoners in relation to adequate accommodation would be enhanced in a much more cost effective manner..

Other than the general remissions on sentences imposed under s107 of the Prisons Act, the review procedure provides the prison authority with an early release mechanism to avoid prison overcrowding. Section 15(3) of the CPEC mandates the prison authority to discharge all prisoners whose cases have been delayed by the processes of review, even though the sentences on the warrants of commitment have not expired. This provision may sound radical but the legislature foresaw the need for regular prisoner population turnover in order to avoid the situations of overcrowding that the penal institution is currently experiencing. If the prison authority invoked this provision almost half of the convicted inmates would be discharged and the prisons budgetary allocations would not be under severe constraint. This because in the absence of review prisoners can only be detained to a maximum period of two years. The short prison terms reduces the prison population and prison cell space would be more efficiently utilised by accommodating more offenders of shorter sentences.¹⁰⁶ Consequently the prisons can utilise the same budgetary allocation to serve more offenders.

As prison conditions worsen, viable and cost effective strategies need to be developed that can reverse prison overcrowding. Criminal review of convictions and sentences complements the granting of pardon¹⁰⁷ and remission of sentence¹⁰⁸ as statutory mechanisms for regulating the convicted prisoner population.

ii. The Prisons Act

The Constitution and the Prisons Act set out a broad set of rights for prisoners, including rights relating to conditions of confinement and remission of sentences. Provisions of the Prisons Act relating to accommodation are outdated and the Act needs to be repealed so that its provisions are brought into compliance and consistency with the Constitution and the SMR.¹⁰⁹ The Prisons Act regulate the turnover of prisoner population through general remissions and special grounds

¹⁰⁶ J Sloth- Nielsen and L Ehlers ‘Assessing the impact: Mandatory minimum sentences in South Africa’ (2005) 14 *SA Crime Quarterly* 15 at 17.

¹⁰⁷ Section 89(2) of the Constitution.

¹⁰⁸ sections 107 and 108 of the Prisons Act.

¹⁰⁹ Kanyongolo op cit (n33) at 122; KAL Nkhoma ‘Reduction of overcrowding: increasing human rights observance in prisons’(2012) 6.

under ss107 and 108, respectively. The prison authority can discharge a convicted prisoner upon the expiration of his sentence with a general remission of one-third of the imposed sentence applied.¹¹⁰ The general remissions is time bound as it depends on the sentence imposed on the convicted prisoner and implementation may not be regular in comparison to criminal review.

The special remissions are based on the commissioner of prisons recommending to the President that remission should be granted to a prisoner by reason of the ‘meritorious conduct or the mental or physical condition of such prisoner’.¹¹¹ Special remissions may be subject to abuse and corruption since the Prisons Act does not state the parameters for ‘meritorious conduct’ and their frequency.

iii. Advisory Committee on the Granting of Pardon Act

The third statutory mechanism for governing early release from prison is through pardon by the head of state.¹¹² Presidential pardon is provided for under s89(2) of the Constitution and the power of pardon is usually exercised annually when the country commemorates independence.¹¹³ Prisoners expressed concern over the inconsistent exercise of this privilege by the President.¹¹⁴ In July 2012 the President ordered the release of 377 prisoners while rejecting 11 other prisoners on the basis of zero tolerance for sexual offences.¹¹⁵ The procedure on pardon is shrouded in secrecy, lacks transparency and prisoners have conveyed despondency about it.¹¹⁶ The mass releases hold the potential for possible ‘abuse’¹¹⁷ as the process has the potential to

¹¹⁰ Section 107 of the Prisons Act.

¹¹¹ Ibid.

¹¹² FE Kanyongolo *Malawi Justice Sector and the Rule of Law: A Discussion Paper* (2006) 9; Kanyongolo op cit (n33) at 59; CH Rolph *The Queen’s pardon* (1978) 112-113; *Republic v Waduwa* [1993] 16(2) MLR 751 (HC) court only released order first accused since second accused had been released under the presidential pardon.

¹¹³ S Maliro ‘President Bakili Muluzi visits Zomba Prison’ (2001) 9 *New Hope* 10 at 11. The President pardoned 800 prisoners in July 2001.

¹¹⁴ Nyasatimes ‘JB visits Maula Prison: inmates ask for pardon’ available at 11 May 2012 <http://www.nyasatimes.com/malawi/2012/05/11/jb-visits-maula-prisons-inmates-ask-for-pardon/> accessed 5 August 2012; PANA 9 July 2012 available at <http://www.afriquejet.com/malawi-prisoners-riot-over-controversial-presidential-pardons-2012070941579.html> accessed on 5 August 2012.

¹¹⁵ PANA 9 July 2012 available at <http://www.afriquejet.com/malawi-prisoners-riot-over-controversial-presidential-pardons-2012070941579.html> accessed on 5 August 2012

¹¹⁶ J Khakona & B Kabango ‘Chaos at ZA prison: one dead, 20 injured’ *The Nation* 10 July 2012 at 2; New Hope ‘Malawi Inspectorate of Prisons executive summary 2000’ *New Hope* 26 at 36.

¹¹⁷ Kanyongolo op cit (n33) at 59-60.

unleash onto society dangerous offenders.¹¹⁸ For instance, in 2012, prisoners staged a riot protesting the release of two prisoners who were supposed to be imprisoned for rape and murder.¹¹⁹ The executive prerogative of granting pardon can have a positive impact on the situation of overcrowding especially when a large number of prisoners are released at one time.

2. THE PRACTICAL SITUATION OF PRISON CONDITIONS AND OVERCROWDING

Prison overcrowding is an issue that affects a lot of countries on the African continent and beyond.¹²⁰ Population density in prisons is not easy to calculate as it depends on terminology used by an establishment.¹²¹ In general overcrowding is measured according to the spatial density (the floor space measured in terms of square metres per person) together with other factors that may be classified as social density (number of persons in one space) and privacy (the time an individual can spend on their own).¹²² Prison accommodation is also assessed through factors such as daily time spent in cells and exercise, access to ventilation, quality of food and work.¹²³ Overcrowding being ‘lived and experienced in the cell’,¹²⁴ the amount of time that prisoners can spend outside the cells helps to relieve the negative effects of this condition. The challenge of prison overcrowding in Africa is that the number of prisoners has been increasing over the years while the number of facilities for accommodating them has remained static.¹²⁵

The special rapporteur on prisons and conditions of detention in Africa points to overcrowding as the main concern in prisons in Malawi and recommended that a

¹¹⁸ J Khakona ‘Prisoners protest against pardon of two’ *The Nation* 9 July 2012 at 3.

¹¹⁹ S Maganga ‘Prisoner protest presidential pardon’ *The Daily Times* 9 July 2012 at 1.

¹²⁰ J Sarkin ‘An overview of human rights in prisons worldwide’ in J Sarkin ed. *Human Rights in African Prisons* (2008) 1 at 14; Sarkin op cit (n45) at 26; Kaguongo op cit (n30) at 12-13; Rutherford op cit (n30) at 4; D Killingray ‘Punishment to fit the crime? Penal policy and practice in British colonial Africa’ In Florence Bernault (ed) *A history of prison and confinement in Africa* (2003) 97 at 101; A Cuamba *Prisoners’ Right to Remunerated Work: A Case of Mozambique* LLM (University of Pretoria) (2010) 11.

¹²¹ A Kensey and P Tournier ‘Prison population inflation, overcrowding and recidivism: the situation in France’ (1999) 7 *European Journal on Criminal Policy and Research* 97 at 107.

¹²² Nkhoma op cit (n109) at 3; Rutherford op cit (n30) at 98-99; RB Cole and JE Call ‘When courts find jail and prison overcrowding unconstitutional’ (1992) 56 *Federal Probation* 29 at 30-31.

¹²³ J Steinberg ‘Prison overcrowding and the right to adequate accommodation in South Africa’ (2005) 1; A Brivik *The impact of overcrowding on prisoners’ rights* LLM (University of Cape Town) (2005) 30.

¹²⁴ C Giffard & L Muntingh *The effect of sentencing on the size of the South African prison population* (2006) 8-9.

¹²⁵ J Sarkin op cit (n120) at 15; C Tapscott ‘Challenges to good prison governance in Africa’ in J Sarkin ed. *Human Rights in African Prisons* (2008) 67 at 73; *Masangano case* supra (n54) at 52.

maximum occupancy level be established for each place of detention.¹²⁶ The prison population increased from 5 557 in 1997 to 7 728 in 2000 and in 2001 it was at 7800.¹²⁷ In 2001 the majority of the prisoners, over 90 per cent, had cell space of two square metre or less, which is against international standards.¹²⁸ The highest number of prisoners per square metre were in the four prisons of Chichiri (2.29), Mzuzu (1.29), Mzimba (1.15) and Maula (1.05).¹²⁹

The prison population trends indicate that the prison population is rising rapidly with figures doubling over a ten year period between 1993 (4 685) and 2004 (9 220)¹³⁰ largely due to changes in sentencing policy.¹³¹ In 2010 the prison population had increased to 11 672 inmates.¹³² In December 2011 the number of institutions was 30, with an official capacity of 5 500 and a total prison population of 12 033 representing an occupancy level of 218.8 per cent.¹³³ The number of offenders detained in prisons depends on the arrests by the police and sanctions of imprisonment made by the courts, which, implies that the statistics are constantly changing overtime. In 2012 the national prison population was 11 959 in May and slightly decreased to 11 889 in August.¹³⁴ The holding capacity and population in August 2012 appears in tables 1a and 1b. The statistics in tables 1a and 1b reveal that 24 out of the 30 operational prison centres are overcrowded, with 12 centres accommodating more than double the design capacity.

¹²⁶ VM Chirwa 'Prisons in Malawi: report of the Special Rapporteur on Prisons and Conditions of Detention in Africa' (2001)33 and 43; SG Mwakilama *Prisoners' Rights in Malawi since Independence: 1964 to 2005, A history of Malawi Prison Service and rights of prisoners* (nd) 27.

¹²⁷ Chirwa op cit (126) at 33 & 43.

¹²⁸ Ibid at 9-10; Brivik op cit (n123) at 36.

¹²⁹ Chirwa op cit note (n126) at 9-10; *Masangano case* supra (n54) at 53.

¹³⁰ International Centre for Prison Studies available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=30, accessed on 6th August 2012.

¹³¹ T Junger-Tas 'Recent trends in sentencing policies in the Netherlands' (1998) 4 *European Journal on Criminal Policy and Research* 479 at 496.

¹³² International Centre for Prison Studies op cit (n130).

¹³³ International Centre for Prison Studies op cit (n130).

¹³⁴ Malawi Prison Service op cit (n13); CHREAA (June 2012)

Table 1a: National prison occupancy level, 31 August 2012, source Malawi Prison Service

Name of prison	Holding capacity	Prison population	Occupancy rate
Southern region			
Chichiri	750	1 734	231%
Mulanje	250	372	148%
Mwanza	150	227	151%
Thyolo	100	130	130%
Nsanje	100	152	152%
Chikwawa	250	377	150%
Luwani	50	37	74%
Bangula	0	0	0
Makhanga	50	45	90%
Makande	300	209	69%
Bvumbwe	50	200	400%
central region			
Maula	750	2 000	267%
Kachere	50	160	320%
Byanzi	60	60	100%
Kasungu	250	232	93%
Ntchisi	100	235	235%
Nkhotakota	100	258	258%
Dedza	100	290	290%

Table 1b: National prison occupancy level, 31 August 2012, source Malawi Prison Service

Name of prison	Holding capacity	Prison population	Occupancy rate
eastern region			
Zomba	800	2 019	252%
Domasi	250	260	104%
Mikuyu 1	250	298	119%
Mikuyu 2	250	310	124%
Mpyupyu	200	189	95%
Mangochi	100	257	257%
Ntcheu	150	230	154%
Northern region			
Mzuzu	75	502	669%
Mzimba	250	517	207%
Karonga	NA	40	NA
Chitipa	100	140	140%
Rumphi	50	275	550%
Nkhatabay	100	134	134%
total 30	6 035	11 889	197%

A Malawi Human Rights Commission¹³⁵ monitoring exercise and analysis of detained persons during the strike found overcrowded levels of occupation by prisoners in cells in the following prisons: Mikuyu 2, Thyolo, Chikwawa, Chichiri and Bvumbwe.¹³⁶ A draft report of the Commission's findings show that accommodation in Malawi's prisons which is in the form of dormitories 'in most cases allows for as many prisoners to an extent that most are overly congested'.¹³⁷ The dormitory design of cells facilitate the compression of many inmates in a confined space which lead to each prisoner sleeping ' while seated in a space of

¹³⁵ Section 13(1) (c) of the Human Rights Commission Act mandates the Commission to promote rights of the vulnerable groups, such as, prisoners and persons under police custody.

¹³⁶

¹³⁷ MHRC para 13.2, draft report not yet officially released.

about 30 square centimetres'.¹³⁸ This explains why in the *Masangano case* the inmates are described as being packed like 'sardines'.¹³⁹

Overcrowding is identified as the root cause of problems such as 'lack of blankets, adequate food, soap, medicine, the inadequate numbers of staff and also the increase in the spread of diseases'.¹⁴⁰ Another consequence of confining prisoners is the increase in number of prisoners dying while serving sentence.¹⁴¹ The Inspectorate of Prisons¹⁴² has identified overcrowding as one of the challenging issues in the administration of penal institutions.¹⁴³ An offender study¹⁴⁴ on the nature and experience of prisons within Malawi notes as a common concern the congestion by prisoners.¹⁴⁵ A study on the review of the criminal justice sector confirms the rising number of persons in detention and the worsening conditions of accommodation which result in overcrowding.¹⁴⁶

Courts need to operate regularly as the various phases of a criminal trial can have a significant impact in regulating prison population. The pre-trial procedures reduce prison duration and prison overcrowding when magistrates grant bail to offenders and refer parties to alternative dispute settlement. At the trial and sentencing stages some offenders may be acquitted, while those convicted may be sentenced to non-custodial forms of punishments. At the post-sentencing stage an appeal or review may lead to a reversal of the finding of conviction and sentence. The post-trial phase, which is the focus of this study, is facing challenges in impacting on the turn-over of the prison population due to caseload volume and delays in hearing cases. In other words, the question that is being asked is: what

¹³⁸ A Sharra 'Congestion in prison: any hope' *Nation Online* 28 January 2013 available at <http://www.mwnation.com/features-the-nation/development/15013-congestion-in-prison-any-hope?highlight=YT0zOntpOjA7czo2OiJwcmVmdlc3Rpb24iO30=> accessed 1 February 2013.

¹³⁹ *Masangano case* supra (n54) at 55.

¹⁴⁰ Chirwa op cit (n126) at 33 and 43; TP Thornberry and JE Call 'Constitutional challenges to prison overcrowding: the scientific evidence of harmful effects' (1983-1984) 35 *The Hastings Law Journal* 313 at 331; DS Nyangulu et al 'Tuberculosis in a prison population in Malawi' (1997) 350 *The Lancet* 1284 at 1286.

¹⁴¹ Sarkin op cit (n45) at 27.

¹⁴² Section 169 of the Constitution mandates the Inspectorate of Prisons to monitor conditions, administration and general function of penal institutions.

¹⁴³ New Hope 'Malawi Inspectorate of Prisons executive summary 2000' (2000) 7 *New Hope* 26 at 27; New Hope 'Overcrowding in Malawi prisons' (1999) 4 *New Hope* 25 at 25; *Masangano case* supra (n54) at 52.

¹⁴⁴ Burton et al op cit (n31).

¹⁴⁵ Burton et al op cit (n31) at 82.

¹⁴⁶ Kanyongolo op cit (n33) 123-125.

viable strategies can be implemented to decongest the convicted prisoners from confinement?

Table 2 shows that the majority of the prisoner population in the prisons in the country are convicted offenders (9 447) with the remand population at about 21 per cent (2 481). The gender disaggregated data shows that the majority of the convicted prisoner population are males at 8 619 as compared to women at 92 while 687 are young offenders.¹⁴⁷ The strike brought court proceedings to a standstill and increased the period of duration on remand which explains the high number of remand prisoners that were detained.¹⁴⁸ As has already been mentioned, during the strike stakeholders in the criminal justice system were complaining of congestion in police cells¹⁴⁹ and prison cells¹⁵⁰ as court users could not access justice and blamed the judiciary for turning ‘prisons and police cells hell [o]n earth with prisoners and suspects packed like sardines because all the courts are closed due to the strike’.¹⁵¹

Table 2: Malawi prison population as at 2 May 2012, source Malawi Prison Service

prisoner type	convicted	remand	children	Grand total
population	9 447	2 481	31	11 959

Table 3 shows the breakdown of the 742 convicted prisoners at Chichiri Prison with cases pending review disaggregated by the grade of the magistrate who tried their case.¹⁵² From table 3 it is asserted that in terms of section 15(3) of the CPEC the prison authority can only detain the 165 prisoners, without their cases being reviewed, for a maximum of period two years since they appeared before a resident magistrate. Similarly, 514 convicted prisoners can only be detained for a maximum period of one year since they were tried first and second grade magistrates, while 63 prisoners can only be detained for a maximum period of six months in respect of the third grade magistrates. If the prison authority exercised

¹⁴⁷ Malawi Prison Service op cit (n13).

¹⁴⁸ Kensey & Tournier op cit (n121) at 101.

¹⁴⁹ At Salima Police, the number of 15 suspects per cell had doubled.

¹⁵⁰ Nkhotakota Prison has 285 inmates in cell capacity of 150 inmates.

¹⁵¹ R Sinoya, ‘Judiciary strike clocks one month’ 7 February 2012 Zodiakonline, available on http://zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=4307:judiciary-strike-clocks-one-month&catid=41:top-headlines&Itemid=97 accessed on 3 August 2012

¹⁵² Section 33 of the Courts Act establishes the four magistrates courts in order of seniority of resident, first grade, second third grade and fourth grade as subordinate to the High Court. A court of a resident magistrate is constituted by a lawyer and is of a higher grade than a court of magistrate of a first grade magistrate which is constituted by a paralegal.

their powers under s15(3) of the CPEC the convicted prisoner population would be drastically reduced and alleviate the condition of prison overcrowding.

Table 3: offenders at Chichiri prison with cases pending review, as of 26 June 2012, source: CHREAA

Presiding Magistrates' Grade	Number of offenders
Chief Resident Magistrate	57
Principal Resident Magistrates	39
Senior Resident Magistrates	69
First Grade Magistrates	338
Second Grade Magistrates	176
Third Grade Magistrates	63
Grand Total	742

3. CONCLUSION

Malawi has legal obligations to protect, fulfil and uphold the prisoners right to adequate accommodation. With the rapid increase in prison population viable strategies need to be devised in order to control the convicted prisoner population. Three statutory strategies that have been identified so far include implementation of remissions, granting of pardon and criminal review of convictions and sentences. In the next chapter it will be contended that review is a strategy that holds the potential to alter the convicted prisoner population and positively impact on the condition of overcrowding.

CHAPTER 3

The right to review

1. LEGAL FRAMEWORK

This chapter will provide an outline of the legal framework on the right to review. The analysis of the Constitution and statutes that governs the revisory power of the High Court over subordinate courts will argue that the timely implementation of review of convictions and sentences can effectively facilitate the control of the prison population and mitigate overcrowding.

a. The Constitution

Section 42 of the Constitution provides for the right to access to justice and fair trial. The right to criminal review is expressly provided for under s42(2)(f)(viii) of the Constitution which states that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, has the right—

- (f) ‘as an accused person, to a fair trial, which shall include the right—
- (viii) to have recourse by way of appeal or review to a higher court than the court of first instance’

The power of review of criminal matters by the High Court predate the constitutional provision as they are provided for under the Courts Act¹⁵³ and the CPEC.¹⁵⁴ The Constitution has made a significant contribution to the human rights of offenders by elevating a statutory power¹⁵⁵ to a fundamental human right which a prisoner can enforce. Review is a constituent part of the process of a fair trial although the process occurs after conviction and sentencing. Besides the optional appeal¹⁵⁶ process, which is initiated by the prisoner, the system of review is an alternative revisionary process which is court driven.¹⁵⁷ The review system ‘is able to remedy errors of law made by judicial officers’¹⁵⁸ and ensures that a superior court has the opportunity to confirm that a defendant underwent a fair trial and is not subjected to ‘a risk of erroneous conviction’¹⁵⁹ or disproportionate punishment. If defects are detected in the trial

¹⁵³ Sections 25 and 26.

¹⁵⁴ Section 15.

¹⁵⁵ Before 1994 review was only provided for under the Courts Act and the CPEC.

¹⁵⁶ Section of the 346 of the CPEC.

¹⁵⁷ *Republic v Dimingu* HC/PR confirmation case no. 850 of 1999.

¹⁵⁸ L van de Vijver (ed) *The Judicial Institution in southern Africa: a comparative study of common law jurisdictions* (2006) 73 at 89.

¹⁵⁹ MM Arkin ‘Rethinking the constitutional right to a criminal appeal’ (1992) 39 *UCLA Law Review* 503 at 514.

procedure the High Court with its unlimited original jurisdiction has extensive powers of remedying them. ‘Judges exercise extraordinarily wide discretion’¹⁶⁰ to reverse the finding and sentence and acquit or discharge the accused;¹⁶¹ alter the finding on sentence by reducing manifestly excessive sentences¹⁶² and alter the nature of the sentence.¹⁶³

b. The Courts Act

The Courts Act is one of the two statutes that provide for the extensive powers of review that the High Court can exercise in criminal matters. Section 25 of the Courts Act gives the High Court powers to review criminal proceedings and matters of subordinate courts in accordance with the relevant provisions of the CPEC. Section 26 of the Courts Act provides for general supervisory powers of the High Court applicable to criminal matters still pending in the subordinate courts. This provision has to be read in conjunction with ss70,¹⁶⁴ 74¹⁶⁵ and 75¹⁶⁶ of the CPEC. Section 28 of the Courts Act states that a party does not have a right to be heard, either personally or by a legal practitioner, when the High Court is exercising its powers of review or supervision. The proviso to s28 is to the effect that no order shall be made to the prejudice of any person unless such person has had an opportunity of being heard.¹⁶⁷

c. The Criminal Procedure and Evidence Code

The High Court exercises its court driven powers of review through the mandatory provisions of s15 of the CPEC.¹⁶⁸ Section 15 of the CPEC provides that certain forms of sentences imposed by subordinate courts should be subject to confirmation by the High Court. The section stipulates that:¹⁶⁹

¹⁶⁰ L Braslow and RE Cheit ‘Judicial discretion and (un)equal access: A systematic study of motions to reduce criminal sentences in Rhode Island Superior Court (1998-2003)’ (2011) 8 *Journal of Empirical Legal Studies* 24 at 26.

¹⁶¹ Section 353(2)(i) of the CPEC; *Republic v Makasho* HC/PR confirmation case no. 1642 of 1998 (unreported)(28th July 1999).

¹⁶² Section 353(2)(ii) of the CPEC; *Republic v Moffat Phiri* HC/PR confirmation case no. 786 of 1998 (unreported) (14th August 1998).

¹⁶³ Section 353(2)(iii) of the CPEC; *Republic v Mponda* HC/PR confirmation case no. 289 of 1996 (unreported) (27th June 1996)- sentence of 18 months imprisonment confirmed with an order suspending its operation for a period of two years.

¹⁶⁴ gives the High Court powers to decide in cases of a subordinate entertaining doubt in trying a case

¹⁶⁵ provides for transfer of case to another magistrate after commencement of inquiry or trial

¹⁶⁶ provides for power of the High Court to change venue of a subordinate court trial

¹⁶⁷ Section 28 of the Courts Act.

¹⁶⁸ South Africa has a similar provision under s302 of the Criminal Procedure Act.

¹⁶⁹ Justice EM Singini, SC, previously Law Commissioner emailed me these comments on 24 January 2013: ‘The Report recommended deletion of what was paragraph (a) of subsection (1) which referred to corporal punishment which the Constitution has abolished altogether. The Report then recommended that the remaining paragraphs of subsection (1) should be renumbered accordingly,

- (1) Where in any proceedings a subordinate court imposes—
- (a) a fine exceeding “K1,000”;
 - (b) Any sentence of imprisonment exceeding
 - (i) in the case of a Resident Magistrate’s court, two years;
 - (ii) in the case of a Magistrate’s court of the first or second grade, one year; or
 - (iii) in the case of a court of a magistrate of the third or fourth grade, six months;
 - (c) any sentence of imprisonment upon a first offender which is not suspended under section 340,
- it shall immediately send the record of the proceedings to the High Court for the High Court to exercise powers of review under Part XIII.
- (2) No person authorised by warrant or order to levy any fine falling within subsection (1) [a], and no person authorised by any warrant for the imprisonment of any person in default of the payment of such fine, shall execute or carry out any such warrant or order until he has received notification from the High Court that it has in exercise of its powers of appeal or review confirmed the imposition of such fine.
- (3) An officer in charge of a prison or other person authorised by a warrant of imprisonment to carry out any sentence of imprisonment falling within subsection (1) [b] (i), (ii) or (iii) shall treat such warrant as though it had been issued in respect of a period of two years, one year or six months respectively, as the case may be, until such time as he shall receive notification from the High Court that it has in exercise of its powers of appeal or review confirmed that such sentence may be carried out as originally imposed.
- (4) Nothing in this section shall affect or derogate from the powers of the High Court to reverse, set aside, alter or otherwise deal with any sentence of a subordinate court on review or appeal.
- (5) When a subordinate court has passed a sentence or made an order falling within subsection (1) it shall endorse on the warrant or order that the sentence or order is one required to be submitted to the High Court for review and which part if any of the sentence or order may be treated as valid and effective pending such review.
- (6) In this section “sentence of imprisonment” means a substantive sentence of imprisonment or a sentence of imprisonment in default of payment of fine, costs or compensation or a combination of such sentences and includes a sentence of imprisonment the operation of which is suspended under section 339.’

An examination of s15 of the CPEC demonstrates that the penal philosophy behind this provision is principally to ensure a fair trial by controlling and limiting the period of incarceration for offenders before review is conducted. The provision fosters the sentencing principle that recourse to imprisonment should be a punishment of last resort.¹⁷⁰ Certain categories of sentences should be reviewed in order to uphold the criminal policy that first offenders¹⁷¹ be given alternative non-custodial sentences and kept out of prison thereby affording them ‘a chance to mend

which meant that what was paragraph (b) was to be paragraph (a) and what was paragraph (c) was to become paragraph (b). However, in drafting the amending Bill attached to the Report, we at the Law Commission omitted to make corresponding amendments in the other subsections of the section which had references to paragraph (c) which had become paragraph (b). This error of omission was carried through to the enactment of the amending Bill as drafted by us at the Law Commission. Thus the error originated in the amending Bill’.

¹⁷⁰ L Muntingh *Prisons in South Africa’s Constitutional Democracy* (2007) 7; Rutherford op cit (n30) at 180.

¹⁷¹ Section 340 of the CPEC.

their ways'.¹⁷² A suspended sentence provides an incentive for first offenders to desist from re-offending.¹⁷³ The provision also mandates the High Court to review monetary penalties for reasonableness and fairness before a default sentence is executed.¹⁷⁴ The legislature requires the High Court to confirm magistrates excess exercise of discretion by demanding that any fine above a K1000.00 should be confirmed by the High Court.¹⁷⁵ Section 15(2) of the CPEC requires that before a default sentence is executed the fine should have been reviewed by the court.¹⁷⁶ To reiterate, the requirement for the verification and confirmations of orders of subordinate courts by a superior court supports the argument that philosophically incarceration of offenders should not be the norm.

Section 15(1) of the CPEC imposes a statutory duty on magistrates to 'immediately'¹⁷⁷ transmit the case records of the matters that fall within the provision to the High Court in order for the superior court to exercise its power of review.¹⁷⁸ The period 'immediately' has no mathematical formula but it has been construed by the 'Performance Standards'¹⁷⁹ to mean seven days from the conclusion of the case.¹⁸⁰ The High Court has a duty to review criminal matters within a reasonable time of seven days from the date the case record is brought to the attention of a judge.¹⁸¹ This court driven process demands that both the subordinate court and High Court appreciate the essence of swiftness as a critical factor in the expedient implementation of review.

Paragraph 6 of the 'Performance Standards' provides for specific time frames to facilitate the implementation of s15 of the CPEC as follows:

1. 'Files should be sent to the High Court within 7 days from conclusion of the cases.
2. Magistrates should not keep completed files in their chambers. They should immediately send them to the criminal registry.
3. Magistrates should understand that it is their responsibility to send legible records to the High Court.

¹⁷² *Republic v Chidakwani* HC/PR confirmation case no. 578 of 1998 at 3.

¹⁷³ Section 15(1)(c) of the CPEC.

¹⁷⁴ Section 15(1)(a) & Section 15(2) of the CPEC; *Republic v Charlie* HC/PR confirmation case no. 924 of 1997; *Republic v Mikolasi* HC/PR confirmation case no. 309 of 1996.

¹⁷⁵ Section 15(1)(a) of the CPEC.

¹⁷⁶ Section 15(2) of the CPEC.

¹⁷⁷ Section 15(1) of the CPEC.

¹⁷⁸ *Chitsukwa v Republic* HC/PR confirmation case no. 1483 of 1998; *Kadam'manja and others v Republic* HC/PR miscellaneous criminal application no. 5b of 2009.

¹⁷⁹ Malawi Judiciary 'Performance Standards' (2006) at 3.

¹⁸⁰ Clause 1 of the 'Performance Standards'.

¹⁸¹ Clause 4 of the 'Performance Standards'.

4. The clerk in charge at the High Court must bring to the attention of the confirming judge the file immediately upon receiving it and the judge shall deal with the file within 7 days.
5. Where the matter is to be set down the procedure in handling of appeal cases shall apply.
6. The order on confirmation should be sent to the trial court and the accused within 7 days. This is the responsibility of the clerk in charge.
7. The clerk in charge must record dates the file is received and sent back to the trial court.’

In terms of judicial policy the ‘Performance Standards’ establish inspirational judicial service standards which can enhance the implementation of the right to review as a managerial accounting tool. It is a critical internal and external accountability measure that introduces fundamental shifts in the procedure and practice relating to transmitting of records and conducting of review. The time limits entail that a sentenced offender can expect to have his matter reviewed and the order communicated within a maximum period of 21 days, which if strictly adhered to will make a substantial difference to the disposal of review cases.¹⁸²

d. Review: a court driven process

Section 353(2) of the CPEC sets out the procedure and practice to be followed in conducting review which outcomes include the power to alter or reverse an order of conviction or sentence that was passed by a subordinate court.¹⁸³ The High Court in conducting review may exercise the same powers as are conferred upon it on appeal¹⁸⁴ and subject the proceedings of the subordinate court to review of both the conviction and sentence by examining the facts that were before the court as well as the application of the law.¹⁸⁵ The CPEC only provides time frames¹⁸⁶ for entering of appeals and the limitations of time for executing the procedure for review are contained in the ‘Performance Standards’. Unlike the ‘cumbersome procedure’¹⁸⁷ for appeals¹⁸⁸ under the review procedure the convicted prisoner is not required to comply with any time limits,¹⁸⁹ or file a petition of appeal¹⁹⁰ which contains the

¹⁸² ie 7 days for transmitting the file; 7 days for review and 7 days for communication.

¹⁸³ Sections 353(2)(a) and (b) of the CPEC.

¹⁸⁴ Section 362 of the CPEC.

¹⁸⁵ WLSA op cit (n21) at 70

¹⁸⁶ Section 349 (1) of the CPEC provides that intention to appeal should be made within ten days of the date of the order appealed. Section 349(2) states that if the appellant requested for a copy of the order the appellant shall enter his petition within 30 days of the date of receipt of such copy.

¹⁸⁷ WLSA op cit (n21) at 72.

¹⁸⁸ Section 349(1) of the CPEC limits appeals to the High Court from any finding, sentence or order to the appellant who have filed a written notice within ten days of the date of the finding, sentence or order appealed, with exceptions for appellants who are in custody or unrepresented.

¹⁸⁹ Section 362(3)(b)(i) of the CPEC

¹⁹⁰ As required by section 350 of the CPEC for appeals

grounds of appeal in regard to which the subordinate court appealed from is alleged to have erred.¹⁹¹

The procedure for review is initiated by the court and stands out as an exception to the predominantly litigation driven legal system.¹⁹² Review, as a backward looking judicial exercise, offers the judiciary at the appellate court level a procedure for self-correcting errors in the trial by the inferior court level, without the offender initiating the exercise. Under s15 of CPEC the onus is on the magistrate who was seized with the matter to transmit the case record to the High Court, while ss360 and 361 of the CPEC empowers the High Court and resident magistrates to initiate the process of calling for records of any criminal proceedings before any subordinate court for the purposes of review. The High Court invokes its powers under s360 of the CPEC in criminal cases which attract media attention,¹⁹³ but it is seriously doubtful if resident magistrates exercise their powers under s361 of the CPEC on a regular basis.¹⁹⁴ This is due to capacity challenges arising from professional magistrates being outnumbered by lay magistrates. The heavy workload of magistrates and the insufficient staffing levels make it unreasonable to expect resident magistrates to abandon their own work and regularly screen cases tried by lay magistrates before transmitting them to the High Court for review by a judge.¹⁹⁵

The High Court reviews records of subordinate courts which have been called for, forwarded or which ‘otherwise comes to its knowledge’.¹⁹⁶ The court interprets the words ‘otherwise comes to its knowledge’ generously and accepts ‘requests on letters from defendants or anyone raising a matter concerning the justice of a case’.¹⁹⁷ Primarily the review process is automatic and suitable for vulnerable

¹⁹¹ Section 350(2) of the CPEC.

¹⁹² A Nyirenda, TT Hansen, D Kaunda *A comparative analysis of the human rights chapter under the Malawi constitution in an international perspective* (nd); Gloppen & Kanyongolo op cit (n25) at 290.

¹⁹³ In *Republic v Akimu* [2003] MWHC 96 / HC/PR Revision case no. 9 of 2003. The trading in ivory tusks.

¹⁹⁴ Malawi Judiciary ‘The DFiD – Malawi Access to Justice Programme: Progress Report July 2008 – August 2008’ (2008) 8.

¹⁹⁵ Refer to table 10 in chapter 4 for caseload statistics; K Starmer QC and TA Christou *Human Rights Manual and Sourcebook for Africa* (2005) 815; WLSA op cit (n21) at 64 & 70; Malawi Judiciary op cit (n194) at 8; S Chisala *et al* ‘The process of confirmation and review of criminal cases: problems and constraints’ (2004)10.

¹⁹⁶ Section 362(1) of the CPEC.

¹⁹⁷ *Republic v Brighton and Mwachangu* HC/PR confirmation case no. 653 of 1997 at 4; e.g. *Republic v Sanjika and Taulo* HCPR confirmation case no. 298 of 1997: the first accused was convicted of armed robbery and sentenced to six years imprisonment. The case was reported in the newspaper and a concerned citizen wrote to the Chief Justice to consider the sentence which he described as ‘leniency at its worst’ (at 2) and that it will encourage mob justice. The member of the public ‘recommended a

offenders, such as convicted prisoners, who due to their incarceration would find it challenging to initiate the appeal process. Secondly, the prisoners' detention curtails their capacity to secure legal assistance therefore mandatory review is an ideal mechanism for allowing courts to protect the constitutional interests of convicted prisoners. The procedure underscores the significance of the law's abhorrence of the deprivation of liberty of an individual without valid reasons and without confirmation of conviction and sentence by an appellate court.¹⁹⁸

The procedure and practice of review reinforces the urgent nature of review by applying caseflow management time reduction mechanisms such as, assigning specific judges to manage the review of cases from court centres in a particular district,¹⁹⁹ calendaring review hearings to 12 cases each week,²⁰⁰ the use of original trial court documents,²⁰¹ restrictions on appearance and oral arguments,²⁰² no opinion writing and the screening of cases.²⁰³ The time reduction devices and the wide flexibility in the application of the law is intended to enhance the court's responsiveness to enforcement of the right to review.²⁰⁴ In practice courts utilise summary procedure for disposing of the matters that are pending hearing subject to no adverse orders being granted.²⁰⁵ Cases that have not been disposed of in chamber are set down for hearing,²⁰⁶ within a reasonable time to avoid undermining the benefits of review and causing injustices to a sentenced prisoner.²⁰⁷

Exceptionally, the review process does not act as bar to an appeal that may be initiated by the prisoner.²⁰⁸ This is important as an appeal presents the convicted prisoner an opportunity to raise issues, which the review judge might not have observed, that the prisoner contemplates were not handled fairly by a magistrate. The provision affords the convicted prisoner a double chance to have his matter considered by the High Court.

sentence of 25 years imprisonment with hard labour'(at 2). On review the sentence was enhanced to ten years imprisonment.

¹⁹⁸ Section 362(b)(ii) of the CPEC.

¹⁹⁹ Except for matters relating to child justice and community service.

²⁰⁰ Registrar 'Assignment of judges' business' (2013).

²⁰¹ Sections 15 & 360 of the CPEC.

²⁰² Section 363(2) of the CPEC

²⁰³ Section 361(2) of the CPEC; Wasby op cit (n35) at 332.

²⁰⁴ Gloppen & Kanyongolo op cit (n25) at 285.

²⁰⁵ proviso to s362 of the CPEC.

²⁰⁶ Section 352 of the CPEC.

²⁰⁷ *Republic v Nhlema* HCPR confirmation case no. 502 of 1994.

²⁰⁸ Section 362(3)(a) & 362(4) of the CPEC.

e. Early release of offenders

Section 15(3) of the CPEC authorises the prison authority to only detain convicted prisoners for certain maximum periods if the High Court has failed to exercise its power of review within a stipulated period of time. Apart from a convicted prisoner being discharged upon the expiration of his sentence with a general remission applied or being granted pardon this study asserts that a prisoner is also entitled to be released early from prison following the failure of review. The period of time for detention without review is two years for resident magistrates, one year for first and second grade magistrates and six months for third and fourth grade magistrates.²⁰⁹ Imprisonment entails the constraint of a person's liberty and periods of incarceration above the stated time periods are serious enough to require confirmation by the High Court.²¹⁰ It is contended that if review is delayed but the period of incarceration without review has expired, the prison authority should release the prisoner even if the sentence imposed has not been fully served.²¹¹

Timely exercise of this power by the prison authority can make prison cell space available and facilitate control of the prisoner population turnover. Unfortunately there is no record that the prison authority have invoked s15(3) of the CPEC.²¹² The failure or neglect by the executive to invoke this power can never withstand constitutional scrutiny since it amounts to violating the prisoner's constitutional right to due process of law.²¹³

2. COURTS RESPONSE TO REVIEW

This section will discuss the court's response to review and the advantages to the prisoner of the possible outcomes of the review process. The range of outcomes on review proceedings²¹⁴ supports the argument that prompt review by the High Court can positively impact on the prisoner population as there is a possibility that a prisoner will be acquitted and discharged or a disproportionate sentence reduced. The High Court has broad power to alter and modify a finding and sentence leading to acquittal or discharge of the accused, an order for the accused to be tried by a

²⁰⁹ Sections 15(1)(b) and (c).

²¹⁰ *Republic v Nambazo* [2000] MWHC 23.

²¹¹ Section 15(3) of the CPEC.

²¹² DTK Madise 'Due Process of the law: some issues' (2009) 4(1) *Malawi Judiciary Newsletter* 8 at 10.

²¹³ *Arkin op cit* (n159) at 503.

²¹⁴ Section 353(2)(a) and (b) of the CPEC.

court of competent jurisdiction, enhancement or reduction of the sentence.²¹⁵ Due to several procedure errors, such as irregular plea taking²¹⁶ and transfer of magistrates²¹⁷ that can occur during trial the probability of altering the nature of the sentence in favour of a prisoner are relatively high since a review cannot convert acquittals into convictions.²¹⁸ If the modification of sentences are structured in compliance with the sentencing policy that views custodial sentences as ‘sanction of last resort’,²¹⁹ it is highly probable that the nature of the sentences will be altered in favour of reducing the sentence,²²⁰ releasing prisoners to serve alternate non-custodial sanctions²²¹ or immediate release²²² of the prisoner.

a. Ensuring fair trial through criminal review of convictions

One essential aspect of the rule of law is the understanding that final legal judgments must be respected. The judicial process of reviewing convictions and sentences adjudicated by subordinate courts, especially convictions, can have the effect of undermining the key principle of finality. However, this principle is subject to s42(2)(f)(viii) of the Constitution which provides that the right to review is a constituent part of the process of a fair trial. The procedure under s15 of the CPEC makes the implementation of review automatic for certain forms of punishments and the hierarchy of the courts subjects decisions by the lower court to an appeal system.²²³ This chapter argues that the objective of review is to ensure fair trial and that quashing of convictions and modifications of sentence complements the executive methods of sentence reduction through early releases.²²⁴ Review has the potential to effectively and sustainably regulate the size of the convicted prisoner population. Prison populations need to change frequently and create space for new inmates to avoid over-crowding . This section will examine case law to demonstrate

²¹⁵ Section 353(2)(a)(i) and (ii) of the CPEC.

²¹⁶ *Republic v Kaliande* [1990] 13 MLR 391 (HC).

²¹⁷ *Republic v Asikimu* [1990] 13 MLR 366 (HC).

²¹⁸ *Republic v Brighton* HC/PR confirmation case no. 653 of 1997 at 6.

²¹⁹ Rutherford op cit (n30) at 180.

²²⁰ *Republic v Matiya and others* HCPR confirmation case no. 806 of 1995: sentence of five years for theft of 11 goats set aside and substituted with a sentence of two years.

²²¹ *Republic v Mponda* HCPR confirmation case no. 289 of 1996: sentence of 18 months imprisonment for burglary and theft with an order suspending its operation for a period of two years.

²²² *Republic v Kadzakumanja* HCPR confirmation case no. 132 of 1997: magistrate erroneously exercised his discretion in passing custodial sentence for young, school going first offenders who had pleaded guilty. The sentence was set aside resulting in immediate release of offenders.

²²³ Chirwa op cit (n69) 454.

²²⁴ S Grossman and S Shapiro ‘Judicial modification of sentences in Maryland’ (2003) 33 *University of Baltimore Law Review* 1 at 44.

how the process of review questions findings of guilt in order to assess the accuracy and fairness of criminal adjudication.

The High Court elaborated the procedure for review in the case of *Republic v Chizumila*,²²⁵ hereinafter *Chizumila case*, and stated that a court examines the matter by way of rehearing, subject to a very useful caveat,

‘Considering that the appellate court does not have the advantage of seeing witnesses and assessing their credibility, the court, therefore, on appeal gives quite some credence to the findings of fact of trial courts, particularly where the verdict turns on the credibility of the witness before that court. The court on appeal will interfere with the verdict if the evidence was wrongly admitted or the finding is perverse on the evidence and the facts on record’.²²⁶

In line with the above mentioned procedure during review the High Court is able to reverse the finding and quash convictions where there were miscarriages of justice at the inferior court. This is illustrated by the cases of *Republic v Kamanga*²²⁷ and *Republic v Asikimu*.²²⁸ In the case of *Republic v Kamanga*²²⁹ the accused was convicted of two offences and sentenced to concurrent sentences of eight and four months imprisonment. On review both convictions and sentences were set aside on the grounds that there was lack of evidence for one of the offences and that of misjoinder of two offences in one charge which might have prejudiced the trial. Similarly, in the case of *Republic v Asikimu*²³⁰ the accused made 13 appearances for his trial before four different magistrates. On review the court made a finding that the accused had been materially prejudiced due to the impropriety of the procedure after transfer of all magistrates who handled his matter.²³¹ After considering all the circumstances of the case, such as the duration of detention on remand and serving the sentence, the judgment and sentence of 36 months imprisonment were set aside.²³²

i. What happens after a conviction has been quashed

During review the High Court has broad power to quash convictions and order for trial *de novo* or release of the prisoner in situations where it detects procedural errors in the trial.²³³ In the case of *Republic v Chitwanga*²³⁴ due to the procedural

²²⁵ [1994] MLR 288 (HC).

²²⁶ [1994] MLR 288 (HC) at 292.

²²⁷ [1993] 16(1) MLR 469 (HC).

²²⁸ [1990] 13 MLR 366 (HC).

²²⁹ [1993] 16(1) MLR 469 (HC).

²³⁰ [1990] 13 MLR 366 (HC).

²³¹ *Ibid* at 369.

²³² *Ibid* at 370.

²³³ Section 353(2)(a)(i) of the CPEC.

irregularities in conducting the trial the court set aside the conviction and ordered that the case be retried. On the other hand, the High Court is reluctant to order a retrial where the accused has utilised a period of time in custody, and releases the defendant in order to avoid further injustices to the prisoner.²³⁵

The outcome of a re-trial cannot be guaranteed to be in favour of an offender, however, review orders for discharge or release can impact positively on the convicted prisoner population. Through the process of release the prisoners regain their liberty in the community thereby creating prison cell space. The cases that follow illustrate circumstances when the High Court has found miscarriage of justice in the manner in which a subordinate court conducted a trial and quashed the convictions and released the prisoners. In the first case of *Republic v Kaliande*²³⁶ the High Court found that the trial court erred in entering a plea of guilty where the accused was a layman and was not represented.²³⁷ Further, the process whereby the magistrate allowed a prosecution witness to submit evidence of the defendant's previous conviction was irregular.²³⁸ The convictions on both counts and the sentences were set aside leading to one less convicted prisoner at the penitentiary.

The case of *Republic v Msosa*²³⁹ illustrates the critical aspect of timely review to avoid maintaining people in prisoner who do not have to be there. The High Court set aside the conviction and sentence of seven years' imprisonment after finding that the trial magistrate did not apply the requisite standard of proof beyond reasonable doubt across the whole evidence.²⁴⁰ Due to the delayed hearing the immediate release of the defendant occurred after one year of detention and his discharge meant that the prison population had one less prisoner whom it had planned to accommodate for another six years.

The High Court overturned convictions arising from procedural errors in conducting a trial and the setting aside of sentences to facilitate the release of the offenders in the cases of *Republic v Nathaya*,²⁴¹ *Republic v Bauleni*,²⁴² *Republic v*

²³⁴ [1990] 13 MLR 383 (HC)

²³⁵ *Republic v Wanda* [2005] MWHC 56 ; HCLDR Confirmation case no. 410 of 2005; *Republic v Mbewe*[2005] MWHC 55; HC/LLDR Confirmation case no. 184 of 2004.

²³⁶ [1990] 13 MLR 391 (HC).

²³⁷ *Ibid* at 394.

²³⁸ *Ibid*.

²³⁹ [1993] 16(2) MLR 734 (HC).

²⁴⁰ *Ibid* at 738.

²⁴¹ [1993] 16(2) MLR 744 (HC) prosecutions failure to prove the offence.

Malifa,²⁴³ *Republic v Namazomba*²⁴⁴ and *Republic v Zgambo*.²⁴⁵ The advantages of review of convictions on the size of the prison population is impacted through the quashing of the conviction and discharge of the defendants from custody.

b. Ensuring fair trial through criminal review of sentences

On review the High Court rationally re-examines the entire court record of the case to verify the accuracy of the trial court then exercises its extensive powers and passes such an order as the magistrate should have imposed that would have resulted in a fair trial. The preceding section has shown that in the course of review the superior court need to primarily establish that the conviction entered against the prisoner was proper. Otherwise convictions that are substantively unjust are quashed and retrials ordered or prisoners discharged. If the conviction is confirmed the court questions the appropriateness and proportionality of the sentence imposed to the seriousness of the offence.²⁴⁶ Judges have wide discretion to correct unlawful sentences and modify lawful ones.²⁴⁷

i. Sentencing guidelines

The development of sentencing policy is exercised by superior courts which devises sentencing guidelines in order to provide sentencing courts with a uniform approach on determining appropriate proportional sentences.²⁴⁸ Sentencing policy impacts on prison growth due to ‘the iron law of prison population’²⁴⁹ which occurs with ‘the rise in prison admissions and the increase in length of time offenders serve in prison’.²⁵⁰ Malawi has sentencing guidelines which were developed through case law and are consolidated in the report : ‘Magistrates’ court sentencing guidelines’.²⁵¹ Sentencing guidelines help to achieve coherence, uniformity and consistency in

²⁴² [1993] 16(2) MLR 722 (HC) conviction irregular since the s39 of the Immigration Act only provides for deportation.

²⁴³ [1993] 16(2) MLR 729 (HC) conviction reversed due to procedural errors in administering pleas.

²⁴⁴ [1993] 16(2) MLR 741 (HC) quashed the conviction on the second count as defendant not properly charged.

²⁴⁵ [1990] 13 MLR 413 (HC) irregularities on the charge.

²⁴⁶ Von Hirsch op cit (n30) at 170.

²⁴⁷ Braslow & Cheit op cit (n160) at 27.

²⁴⁸ Rutherford op cit (n30) at 29.

²⁴⁹ TR Clear and J Austin ‘Confronting the costs of incarceration: reducing mass incarceration: implications of the iron law of prison populations’ (2009) 3 *Harvard Law & Policy Review* 307 at 312.

²⁵⁰ Y Zhang CD Maxwell and MS Vaughn ‘The impact of state sentencing policies on the U.S. prison population’ (2009) 37 *Journal of Criminal Justice* 190 at 191.

²⁵¹ Malawi Judiciary ‘Magistrates’ Court : sentencing guidelines’ (2007).

sentencing thereby avoiding disparities on similar infractions of the law.²⁵² The guidelines bring ‘greater fairness and rationality to sentencing’.²⁵³ Sentencing guidelines are permissive and are not applied mathematically, due to a ‘considerable degree of flexibility’²⁵⁴ that allows a sentencing court to consider other variables affecting sentencing discretion.²⁵⁵

The courts have since 1994 been increasingly meting out harsh and severe sentencing tariffs in a policy to curb the rise in crime levels and meet the demand of justice.²⁵⁶ This sentencing trend has led to a growth in prison population as has been shown in chapter two. Social issues such as HIV and AIDS are some of the factors that influence the court on the type of sentence that can be imposed.²⁵⁷ The crime reduction potential of incapacitation through harsh sentences has not been explored and documented locally.²⁵⁸ However, in the case of *Republic v Kholoviko*²⁵⁹ the court expressed doubt on the positive impact on deterrence and reformation that long custodial sentences can have on young defendants.²⁶⁰ The courts have confirmed that long and disproportionate sentences are a violation of the defendants fundamental rights under the Constitution of not to be subjected to any cruel and unusual treatment.²⁶¹ International studies reveal that severe sentences do not positively impact on the level of crime as ‘the length of stay in prison is not associated with a change in the risk of recidivism’.²⁶² The trend is towards short and meaningful punishments that restrict leisure time, such as, the provision under s25(3)

²⁵² Biggs op cit (n29) at 2; *Republic v Ndelemani*, [2000] MWHC 19.

²⁵³ Frase op cit (n29) at 173; M Bagaric *Punishment and Sentencing: A Rational Approach* (2001) 25.

²⁵⁴ Bagaric op cit (n253) at 17.

²⁵⁵ DD Ntanda Nsereko ‘Minimum sentences and their effect on judicial discretion’ (1999) 31 *Crime, Law & Social Change* 363 at 364; Grossman & Shapiro op cit (n224) at 33-34.

²⁵⁶ *Banda v Republic* [1990] 13 MLR 56 (SCA): SCA reduced sentences of 13 years and six months imprisonment to seven years; Kanyongolo op cit (n33) 118; *Manyungwa v Republic* [1991] 14 MLR 237 (HC) An appeal court held that a sentence of ten years’ imprisonment was manifestly excessive in principle; *Naison v Republic* [1997] 2 MLR 163 (HC) An appeal court found a sentence of 13 years imprisonment manifestly excessive and reduced it to eight years; The Supreme Court of Appeal determined that a sentence of 12 years imprisonment was an appropriate punishment for armed robbery for the defendant in the case of *Republic v Chavula* [2005] MWHC 32.

²⁵⁷ *Republic v Eliya* [2010] MWHC 15/ HC/PR confirmation case no 480 of 2010. A sentence of four years’ imprisonment for indecent assault enhanced to six years due to the HIV positive status of the defendant.

²⁵⁸ AR Piquero and A Blumstein ‘Does incapacitation reduce crime?’ (2007) 23 *Journal of Quantitative Criminology* 267 at 270.

²⁵⁹ [1996] MLR 355 (HC).

²⁶⁰ *Republic v Kholoviko* [1996] MLR 355 (HC) at 360.

²⁶¹ *Republic v Phiri* [1997] 2 MLR 92 (HC) at 93.

²⁶² Clear and Austin op cit (n249) at 310; Harris op cit (n45) at 493-494.

of the Penal Code which allows offenders to work and includes an element of custodial sentence to be served during weekends or public holidays.²⁶³

It is asserted that the commonplace of crime is not arising from failure of sentencing approach by the courts.²⁶⁴ Imprisonment as a sentencing policy is more successful at achieving individual deterrence because there is no re-offending as a result of incapacitation, unlike general deterrence.²⁶⁵ To fit the goal of rehabilitation courts make punishment individualised and are reluctant to use first offenders as ‘scapegoats for general deterrence’.²⁶⁶ In the context of prison overcrowding the courts should impose optimal sentence lengths that ‘minimise the direct social harm from crime and the cost of imposing punishment’.²⁶⁷

In the *Chizumila case*²⁶⁸ the court was of the opinion that ‘when reviewing a sentence, whether under the general powers on appeal or review, courts have always been slow to interfere with the discretion of the sentencing court at first instance’.²⁶⁹ At the stage of review courts avoid being perceived as ‘substitute sentencers to the trial court’²⁷⁰ and only interfere with the exercise of the discretion where the sentencing court has ‘proceeded on a wrong principle or overlooked a material factor or the sentence is manifestly excessive in all circumstances of the case as to import that there must have been an error of principle’.²⁷¹

The question that crosses the minds of magistrates and which is usually subject to consideration during review is: what is the appropriate and quantum of punishment? There is no precise measure for criminality and sentences imposed. Sentences are matters of judicial discretion for a trial or sentencing court and the decisions of superior courts on sentences are not binding on lower courts.²⁷² The sentencing court must exercise the discretion in light of the law and after taking into account all the circumstances in the case and the trend of sentencing set by the High

²⁶³ AC Chipeta ‘Recent enactments and recent developments in the law’ Judges’ Annual Colloquium (2011) 9.

²⁶⁴ *Republic v Bayani* [2000] MWHC 26.

²⁶⁵ Bagaric op cit (n253) at 128; L Blom-Cooper *The Penalty of Imprisonment: Why 60 per cent of the prison population should not be there* (2008) 77.

²⁶⁶ *Republic v Bayani* [2000] MWHC 26; Biggs op cit (n29) at 2; Zhang *et al* op cit (n250) at 191.

²⁶⁷ Avio op cit (n101) at 164.

²⁶⁸ [1994] MLR 288 (HC).

²⁶⁹ [1994] MLR 288 (HC) at 305.

²⁷⁰ [1994] MLR 288 (HC) at 305.

²⁷¹ [1994] MLR 288 (HC) at 305; Ntanda Nsereko op cit (n255) at 364.

²⁷² *Republic v Ajibu* [1997] 2 MLR 99 (HC) at 101; Bagaric op cit (n253) at 128 15-16; Ntanda Nsereko op cit (n255) at 365.

Court which is the final authority on sentences that can be passed by a magistrate.²⁷³ Further, magistrates are encouraged to read the opinions of fellow magistrates in order to compare sentences passed by other courts of concurrent jurisdiction in the locality or elsewhere in the country.

In principle subordinate courts are advised to pass the ‘usual’²⁷⁴ proportional sentence that is equal to the criminal conduct, to the offender and reflects public interest in crime prevention. This results in imposing a sentence that ‘compares well with sentences usually passed for offences more serious, less serious or comparable’.²⁷⁵ Public interest demands that sentences must be clearly formulated to facilitate execution²⁷⁶ and long sentences should be reserved for serious offences such as burglary.²⁷⁷ Otherwise a review court makes a finding that the sentence is wrong in principle. Where the review court finds the sentence imposed appropriate the judge will handle the case summarily and confirm the sentence imposed by the lower court.²⁷⁸ The review procedure also verifies if magistrates considered various forms of non-custodial punishment where appropriate.

ii. Non- custodial sanctions

Research based on International Crime Victim Surveys reveal that the public prefers non-custodial sentences as opposed to imprisonment.²⁷⁹ There are several causes of prison overcrowding,²⁸⁰ but the prison authority ‘have noted that harsh custodial sentences handed to offenders committing petty offences as major factors contributing to congestion in prisons’.²⁸¹ As a sentencing principle and to prevent overcrowding it is critical that imprisonment should be the exception and used ‘more sparingly’²⁸² against violent offenders for purposes for rehabilitating them.²⁸³ A court

²⁷³ Section 11(2) of the Supreme Court of Appeal Act; *Banda v Republic* [1990] 13 MLR 56 (SCA) at 58; *Chizumila case* supra (n225).

²⁷⁴ *Republic v Phiri* [1997] 2 MLR 92 (HC) at 94; *Republic v Seleyasiyo* HCPR confirmation case no. 1204 of 1997 at 2.

²⁷⁵ *Republic v Phiri* [1997] 2 MLR 92 (HC) at 94.

²⁷⁶ *Republic v Nasoni* [1990] 13 MLR 400 (HC) at 403.

²⁷⁷ *Banda v Republic* [1990] 13 MLR 56 (SCA) at 59.

²⁷⁸ Sections 353(2) & 363 of the CPEC; *Republic v Mkoma* [1995] 2 MLR 598 (HC).

²⁷⁹ J Van Kesteren ‘Public attitudes and sentencing policies across the world’ (2009) 15 *European Journal on Criminal Policy and Research* 25 at 44.

²⁸⁰ Sarkin op cit (n45) at 27.

²⁸¹ S Zimba ‘Courts aiding in jail congestion – prison commander’ Zodiak on line 26 July 2012 available on

http://zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=5401:courts-aiding-in-jail-congestion-prison-commander-&catid=1:latest-news&Itemid=109 accessed on 3 August 2012.

²⁸² Bagaric op cit (n253) at 128.

should sanction non-custodial punishments for first-time offenders.²⁸⁴ In *Republic v Pearson*²⁸⁵ the accused was convicted of having been found in possession of half an ounce of Indian hemp and was sentenced to an immediate custodial sentence but on review the High Court ordered his immediate release. The court found the prison sentence inappropriate since the accused was a first offender who pleaded guilty to the charge and a proportionate sentence in the matter would have been a fine.²⁸⁶

A sentencing court must first rule out the possibility of alternative sentences such as community service, absolute or conditional discharge, probation or a fine, as the appropriate punishment for the particular offence before imposing a custodial sentence in an effort to mitigate prison overcrowding.²⁸⁷ Further, sanctioning restorative justice remedies like restitution²⁸⁸ or the payment of compensation either in addition to, or in substitution of, any other punishment prevents prison overcrowding.²⁸⁹

1. Payment of fines

A fine is a form of non-custodial punishment normally provided for in the penal provision and imposed as a sanction where appropriate. Generally, the penalty clause must provide for imposition of the fine²⁹⁰ as explained in the case of *Republic v Chilenje*.²⁹¹ If a fine is the only penalty prescribed, courts will not, as a matter of principle, impose a sentence of imprisonment unless the defendant defaults on payment. Section 15 (2) of the CPEC subjects incarceration in default of payment to review of sentence which controls prisoner population by confirming that a non-custodial sentence is not feasible. If the fine is in combination with, or an alternative

²⁸³ M Sekhonyane ‘The pros and the cons: Public Private Partnership (PPP) in South African Prisons’ (2003) 3 *SA Crime Quarterly* 33 at 35; Blom-Cooper op cit (n265) at 90; F Bernault ‘The politics of enclosure in colonial and post-colonial Africa’ In F Bernault (ed) *A history of prison and confinement in Africa* (2003) 1 at 2.

²⁸⁴ Malawi Judiciary ‘The DFiD Malawi Access to Justice Programme: Progress Report July 2008 – August 2008’ (2008) 8; Blom-Cooper op cit (n265) at 76; *Republic v Chiboli* [1997] 2 MLR 89 (HC).

²⁸⁵ [1995] 1 MLR 230 (HC).

²⁸⁶ Ibid at 232.

²⁸⁷ Sarkin op cit (n45) at 34; *Republic v Pearson* [1995] 1 MLR 230 (HC).

²⁸⁸ WL Armstrong ‘Prudent use of prison space: the sentencing improvement act’ (1984) 11 *Journal of Legislation* 237 at 243.

²⁸⁹ Section 32 of the Penal Code; *Republic v Msusa* [1995] 2 MLR 718 (HC); Kanyongolo op cit (n33) 119.

²⁹⁰ e.g. offence of theft does not allow option for fine: *Republic v Msusa* [1995] 2 MLR 718 (HC).

²⁹¹ [1996] MLR 361 (HC).

to, a prison sentence the practice is to impose a fine first because it is less onerous than a prison sentence.²⁹²

The case law demonstrates that magistrates and the prison authority do not appreciate the implementation of fines and default payments under s29(3) of the Penal Code, which have resulted in unnecessary incarcerations. Use of imprisonment in order to enforce non-custodial criminal penalties needs to be delinked as fine defaulters increase the levels of prison population.²⁹³ The high level of socio-economic challenges facing the majority of people implies that non-compliance with payment of fines may be a challenge to many and an exorbitant fine may infringe a prisoner's fundamental right against inhuman and oppressive punishment.²⁹⁴ To avoid sending a defendant to prison in default of payment of a fine a court could order instalments or resort to other ways of enforcing the fine.

The correct implementation of fines will also be more effective if there is a speedy disposal of review cases to assess that defaulters are not jailed without due process of the law. The two subsequent cases underscores the argument that prompt disposal of review matters is a critical factor in preventing further 'miscarriages of justice'²⁹⁵ especially for socio-economically disadvantaged members of society. In the two cases the miscarriage of justice of the lower courts caused the incarceration of the poor defendants, which injustice was only remedied by the High Court after the defendants had been imprisoned. In the case of *Republic v Chakanaka*²⁹⁶ the defendant was convicted of failing to declare foreign currency on importation. He was unable to pay a fine of K2 000 and was accordingly imprisoned for twelve months as a result of his default.²⁹⁷ On review the judge was of the opinion that the magistrate erred in sentencing the accused to an amount of fine not fixed by legislation and without examining the position of the accused before he was ordered to pay such an excessive fine.²⁹⁸ The court modified the fine to K300.00 and the default sentence was reduced by over 80 per cent to two months imprisonment.

²⁹² *Malakamu v Republic* [1993] 16(2) MLR 559 (HC).

²⁹³ Rutherford op cit (n30) at 7.

²⁹⁴ *Republic v Charlie* HC/PR confirmation case no. 924 of 1997 at 4.

²⁹⁵ Johnson op cit (n28) at 452.

²⁹⁶ [1991] 14 MLR 426 (HC).

²⁹⁷ section 15(2) of the CPEC prohibits the execution imprisonment in default of a fine unless the imposition of fine has been reviewed.

²⁹⁸ *Masambo v Republic* [1984-86] 11 MLR 384 (SCA) posits that a fundamental principle of sentencing is to enquire into the defendant's ability to settle a fine.

The wide scope of criminal law, such as offences criminalising poverty, are another factor that contributes to unnecessary overcrowding in prisons as is demonstrated by the case of *Republic v Luwanja*.²⁹⁹ Three defendants were convicted on their own pleas of guilty on charge of being rogue and vagabond and sentenced to a fine of K20.00 and in default of payment of fine to two months' imprisonment with hard labour.³⁰⁰ The High Court quashed the convictions because the pleas of guilty were irregularly obtained and the sentence was set aside since the imposition of the fine was unlawful for not being an option of punishment under the penal provision.³⁰¹ According to the ruling, a court must ascertain the means of the defendants before imposing a fine and a fine is not an appropriate punishment when the factor contributing to the arrest of the defendants is that of pauperism.³⁰² This case points to the importance of informed prosecutorial discretion considering that the criminal justice and penal systems are blunt institutions for dealing with petty welfare issues.³⁰³ However, prompt review would have prevented the offenders from incarceration and ensured that they were subjected to appropriate non-custodial sentence.

A rare scenario is when a fine and imprisonment can be combined where the fine is a claw back on illegal opulence. In the case of *Republic v Akimu*³⁰⁴ trafficking in ivory tusks was considered to be a serious crime to be punished with a fine of K6000.00 and a one year sentence of imprisonment.

2. Probation

A probation order is made under s337(1)(c)(i) of the CPEC³⁰⁵ and its implementation is governed by the Probation of Offenders Act.³⁰⁶ The court in *Republic v Nasoni*³⁰⁷ noted that probation orders affecting adult offenders are rarely made by courts due to lack of programmes of probation service for adult offenders. The moderate use of this form of non-custodial punishment could be due to conceptualising probation as a diversionary mechanism from custody for children who are in conflict with the

²⁹⁹ [1995] 1 MLR 217 (HC).

³⁰⁰ *Ibid* at 218.

³⁰¹ *Ibid* at 219-220.

³⁰² *Ibid* at 219.

³⁰³ Rutherford *op cit* (n30) at 182.

³⁰⁴ [2003] MWHC 96.

³⁰⁵ Section 2 of the Probation of Offenders Act.

³⁰⁶ Act 10 of 1945.

³⁰⁷ [1990] 13 MLR 400 (HC).

law.³⁰⁸ Implementation of programmes for this model of non-custodial sentencing would help the criminal justice system reduce rates of imprisonment.

3. Community service

Orders for community service are provided for under s339(2) of the CPEC and offer better opportunities for rehabilitation of offenders and reparation to the community in comparison to imprisonment.³⁰⁹ The programmes of the Community Services Directorate are not being fully utilised although it has the capacity to handle about 2000 offenders in executing community service sentences.³¹⁰ Magistrates should be trained to use their discretionary sentencing power to sanction non-custodial sentences for minor offences in order to help prevent prison overcrowding by allowing offenders to serve their punishment in the community.³¹¹

4. Suspended sentence

A court will impose a sentence of imprisonment where in its broad discretion it regards such an appropriate punishment. For first-time offenders suspension³¹² of the prison sentence must be considered as ‘the general policy in our criminal law is to spare first offenders from the horrors of prison life’.³¹³ A suspended sentence is a prison sentence, operation of which has been delayed subject to conditions.³¹⁴ The review process has advantages for sentenced first-time offenders in allowing the High Court to re-examine the reasons for the immediate imprisonment. If judicial errors are detected a reversal of the finding on sentence or its modification helps to reduce the growth of prison population.

The procedure for activating a suspended sentence is laid down under the provision of ss339 and 341 of the CPEC. Offenders on suspended sentences risk being incarcerated and a review court must act timely to verify that the suspended

³⁰⁸ O Sevdiren ‘Alternatives to imprisonment in England: destined to fail?’ in *Alternatives to Imprisonment in England and Wales, Germany and Turkey* (2011) 45 at 46-47.

³⁰⁹ Junger-Tas op cit (n131) at 490.

³¹⁰ W Kumwembe ‘Miles towards prison decongestion in Malawi’ 7 June 2012 Zodiakonline, available on http://zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=5120:ml-es-toward-prisons-decongestion-in-mw&catid=55:features&Itemid=113 accessed 3 August 2012.

³¹¹ CJ Kachale ‘Community service in perspective’ (2001) 9 *New Hope: newsletter about prison reform* 12,22.

Malawi Judiciary ‘Annual Report 2008- 2009’ (2010) 104; Malawi Judiciary ‘Annual Report 2009-2010’ (2010) 71; Sevdiren op cit (n308) at 64.

³¹² Section 340 of the CPEC.

³¹³ *Republic v Nkhoma* HC/PR confirmation case no. 20 of 1996 at 2; Sevdiren op cit (n308) at 59.

³¹⁴ *Republic v Manyamba*, [1997] 2 MLR 39 (HC); *Republic v Nkhoma* HC/PR confirmation case no. 20 of 1996.

sentence was properly invoked as demonstrated in the case of *Republic v Liwonde*.³¹⁵ In the context of prison overcrowding the powers to suspend prison sentences is critical in decreasing the size of the prison population particularly when rates of recidivism are low and first-time offenders constitute a majority of the convicted offenders.

c. Reduction of manifestly excessive sentences

As a general principle the High Court on review ‘will not interfere with a sentence passed by a subordinate court simply because the High Court itself would have passed a different sentence had it been seized of the case at the first instance’.³¹⁶ The court can only interfere with sentence if a sentence is disproportionate for being manifestly excessive, inadequate or illegal.³¹⁷ The severity of a sentence is not enough ground for an ‘appeal court to alter sentence where no sense of shock is experienced by appeal court’.³¹⁸ In the absence of quantitative data, the argument that expedited reviews can positively impact on the prison population is reified by an examination of the case law. The case authority on confirmation cases shows that the review procedure plays a critical role in ensuring the appropriateness, consistency and uniformity of sentencing outcomes by magistrates’ courts to ensure that the sentences are proportionate, fair and that they meet the culpability of the offender. The cases that follow will demonstrate that this is an ideal entry point where the timely implementation of the right to review can positively impact on the prisoner population. Through analysing the case law this study has identified four models for altering and reducing sentence length and facilitate the reduction of prison population or periods of incarceration. The patterns which will be discussed in below are: the immediate release orders, high margin reduction by two-thirds or more, reduction of sentence by half and reduction of sentence by one-third or less.

i. Scenario 1: immediate release orders

This study terms the first scenario of reducing excessive sentences as the immediate release orders.³¹⁹ This occurs when the High Court after finding a sentence

³¹⁵ [1992] 15 MLR 434 (HC).

³¹⁶ *Republic v Kampango* [1991] 14 MLR 432 (HC) at 434; Braslow & Cheit op cit (n160) at 28.

³¹⁷ Sections 353(2)(a)(ii) & (iii) of the CPEC; Grossman & Shapiro op cit (n224) at 10.

³¹⁸ *Republic v Band* [1993] 16(1) MLR 467 (HC).

³¹⁹ The cases of *Republic v Lasten* HCPR confirmation case no. 404 of 1998; *Republic v Tambala*, HCPR confirmation case no. 409 of 1998; *Republic v Selemani* HCPR confirmation case no. 982 of

disproportionate orders a massive reduction on the sentence duration that would result in the immediate release from prison of the offender, as was ordered in the cases of *Republic v Zuunde*,³²⁰ *Republic v Majiya*,³²¹ *Republic v Sozinyo*³²² and *Republic v Malanga*.³²³ In the context of prison overcrowding expedited review resulting in immediate release of a prisoner has positive bearing in reducing prison population or preventing it from getting worse.

In the case of *Republic v Zuunde*³²⁴ the defendants were convicted for possession of Indian hemp and sentenced to 12 months imprisonment. The reviewing judge sustained the conviction but modified the manifestly excessive sentence by reducing it by 66 per cent. The substituted sentence of four months imprisonment resulted in the offender's immediate release. Similarly, in the case of *Republic v Majiya*³²⁵ the defendant's sentence of three years' imprisonment was reduced by about 86 per cent.³²⁶ In the case of *Republic v Sozinyo*³²⁷ sentences of four years' imprisonment were reduced to one year and nine months (56 per cent) and resulted in the immediate release of the defendants. In the case of *Republic v Malanga*³²⁸ a sentence of 18 months' imprisonment was substituted by one that would result in the offender's immediate release after being imprisoned for over 11 months. If review had been conducted promptly a shorter term of imprisonment would have positively impacted on the prison population size.

ii. Scenario 2: high margin reduction by two-thirds or more

The second scenario of reducing manifestly excessive sentences of imprisonment through review is the altering of sentence with a high margin reduction of a fraction of two-thirds [66 per cent] or more. The High Court ordered a reduction of sentences by two thirds or more which reduced the period of incarceration in the following

1996 illustrate that mitigating factors play a critical role in altering sentences that result in immediate release orders.

³²⁰ [1993] 16(2) MLR 757 (HC).

³²¹ [1997] 2 MLR 87 (HC).

³²² [1997] 2 MLR 16 (HC).

³²³ [1993] 16(1) MLR 475 (HC).

³²⁴ [1993] 16(2) MLR 757 (HC).

³²⁵ [1997] 2 MLR 87 (HC).

³²⁶ An order for immediate release following a 96 per cent (81 months) reduction in sentence was also granted in the case of *Republic v M'munda* HC/PR confirmation case no. 5 of 1996.

³²⁷ [1997] 2 MLR 16 (HC).

³²⁸ [1993] 16(1) MLR 475 (HC).

cases: *Republic v Ngozo*,³²⁹ *Republic v Mulinga Banda*,³³⁰ and *Republic v Lenso*.³³¹ A reduction by six years in the case of *Republic v Phiri*³³² is about 75 per cent of a prison sentence of eight years.³³³ This occurred after the review court upheld the conviction for theft to the extent of a lesser amount.

Examples of high margin reduction in sentence by 85 per cent are the cases of *Republic v Phiri*³³⁴ and *Republic v Moffat Phiri*.³³⁵ In the former case the defendants were convicted of the offence of theft of cattle and committed to seven years imprisonment as ‘a reformatory’³³⁶ sentence. The reviewing court set aside the sentence for being disproportionate to the personal circumstances of the defendants and substituted it with one year’s imprisonment. In the latter case a sentence of 14 years imprisonment was shortened to two years, after a reduction of 85 per cent (12 years) on the original sentence.

iii. Scenario 3: reduction of sentence by half

The third scenario of modifying the length of manifestly excessive sentences of imprisonment occurs when the review court reduces the original sentence by 50 per cent or more.³³⁷ The instances of decreasing of sentence by a half are more frequent as illustrated by the four cases of *Republic v Chavula*,³³⁸ *Republic v Havula*³³⁹ and *Republic v Suluma*.³⁴⁰

In the case of *Republic v Chavula*³⁴¹ the court found both sentences for the accused to be excessive and were set aside. A sentence of 15 months imprisonment

³²⁹ HCPR confirmation case no. 1088 of 1997, a sentence of three years imprisonment substituted with one year imprisonment.

³³⁰ HCPR confirmation case no. 658 of 2007, imprisonment of three years reduced to one year.

³³¹ HCPR confirmation case no. 716 of 2007, sentence reduced from one year to four months imprisonment.

³³² [1992] 15 MLR 441 (HC).

³³³ *Ibid* at 443.

³³⁴ [1997] 2 MLR 92 (HC).

³³⁵ HCPR confirmation case no. 786 of 1998.

³³⁶ [1997] 2 MLR 92 (HC) at 93.

³³⁷ *Republic v Dimingu* HCPR confirmation case no. 850 of 1999, sentence reduced from one year to six months. In *Republic v Gumede* HCPR confirmation case no. 461 of 1998 a two years’ sentence reduced to 12 months imprisonment. In *Republic v Akimu* the sentence of 24 months was reduced by 50 per cent to twelve months imprisonment. In *Republic v Gong’ontha Banda* HCPR confirmation case no. 1631 of 1998, two consecutive five year sentences unduly long for first offenders who pleaded guilty and all the property was recovered. Ordered to run concurrently thereby reducing the cumulative period of ten years by 50 per cent.

³³⁸ [1990] 13 MLR 379 (HC).

³³⁹ [1991] 14 MLR 429 (HC).

³⁴⁰ [2005] MWHC 78.

³⁴¹ [1990] 13 MLR 379 (HC).

lead to a 50 per cent reduction in the period of incarceration for the second accused. Likewise in the case of *Republic v Havula*³⁴² the court halved the sentences of two years imprisonment and substituted for each prisoner a sentence of 12 months' imprisonment. For young offenders the courts aim to impose short term custodial sentences even for serious offences. In *Republic v Suluma*³⁴³ an 18 years old defendant convicted of robbery had a sentence of four years imprisonment reduced to two years on consideration of age as a mitigating factor.

iv. Scenario 4: reduction of sentence by one-third or less

The fourth scenario of reducing manifestly excessive sentences occurs when the review court reduces the original sentence by a fraction of one-third or a less. In *Republic v Chikwanje*³⁴⁴ a sentence of six years' imprisonment for housebreaking was deemed manifestly excessive and was reduced by two years' to four years' imprisonment. The case law show that the review process is an important tool for examining the fairness of a trial and the proportionality of a sentence. The outcomes of the procedure are significant in confirming the status of an offender and the criminal justice system needs to focus more attention on this appellate process.

d. Enhancement of manifestly inadequate sentences

Review of sentences implies that sentences that are wrong in principle or manifestly inadequate should be enhanced in order to ensure that the offender is subjected to a fair trial and proportionate punishment. The delays in setting down matters for review, while unfair to prisoners who have been wrongfully convicted and inappropriately punished, have benefited some offenders whose sentences were manifestly inadequate and required enhancement. For instance, in the case of *Republic v Genti*³⁴⁵ the accused was convicted of burglary and his matter was set down for review five months after the expiry of sentence. The sentence of 18 months imprisonment was out of line with the guidelines and it would have been enhanced to three years if reviewed promptly. In the case of *Republic v Lemison*³⁴⁶ a burglary sentence of 18 months failed to be enhanced since the matter was listed ten months

³⁴² [1991] 14 MLR 429 (HC).

³⁴³ [2005] MWHC 78.

³⁴⁴ [1997] 2 MLR 109 (HC).

³⁴⁵ HC/PR confirmation case no. 1604 of 1998.

³⁴⁶ HC/PR confirmation case no. 811 of 1998.

after the expiry of the sentence without the rebate.³⁴⁷ Likewise, in *Republic v Kajawo*³⁴⁸ a 15 months sentence of imprisonment could not be enhanced to three years because case was listed seven months after the expiry of the prison sentence without rebate.

Enhancement of sentences of imprisonment has the effect of lengthening the duration of incarceration and can negatively impact on the prison population. However, the High Court considers relevant factors before enhancing sentences including the aspect of prison overcrowding. Prison congestion has been proffered as a relevant factor justifying the confirmation of short prison sentences than would be usually be maintained as punishment.³⁴⁹ In the case of *Republic v Mussa*³⁵⁰, the court observed that

‘...indeed as much as I would want to believe that a stiffer punishment was warranted in this instance, I must agree that the reason behind punishment of the offender should always be reform. I am also mindful of the fact that there is congestion in the prisons and hence as courts we should endeavour to reduce the same by imposing sentences which are meaning [ful] albeit short³⁵¹.’

3. CONCLUSION

This chapter has outlined the legal framework and the courts response on the right to review. The analysis of the cases law shows that the timely implementation of the right to review holds the potential to facilitate the continuous reduction in prisoner population through discharges, immediate release orders and modification of sentence length to decrease average duration of imprisonment. The failure for timely review has a major impact on prisoners who are subjected to miscarriages of justice because those wrongfully convicted and sentenced are made to serve the objectionable sentence and negatively impact on the condition of overcrowding.

³⁴⁷ Under s.107 of the Prisons Act.

³⁴⁸ HCPR confirmation case no. 1519 of 1998.

³⁴⁹ Frase op cit (n29) at 174.

³⁵⁰ [2010] MWHC 25.

³⁵¹ *Republic v Mussa* [2010] MWHC 25at 2. The judge is the current chairperson of the Inspectorate of Prisons.

Chapter 4

THE CHALLENGES AFFECTING THE CASE MANAGEMENT OF REVIEW CASES

The preceding chapter has argued that if the criminal review of convictions and sentences is implemented efficiently it has the potential to facilitate continuous turnover of prisoner population and uphold a convicted prisoner's right to adequate accommodation whilst incarcerated in prison. This chapter examines case law and court statistics processed at the High Court, Principal Registry,³⁵² between January 2009 and June 2012 in order to analyse some of the existing challenges curtailing the practical implementation of the right to review and why the procedure is failing to achieve the desired impact on the prisoner population. The four challenges identified broadly pertain to staffing challenges and delays in setting down matters for review which result in a low throughput of confirmed criminal cases.

1. CAPACITY CHALLENGES

The criminal cases that are subject to automatic review depend on the type of sentence that has been imposed and the rank or grade of the subordinate court.³⁵³ A study on the constraints of implementing review identified knowledge gaps in procedure and practice as the main challenge to the efficient enforcement of the right.³⁵⁴ Magistrates claimed the challenging factors for efficient management of review cases as first, the lack of understanding of the law and procedure regarding review;³⁵⁵ second, the deliberate unwillingness by some magistrates to transmit case records to the High Court for review;³⁵⁶ and third, the judicial administrative issues regarding transportation and security of files.³⁵⁷ Additionally, judges observed that the procedure for review is not strictly adhered to by those who are involved in the process such as judges, magistrates and registry staff leading to inefficient practice.³⁵⁸ Further, the number High Court judges is insufficient to efficiently handle the input of cases and produce the desired impact on the prison population.³⁵⁹

³⁵² The Principal Registry located in Blantyre handles review cases from 40 magistrates' court centres in the southern region districts of: Blantyre, Mulanje, Thyolo, Chikhwawa, Nsanje, Mwanza, Neno, Chiradzulu and Phalombe.

³⁵³ Section 15 of the CPEC; Madise op cit (n221) at 10.

³⁵⁴ Chisala *et al* op cit (n195) at 8-9.

³⁵⁵ Ibid.

³⁵⁶ Chisala op cit (n195) at 8.

³⁵⁷ Ibid at 8-9.

³⁵⁸ Ibid at 10-11.

³⁵⁹ WLSA op cit (n21) at 70.

For the 2008 and 2009 court calendar seven High Court judges of the Principal Registry disposed of 3,369 cases from a total of 7,683 cases registered, which is an average of 481 cases per judge.³⁶⁰ Likewise in the following year eight High Court judges disposed of 3,496 cases from the 7,065 cases registered, representing an average of 437 cases per judge.³⁶¹ Notably, the caseload is heavy as the average annual number of cases concluded far exceeds the number of days in a court calendar. Moreover, resource shortages in the judiciary,³⁶² especially the lack of an electronic case management system, exacerbates the problems of implementing review.³⁶³

One of the main reasons for contending for the fast-tracking of review cases is that a majority of the cases are handled by lay magistrates³⁶⁴ who require more supervision from the professional judges especially in matters that require determining complex legal issues.³⁶⁵ It has been shown that the procedural errors arising from legal technicalities in a criminal trial will challenge the validity of a conviction and justify a reversal of the verdict and sentence.³⁶⁶ For example, the issues pertaining to less familiar areas of the law such as enforcement of immigration laws.³⁶⁷ Table 4 reveals that the vast majority of the cases submitted for review are from lay magistrates, with over 90 per cent of the cases for the years 2009 and 2012. For the 2008 and 2009 court calendar the magistrates' court in the southern region registered 12 069 criminal cases and concluded 7 338.³⁶⁸ During the 2009 and 2010 court calendar of the 4 190 criminal cases registered 2 477 were disposed of.³⁶⁹ It is therefore unreasonable to expect seven professional magistrates to abandon their overburdened court schedules and screen the cases of 30 lay magistrates.³⁷⁰ Recruiting and maintaining a predominantly lay bench in the subordinate courts

³⁶⁰ Malawi Judiciary 'Annual Report 2008- 2009' (2010) 18-25 & 81.

³⁶¹ Malawi Judiciary 'Annual Report 2009- 2010' (2012) 16-24 & 52.

³⁶² Van de Vijver op cit (n158) at 86. (Malawi); Starmer & Christou op cit (n195) at 815; WLSA op cit (n21) at 64-65, 78.

³⁶³ GJ Mwase op cit (n36); Kanyongolo op cit (n33) at 72.

³⁶⁴ Refer to table 8 below; *Republic v Brighton* HC/PR confirmation case no. 653 of 1997 at 3.

³⁶⁵ WLSA op cit (n21) at 68.

³⁶⁶ Refer to chapter 3.

³⁶⁷ *Republic v Bauleni* [1993] 16(2) MLR 722 (HC).

³⁶⁸ Malawi Judiciary 'Annual Report 2008- 2009' (2010) 83.

³⁶⁹ Malawi Judiciary 'Annual Report 2009- 2010' (2012) 55.

³⁷⁰ Malawi Judiciary 'Quick statistics' (2009) 2. The judiciary had a total of 18 (six female and 12 male) professional magistrates and 171 (39 female and 132 male) lay magistrates.

requires an efficient review system by the High Court as a tool for the supervision of lay magistrates in order to avoid miscarriages of justice.³⁷¹

Table 4: Number of cases transmitted for review by grade/rank of Magistrate

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Resident	FGM	SGM	TGM	Incomplete data	Total	Lay magistrates	Percentage by lay magistrates
2009	95	412	525	0	2	1034	937	90.61%
2010	45	392	344	51	47	879	787	89.53%
2011	103	313	206	88	41	751	607	80.83%
2012	2	65	53	7	0	127	125	98.43%

2. INORDINATE DELAYS IN TRANSMITTING FILES OF RECORDS OF THE CASES

It is impossible to review criminal proceedings of a subordinate court without the records of the cases, which consists of the original trial court papers, before the High Court.³⁷² Magistrates are accountable to judges in timely making available legible records of the cases for review instead of piling them in their chambers.³⁷³ Internally, registry staff are accountable to magistrates and judges to ensure that they transmit records of the cases to the High Court and that the files are brought to the attention of the review judge.³⁷⁴ The minimum standard transmission time is seven days from the date of judgment of the subordinate court.³⁷⁵ The delay in transmission of files triggers unreasonable delays in conducting review.

The manual case management system in the judiciary contributes to the delay in the transmission of files and facilitates the gross violation of convicted prisoners' right to expedited review as enshrined in the Constitution.³⁷⁶ The delays make the review mechanism a mockery of the administration of the criminal justice system and it is imperative that the court practice preserves the review process if vulnerable

³⁷¹ WLSA op cit (n21) at 74.

³⁷² *Kadam 'manja v Republic* HC/PR miscellaneous criminal application no. 5b of 2009; Wasby op cit (n35) at 335.

³⁷³ clauses 2 and 3 of the 'Performance Standards'; Malawi Judiciary 'The DFID Malawi Access to Justice Programme: Progress Report July 2008 – August 2008' (2008) 8.

³⁷⁴ clauses 1,4,6 and 7 of the 'Performance Standards'.

³⁷⁵ Clause 1 of the 'Performance Standards'.

³⁷⁶ H Mia 'Draft record keeping handbook for the justice sector in Malawi' (2010) 17, 27; Mwase op cit (n36).

prisoners are to reap its benefits.³⁷⁷ An analysis of the review case registers show that the judiciary is failing to be accountable to the Constitution in upholding the right to review in that the performance standards are not complied with.

The statistics in table 5 reveal that a minimal number of records of the cases of 2 per cent or less, are transmitted by the subordinate court to the High Court within the stipulated performance standard time of seven days. In 2009 out of a total 210 magistrates' court centres 124 were operational and covered a wide geographical area, including rural areas.³⁷⁸ However, the 40 operational magistrates' court centres in the southern region are within one day's trip away from the High Court Principal Registry.³⁷⁹ Having ruled out distance, there must be other factors that are causing these inordinate and objectionable delays in transmission of files of cases which need to be identified through qualitative studies so that viable strategies are devised and implemented for addressing the challenges.³⁸⁰

Table 5: Files transmitted within 7 days, High Court Principal Registry

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Total number of files transmitted	Total number of files transmitted within 7 days	Percentage of files transmitted within 7 days
2009	1034	3	0.29%
2010	879	18	2.04%
2011	751	10	1.33%
2012	127	3	2.36%

The least mean time of over 102 days taken to transmit records of the cases is also unreasonable in light of the performance standards.³⁸¹ Administrative challenges have been raised as the main reason for delays in transmitting files of cases, however it is difficult to understand how a case file will take 3,646 days (nine years) to be transported from a magistrate court to the High Court as shown in table 6 below. This can only be interpreted as either gross negligence on the part of magistrates' court registry staff or as deliberate unwillingness by the magistrate to transmit the

³⁷⁷ Chisala op cit (n195)6.

³⁷⁸ Malawi Judiciary 'Annual Report 2008- 2009' (2010) at 84.

³⁷⁹ Based on my personal knowledge arising from court inspections.

³⁸⁰ Chisala *et al* op cit (n195) at 9-10.

³⁸¹ Clause 1 of the 'Performance Standards'.

record of the case.³⁸² In terms of s15(3) of the CPEC the file of the record of the case could only have been remitted for theoretical reasons because the prisoner is supposed to have been released anyway due to the failure to conduct the review within the statutory time frame. It is contended that the courts are impinging on the prisoner's constitutional right to review by failing to conduct review before a prisoner is due to be released in terms of s15(3) of the CPEC.

Table 6: Period of time taken to transmit case files, High Court Principal Registry

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Minimum number of day	Mean number of days	Maximum number of days
2009	0	102.27	947
2010	0	149.96	2 452
2011	0	144.55	3 646
2012	2	177.99	1 178

Apart from the delays in transmission of files it is noted that not all the records of the cases concluded by the magistrates are remitted for review since there is a huge gap between the number of case records remitted to the High Court and the number of cases concluded by magistrates.³⁸³ For instance, during 2008 and 2009 out of 7 338 concluded matters 1 034 case records (14 per cent) were remitted for review.³⁸⁴ The following court year 879 (35 per cent) of the records of the cases were transmitted for review from the 2 477 concluded cases.³⁸⁵ This difference can be explained by the assertion that some magistrates 'deliberately opt not to send their cases for review',³⁸⁶ as well as a high level of findings of acquittal since review focuses on the accuracy of convictions and sentences.³⁸⁷

3. UNREASONABLE DELAYS IN SETTING DOWN REVIEW MATTERS

Once a record of a case has been transmitted to the High Court for review the delay in setting down matter promptly can cause injustice to the defendant and to the

³⁸²Chisala *et al* op cit (195) at 8.

³⁸³ Chisala op cit (n195) at 12.

³⁸⁴ Malawi Judiciary 'Annual Report 2008- 2009' (2010) 83.

³⁸⁵ Malawi Judiciary 'Annual Report 2009- 2010' (2012) 55.

³⁸⁶ Chisala op cit (n195) at 8.

³⁸⁷ Section 15 of the CPEC.

criminal justice system.³⁸⁸ The ‘timely confirmation of sentences by the High Court’³⁸⁹ is noted as one of the measures at the post sentencing stage that can help in reducing prison overcrowding.³⁹⁰ A registrar of a court ceases to have jurisdiction to set down matters for review upon attainment of a period of two years for resident magistrates, one year for magistrates of the first and second grade and six months for third and fourth grade magistrates.³⁹¹ The implementation of this provision by the prison authority would help to reduce prison overcrowding and provide an indication of the level of productivity in the judiciary in implementing review matters.

The trend of delaying the setting down of review matters has been raised as a concern in the following cases: *Republic v Nalumo*;³⁹² *Republic v Munthali*;³⁹³ *Republic v Ndelemani*.³⁹⁴ A delay in review leads the defendant to serve the objectionable sentence and increase cell capacity for those sentences considered manifestly excessive or if the review judge eventually quashes the conviction.³⁹⁵ A review court will be reluctant to enhance sentence where the original sentence is considered manifestly inadequate because a court will be reluctant to recall a prisoner who has already been released to return to prison to serve an enhanced sentence.³⁹⁶

Table 7 shows that the cases registered in 2010 took an average of 453 days and a maximum of 918 days to be reviewed, that is a period of over two years and six months, respectively. For the cases registered in 2009 the average time is even longer at 816.15 days which is close to the maximum number of days for review in 2010.

³⁸⁸ Clause 4 of the ‘Performance Standards’; Chisala op cit (n195) at 10-11.

³⁸⁹ Nkhoma op cit (n109) at 5

³⁹⁰ Ibid at 5.

³⁹¹ Section 15(3) of the CPEC; *Republic v Moffat* [2000] MWHC 17; HC/PR Confirmation case no. 734 of 1999.

³⁹² [2000] MWHC 25, sentence reduced from four years to three years.

³⁹³ [2000] MWHC 22, sentence meant to be enhanced from 36 to 42 months. Hearing delayed, prisoner already completed serving sentence.

³⁹⁴ [2000] MWHC 19, defendant sentenced to a manifestly excessive eight months imprisonment for theft. Efficacy of the review process undermined due to more than 6 months delay in setting down matter.

³⁹⁵ *Republic v Kasimu* HCPR confirmation case no. 1514 of 1998.

³⁹⁶ In *Republic v Chikango* HCPR confirmation case no. 792 of 1993: grossly inadequate sentence of nine months imprisonment reluctantly confirmed because review delayed. Matter listed after offender had earned his remission of sentence, completed his sentence and was released from prison. In *Republic v Phiri* HCPR confirmation case no. 691 of 1993: court failed to enhance sentence since matter set down after offender had served his sentence and been released from prison; In *Republic v Nhlema* HCPR confirmation case no. 502 of 1994: the defendant had served his manifestly inadequate prison sentence by the time the matter was set down for hearing.

The 2009 cases have been pending review longer and have highest maximum number of days at 1 318. The few cases registered in 2012 were reviewed at the least average time of 53 days and a maximum of 88 days.

Table 7: Period of time taken to review a case

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Minimum number of days	Mean number of days	Maximum number of days
2009	0	816.15	1318
2010	0	453.4	918
2011	2	319.42	548
2012	1	53.29	88

The long periods of delay experienced by prisoners in review matters are alarming and negatively impact on prisoners' human rights status.³⁹⁷ First, the convicted prisoners are denied the right to a fair trial because the review of their case is not conducted within a reasonable time. Secondly, the delays slow down the turnover of the prisoner population and thirdly, delays result in offenders being subjected to prison overcrowding. This analysis shows that there is a causal link between convicted prisoner overcrowding and the rate of disposal of review cases, especially under the current situation where the prison authority do not invoke s15(3) of the CPEC. It is contended that low rates of case disposal maintains a high rate of convicted prisoner population which leads to prison overcrowding.

The following examination of case law illustrates the argument that unreasonable delays in conducting review occurs when a matter is set down after a sentence has expired or a prisoner has been discharged, when a prisoner is wrongfully convicted and when a prisoner serves disproportionate sentence.

a. Matter set down after sentence has expired or prisoner released

The High Court has noted that the registry is not running efficiently in that there are delays in setting down review matters.³⁹⁸ The outcome is that some matters are called

³⁹⁷ Chisala op cit (n195) at 11.

³⁹⁸ *Republic v Joe* HCPR confirmation case no. 343 of 1998 matter set down after nine months; *Chitsukwa v Republic* HCPR confirmation case no. 1483 of 1998 on review the defendant was acquitted after he had served his sentence; *Mbondo v Republic* HC/PR confirmation case no. 649 of

for hearing after the prisoner's sentence has expired³⁹⁹ or he has been discharged from prison.⁴⁰⁰ Consequently, review of the matter becomes a theoretical exercise and it fails to serve its intended practical objectives. For instance, in the case of *Republic v Nambazo*⁴⁰¹ the defendant convicted and sentenced to 18 months imprisonment on 15 July 1999. The reviewing judge screened the case on 7 October 1999 and was of the opinion that the punishment was manifestly inadequate. However, the registrar set down the matter for hearing almost a year later, on 22 August 2000, after the defendant had already served his sentence with rebate.⁴⁰² In this circumstance it would be unfair to summon the defendant, who already had his freedom back to serve an extended term. Similarly, in the case of *Republic v Bayani*⁴⁰³ the court lamented the fact that the case was set down for review several months after the defendant had been released after completing serving his eighteen months sentence of imprisonment.

b. Prisoner serving manifestly excessive sentence

It has been noted the High Court in the process of remedying a possible miscarriage of justice by a lower court causes further injustice to the offender when it exercises unreasonable delay to set down a matter for review by making the offender serve the objectionable sentence.⁴⁰⁴ For instance in *Republic v Kaliyati*⁴⁰⁵ the review court reluctantly confirmed a manifestly excessive sentence of two years imprisonment because the defendant had already served the sentence at the time of review. Similarly, in *Republic v Kasimu*⁴⁰⁶ the court failed to reduce a manifestly excessive sentence of two years' imprisonment for theft of bicycle because at the hearing the defendant had already served the full prison term. The wrongful periods of incarceration arising from excessive sentences could be avoided with prompt review and thereby reduce prison overcrowding.

1997 conviction quashed and sentence set aside after defendant had served a sentence which he should not have served in the first place; *Republic v Rajabu* HC/PR confirmation case no. 1456 of 1998.

³⁹⁹ *Republic v Makasho* due to delayed hearing the accused had completed serving the sentences imposed although they were wrong in principle. The review court discharged the offenders from prison.

⁴⁰⁰ *Mbondo v Republic* HCPR confirmation case no. 649 of 1997; in *Chitsukwa v Republic* HCPR confirmation case no. 1483 of 1998: defendant was acquitted after he had served his sentence.

⁴⁰¹ [2000] MWHC 23.

⁴⁰² The prisoner is entitled a remission & s15(3) entitles them to keep him for only one year.

⁴⁰³ [2000] MWHC 26.

⁴⁰⁴ *Mbondo v Republic* HC/PR confirmation case no. 649 of 1997

⁴⁰⁵ HCPR confirmation case no. 1198 of 1994.

⁴⁰⁶ HCPR confirmation case no. 1514 of 1998.

c. Prisoner serving disproportionate sentence

Delays in setting down matters for review lead prisoners to serve disproportionate sentences which exacerbate the situation of prison overcrowding. For instance, in *Republic v Napolo*⁴⁰⁷ the defendants were convicted of escape from lawful custody and were fined K300.00⁴⁰⁸ in default six months imprisonment which sentence was beyond what the law permitted. The delays in listing caused injustice to the defendants who served the manifestly excessive default prison sentence before the High Court had exercised its powers of review.⁴⁰⁹ This ‘injustice would have been avoided by this court being more punctilious with the safeguards and procedures introduced by the Criminal Procedure and Evidence Code’.⁴¹⁰

d. Prisoner wrongfully convicted and serving wrong sentence

In chapter three it was argued that on review wrongful convictions are reversed and orders made for the discharge of the prisoner or conduct of a new trial. However, delays in review cause injustice because the findings are made after a prisoner has been incarcerated for a considerable period of time. In the case of *Republic v Paulo*⁴¹¹ the defendants were charged with illegal entry, convicted and sentenced to one-month imprisonment with hard labour. The High Court found that the conviction was not proper since no offence was committed by the defendants as their conduct only rendered them prohibited immigrants.⁴¹² Unfortunate in this case the accused persons had already served the sentences and the court was constrained from making any order in respect to the sentence. The case also illustrates that lay magistrates face challenges in adjudicating certain criminal cases which emphasises the need for the timely review. The detection of procedural errors imply that trial court time is being wasted and there is overuse of imprisonment as punishment without confirming with the penalty clauses in the statute. This leads to miscarriages of justice and impacts negatively on the prisons by increasing the population with persons who should not be confined at all.

⁴⁰⁷ [2000] MWHC 16.

⁴⁰⁸ 300.00 Malawi Kwacha

⁴⁰⁹ Section 15(3) of the CPEC.

⁴¹⁰ [2000] MWHC 16.

⁴¹¹ [1993] 16(2) MLR 747 (HC).

⁴¹² *Ibid* at 748.

In the case of *Republic v Ndasauka*⁴¹³ the opinion on review was delivered on 5 February 1990, almost two years from the year of registration as a confirmation matter. The High Court found that the accused was highly prejudiced in the way the trial was conducted due procedural irregularities in respect of the charge sheet; the change of magistrates and the recording of evidence. The conviction and sentence were set aside with an observation that ‘the accused in this case has already served his prison term which was two years imprisonment with hard labour’.⁴¹⁴ The review order served other purposes such as clearing the defendant’s conviction record by confirming that there was no fair trial but causing the accused to serve a full prison term before his matter could be reviewed is a great miscarriage of justice by the judiciary. If the review had been done swiftly the defendant would have been released much earlier from prison and reduced the prison population.

A similar situation of unreasonable delay happened in the case of *Republic v Kadzani*.⁴¹⁵ In this matter the defendant was sentenced to 12 months’ imprisonment and the matter was set down for hearing after the prisoner had already served his sentence and had been released. Unlike in the case of *Republic v Ndasauka*,⁴¹⁶ the judge was of the opinion that in the circumstances the proper course was to confirm the conviction and the sentence.⁴¹⁷

4. Poor rate of case disposal

A fourth challenge facing the implementation of the right to review is that the criminal case throughput by the judiciary is extremely low. The case disposal rate for criminal matters at High Court Principal Registry for 2008 to 2009 court calendar were at 22.8 per cent (1 248 cases were registered, 285 were concluded while 963 were pending).⁴¹⁸ This is against an annual performance of 43.85 per cent, with 7 683 cases being registered, 3 369 disposed of while 4 314 were pending.⁴¹⁹ The productivity in criminal matters almost doubled to 42.63 per cent during the 2009 to

⁴¹³ [1990] 13 MLR 404 (HC).

⁴¹⁴ [1990] 13 MLR 404 (HC) at 406.

⁴¹⁵ [1991] 14 MLR 431 (HC).

⁴¹⁶ [1990] 13 MLR 404 (HC).

⁴¹⁷ [1991] 14 MLR 431 (HC) at 432.

⁴¹⁸ Malawi Judiciary ‘Annual Report 2008- 2009’ (2010) at 81.

⁴¹⁹ Ibid.

2010 court calendar as a result of concluding 755 criminal cases from the 1 771 registered.⁴²⁰

Table 8: Number of case reviewed within seven days, High Court Principal Registry

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Total number of files confirmed	Total number of files confirmed within 7 days	Percentage of files confirmed within 7 days
2009	323	70	21.67%
2010	412	87	21.11%
2011	201	28	13.93%
2012	33	3	9.09%

The managerial accountability for review matters is poor in that the provisions of s15 of the CPEC and the 'Performance Standards' are not being complied with. The study findings show that only a minority of the criminal cases are reviewed within seven days from the date of their registration at the High Court. Table 8 reveals that in 2009 and 2010 just over 20 per cent of the cases were reviewed within the seven days limitation of time. In 2011 the cases reviewed were as low as 14 per cent and for the first six months in 2012⁴²¹ the productivity had dropped to 9 per cent (three) of the cases being reviewed within seven days. Generally the performance of the judiciary in review matters over the four year study period has been very poor and it worsened in 2012 due to the industrial action.⁴²² The backlog of review cases is a factor causing offenders to serve long sentences and contribute to prison overcrowding.

⁴²⁰ Malawi Judiciary 'Annual Report 2009- 2010' (2012) at 52.

⁴²¹ The industrial action affected the commencement of review of cases for 2012 for a period of three months.

⁴²² S Khunga 'Courts reopen today' *The Daily Times* 26 March 2012 at 3.

Table 9: Review case disposal rate, High Court Principal Registry

Source: analysis of HC/PR review case registers for 2009, 2010, 2011 and 2012

Year	Total number of files registered	Total number of filed reviewed	Number of files pending	Number of files with incomplete data	Percentage Rate of disposal
2009	1034	323	691	20	31.23%
2010	879	412	465	2	46.87%
2011	751	201	536	14	26.76%
2012	127	33	94	0	25.98%

In table 3 it was shown that 742 case records of the convicted prisoners at Chichiri Prison are pending review. The analysis of the annual statistics from 2009 to 2012 which appears in table 9 shows that the majority of the cases submitted to the High Court are not being reviewed within the stipulated limitations of time, if at all. The year 2010 had the highest percentage of cases being reviewed at 46.87 per cent (that is 412 cases of the 879 cases registered). Figure 1 graphically confirms that the level of productivity over the study period was indeed highest in 2010 and has been declining until it reached a major slump in 2012 due to the strike. For the remaining three years under this study less than one third of the cases have been reviewed.

In principle, all the cases transmitted to the High Court are supposed to be reviewed then remitted back to the magistrates who submitted them so that the objective of supervision can be achieved and completed. It is not clear as to when the matters which are pending review will be set down for hearing. This rate of performance is appalling and it is painstaking because it is arising from the judiciary breaching its duty to uphold the constitutional right to review of convicted prisoners.⁴²³ Based on these findings of inefficiency in conducting review it is asserted that the judiciary is failing to achieve the two strategic objectives of 'quality service provided to users of the judicial system'⁴²⁴ and 'effectiveness and efficiency of the judicial system's administration'.⁴²⁵ Litigants lose respect and confidence in

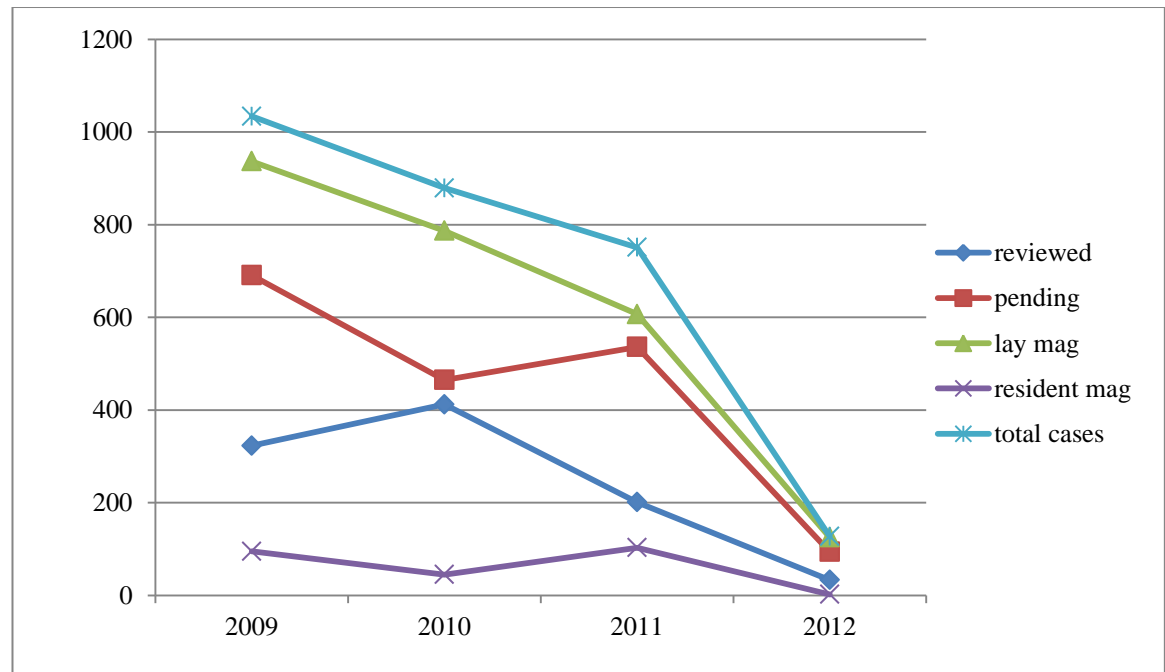
⁴²³ Section 42 of the Constitution.

⁴²⁴ Malawi Judiciary 'Strategic Plan 2011- 2016' (2011) at 25.

⁴²⁵ Malawi Judiciary 'Strategic Plan 2011- 2016' (2011) at 25.

the courts when their cases are not concluded speedily and efficiently as the judiciary has promised in the mission statement.⁴²⁶

Figure 1 : Annual trends in disposal of review cases and transmission of records by rank of magistrate



It is asserted that the low rates of disposal of criminal review cases impacts negatively on prisoner population in that it leads to high numbers of convicted prisoners being imprisoned whose sentences might otherwise have been modified by a court in the course of review. Timely review is critical because a higher rate of disposal of review matters in accordance with the 'Performance Standards' holds the potential to reduce the convicted prisoner population. Through primary sources this chapter has demonstrated that the courts are currently facing challenges in effectively implementing the right to review thereby contributing to prison overcrowding.

⁴²⁶ Mwase op cit (n36) at 1; Malawi Judiciary 'Strategic Plan 2011- 2016' (2011) at 23.

Chapter 5

Conclusion

The courts in implementing the right to review have a critical role in ensuring that the administration of criminal justice institutions complies with constitutional and international human rights standards applicable to sentenced prisoners. The wide flexibility in the application of the supervisory power of review affords the High Court an opportunity to swiftly dispose of criminal matters of convicted offenders to confirm that the prisons only detain prisoners who have been convicted after a fair trial and sentenced proportionally. The process of review offers possibilities for reversal of findings of convictions and for sentences to be altered on the ground of procedural errors arising from the conduct of the trial at the lower court.⁴²⁷ The orders in confirmation hold the potential to positively impact on the prisoner population through the release of prisoners if a conviction is adjudged irregular and quashed.⁴²⁸ Further, convicted prisoners have the prospect through the review process to have their sentences altered to an appropriate and proportional punishment for the offence for which they were convicted.⁴²⁹ Additionally, the law on review regards the deprivation of liberty through imprisonment serious and mandates the prison authority to discharge prisoners upon failure by the courts to review their cases within a stipulated timeframe.⁴³⁰

The prisoners' realisation of the right to review depends for enforcement and implementation on the performance by the judiciary. In the absence of operational efficiency in this branch of government the implementation of the right to review is severely constrained. This dissertation has shown that the inexpediency in implementing review by the judiciary has produced little tangible benefit for the prisoner largely due to the practical and motivational barriers in the judiciary and the prison authority. The practice is not reflecting the constitutional promise and the Constitution would be better served by strengthening the capacity of the judiciary to allow for a speedy and efficient disposal of review cases and the prison authority to discharge prisoners on expiry of review. The challenges raised in this dissertation can be mitigated by devising and implementing strategies that would facilitate the

⁴²⁷ Section 353(2)(a) of the CPEC.

⁴²⁸ subsection 353(2)(a)(i) of the CPEC.

⁴²⁹ subsections 353(2)(a)(ii) & (iii) of the CPEC.

⁴³⁰ Section 15(3) of the CPEC.

clearing of the review case backlog and the handling of new cases in accordance with the 'Performance standards'.

It is recommended that the Judicial Service Commission should facilitate the recruitment of an optimum number of judicial officers and court service staff who can expeditiously manage review cases.⁴³¹ Adding more judicial officers and support staff is 'a quick way to keep a court's backlog within reasonable bounds or at least to prevent it from getting worse'.⁴³² Moreover, the procedure under s361 of the CPEC would be feasible if a sufficient number of resident magistrates are available and tasked to screen criminal cases tried by lay magistrates from a given district in readiness for review. The prior screening of cases would facilitate the speedy disposal by the High Court of review matters in that the judges' already overtaxed time in perusing through the record of the case would be reduced since the resident magistrates' statement would guide the superior court on the pertinent issues in a particular case.

Further, there is need to allocate adequate financial resources in the national budget to the judiciary for the efficient administration of the criminal justice system. Sufficient funding is required to cater for personal emoluments and operational expenses such as facilitating the procurement and installation electronic case management systems⁴³³ and the provision of systematic training on the right to review⁴³⁴ to key stakeholders in the criminal justice system.

Moreover, the constitutional and statutory review requirements that have been highlighted should prompt the court to give more attention to criminal matters. The heavy caseload for the High Court Principal Registry calls for restructuring of jurisdiction from a general registry to a specialised division which can specifically focus on criminal matters in order to improve productivity.⁴³⁵ In order to increase productivity and attain the objectives of caseload management there is need for leadership that can develop a 'legal culture'⁴³⁶ that embraces the concept of expedited mandatory review of criminal cases as a tool for mitigating prison

⁴³¹ WLSA op cit (n21) at 64; Malawi Judiciary 'Report on judicial administration and case management workshop held at Club Makokola, Mangochi' (2010) 3-5.

⁴³² Wasby op cit (n35) at 326.

⁴³³ Mwase op cit (n36) at 11; Starmer & Christou op cit (n195) at 815; Chisala op cit (n195) at 10.

⁴³⁴ Kanyongolo op cit (n33) at 86; WLSA op cit (n21) at 73.

⁴³⁵ Ministry of Justice and Constitutional Affairs 'Minutes of homicide stakeholders meeting' (30 January 2009) 6; Ministry of Justice and Constitutional Affairs 'Minutes of homicide stakeholders meeting' (28 August 2009) 4-5;

⁴³⁶ Gloppen & Kanyongolo op cit (n25) at 282.

congestion. Additionally, to improve the responsiveness of the judiciary there should implement a system of monitoring the input and output of cases in order to hold court service staff, magistrates and judges accountable for the delay in the handling review cases.⁴³⁷

The analysis of the practise and outcomes of review presented in this dissertation has significant implications for criminal justice policy. The quashing of convictions, altering and reduction of sentences presents a potentially interesting case in the context of prison overcrowding. It has been shown that review is a strategy for reducing incarceration rates because it influences the two factors that determine the size of the prison population: review outcomes reduce the number of people who get convicted and modify the sentence length. These findings reflect the experience of one High Court registry in handling review matters, additional research will shed more light on the practice in the remaining three registries in Malawi or in other jurisdictions.

⁴³⁷ WLSA op cit (n21) at 74; Starmer & Christou op cit (n195) at 815-816; LP Chikopa 'Registry organisation, functions and operations and procedures' in Malawi Judiciary 'Brief Report on case flow and record management workshop' (2010) 6.

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