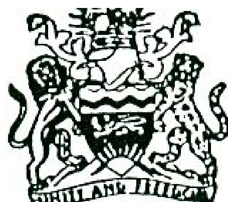

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CONSTITUTIONAL CASE NO. 15 OF 2007

GABLE MASANGANO (Suing on His Own
Behalf of All Prisoners in Malawi)....................................Applicant

Vs

THE ATTORNEY GENERAL...................................1st Respondent

MINISTER OF HOME AFFAIRS AND
INTERNAL SECURITY...2nd Respondent

COMMISISONER OF PRISONS..............................3rd Respondent

CORAM: **HON. JUSTICE R.R. MZIKAMANDA**

HON. JUSTICE R.R. CHINANGWA

HON. JUSTICE E.J. CHOMBO

Mr Salimu; Counsel for Applicant

Mr Kachule; Counsel for the Respondent

Mr E.B. Kafotokoza; Court Interpreter

J U D G M E N T

This is a judicial review. The matter was commenced in the High Court Principal Registry as Miscellaneous Application No. 132 of 2006. On 21st September, 2007 Acting Chief Justice H.M. Mtegha certified these proceedings under Section 3(2) of the Courts (Amendment Act) 2004 as substantially relating to and concerning the interpretation or application of the provisions of the Constitution of Republic of Malawi. It was directed that the matter be heard and disposed of by a Panel of not less than 3 High Court Judges. A panel consisting of Nyirenda J, as he then was, Singini J, as he then was and Chinangwa J was constituted. The matter was set down for hearing on 10th March, 2008 at 9:00 in the forenoon. It seems the hearing did not take place on the scheduled date. Two members of the Panel, namely Nyirenda J and Singini J, were appointed Supreme Court Justices. Subsequently the Panel was reconstituted to be composed of Mzikamanda J, Chinangwa J and Chombo J. The matter was heard on 17th February, 2009. This now is the judgment.

The court bundle as presented by the Applicant here shows that the Applicant is suing the Respondents on his own behalf and on behalf of all Prisoners in Malawi. The Applicants' affidavits show that he is a convicted prisoner serving a 12 year prison term effective 2006. He was first at Chichiri Prison but presently he is at Domasi Prison. He avers that ever since his imprisonment, he and his fellow prisoners have been subjected to torture and cruel, inhuman and degrading treatment or punishment which is an infringement of his rights which he believes to be non-derogable as per Section 44 of the Constitution. Among other things the prisoners are subjected to:

(a) Insufficient or total lack of ordinary diet which only comprises maize meal (nsima) and peas or beans contrary to the 3rd Schedule of the Prison Regulations in the Prisons Act Cap 9:02 of the Laws of Malawi.

(b) Insufficient or total lack of food stuffs in that only one meal is normally served per day with no breakfast contrary to the 3rd Schedule of the Prison Regulations.

(c) Insufficient or total lack of clothing and accessories such as 2 pairs of shorts, singlets, soap, a pair of sandals contrary to the 4th Schedule of the Prison Regulations.

(d) Insufficient or total lack of cell equipment such as blankets, sleeping mats and mugs contrary to the 5th Schedule of the Prison Regulations.

(e) Insufficient or total lack of space in the cells as they are always congested in a total number of 120 persons that are made to occupy a cell meant for 80 persons.

(f) That the prisoners are denied the right to chat with their relatives as the prison warders close the visitors' room so that prisoners should not have a chance of chatting.

(g) That the prisoners are harassed and physically tortured by the warders in front of their relatives.

(h) That only prisoners with money have access to communication.

(i) That prisoners are denied access to medical attention and the right dose for a person to fully recover and are even asked the offence they committed before receiving any medical attention and are even sometimes given wrong dosage.

The Applicant further avers that the prisoners are not allowed to do some exercises and if they are found doing such act they are called by the most top boss and given punishment while being accused that they are planning to escape. Donations received for prisoners are only given to them half their share and the prisoners do not know where the rest goes. For all the above, the Applicant verily believes that there is need to have an interpretation or application of the provisions of the Republican Constitution against these infringements of the said rights in making an Order against the authorities responsible in the form of judicial review. The Applicants believe that the Respondents are acting unconstitutionally and unlawfully in that the prisoners' non-derogable Constitutional rights not to be subjected to torture and cruel, inhuman and degrading treatment or punishment have been grossly violated.

The affidavit in opposition was sworn by the Chief Commissioner of Prisons, Mr Macdonald Luciano Chaona. According to that affidavit, in the SADC region each prisoner is supposed to be allocated 0.680 Kg of maize flour for consumption per day to go with a day's relish. The 0.680 Kg is meant to cater for both lunch and supper. About 25 bags of 50Kgs each of beans are consumed per day. In prisons such as Bzyanzi in Dowa, the prisoners are given three meals a day from the same 0.680 Kg of maize flour and are provided with mosquito nets. This is possible because there are few prisoners at Bzyanzi, relatively proportionate to the capacity of the available cooking utensils and machinery at the prison. The position is different with Maula and Chichiri prisons which host almost double the number of prisoners those prisons were initially designed to hold. As a result, it would be difficult for the prisoners in these prisons to be given three meals a day as this would practically mean that some prisoners would be having their breakfast at lunch time, their lunch at supper and supper sometime in the early hours of the morning. There would be difficult management and administrative problems and that might affect the security detail of the prisons. Despite these problems each prisoner

still gets the required 0.680 Kg of maize flour per day in that single meal. Since 0.680 Kg of maize flour per prisoner is more than enough for a single person for a single meal, the prisoners actually split the meal into two portions, one for lunch and the other for supper. The prisoners are on occasion fed fish, meat and vegetables dishes. They have access to safe drinking water with Maula paying about K600,000 per month in water bills. The farming or agricultural activities have been intensified in prison farms and have considerably improved the food situation in the prisons. Government has already provided more farming land to the Prison Department such as Makande in Thyolo, Maula garden and Nkhate in Nsanje. There is poultry farming benefiting prisoners as eggs are provided to prisoners admitted at hospital. The Prisons are planning to keep cattle for the benefit of the prisoners in terms of food and milk. Prisoners are allowed to get food from their relatives.

He further averred that Government is already devising and implementing policies aimed at decongesting and improving the living conditions in prisons. Government has reopened Mikuyu and Nsanje prisons and both prisons are currently

undergoing renovation works. New 300 capacity Cell blocks have just been completed in the Mwanza, Ntchisi, Chitipa and Mulanje prisons to help ease congestion problems. Government has already approved the building of two more prisons in the districts of Ntchisi and Mwanza. Government has also approved the building of a new maximum security prison in Lilongwe. Government, in partnership with DFID has just finished the construction of the Mzimba prison facility. All these projects attest to the fact that Government is indeed progressively trying to solve the congestion problem in its prisons in all the three regions of the country.

Regarding prison clothing, it is not possible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds. The prison authorities had requested K1.2 billion as allocation for the year but only got K265 million as approved by Parliament. The lack of sufficient clothing has been aggravated by the increase in number of prisoners due to escalating levels of crime in the country. The Prison authorities are discussing with various donors to provide the same funding to supplement the shortfalls in the

resources available. He thus prays that the application for Judicial Review be dismissed with costs.

The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is to ensure that the applicant is given fair treatment by the authority to which he has been subjected. It is not intended to substitute the opinion of the judiciary or indeed the individual judges for that of the authority constituted by law to decide the matters in question (see **R. Mpinganjira and Others V Council for the University of Malawi** Misc. Civil Cause No.4 of 1994. **The State V the Attorney General, The Inspector General of Police, The Commissioner of Police** (Central) Misc. Civil Cause No. 49 of 2008). The present matter is about the realization of prisoners' rights as guaranteed under the Republic of Malawi Constitution and relevant laws under it, especially the Prisons Act Cap 9:02. The question we are called upon to address is whether since his imprisonment, the applicant and the other persons whose representative capacity he is acting for have been subjected to torture and cruel, inhuman and degrading treatment or

punishment being an infringement on his rights and those of the other persons. This case is concerned with the realization of human rights of prisoners and the State's Constitutional obligations in relation to prisoners and prison conditions.

Section 42 (1)(b) of the Republic of Malawi Constitution provides that every person who is detained, including every sentenced prisoner shall have the right to be detained 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. The South African Constitution under S 35 (2)(e) includes at least exercise and adequate accommodation as part of the rights of prisoners. The Prisons Act Cap 9:02 of the Laws of Malawi provides for the establishment of prisons within Malawi, for a Prison Service, for the discipline of Prison Officers, for the management and control of prisons and prisoners lodged therein and for matters incidental there-to. Under the Prisons Act are Prison Regulations which include a part on the admission and confinement of prisoners, among other parts of the regulations. The Third Schedule to the Act

deals with the diet of the Prisoners and daily issues. The Fourth Schedule deals with prisoners' clothing and accessories while the Fifth Schedule deals with cell equipment, such as the number of blankets for cold season and the number of blankets for hot season, besides sleeping mat and mug. In each of the Schedules referred to there is a scale provided on the quantities to be provided. The Applicants in this case complain that the Respondents have failed to meet the minimum Constitutional and Statutory obligations placed on them with respect to the Applicant and all prisoners as well as with respect to prison conditions.

The skeletal arguments for the Applicants show that leave to apply for judicial review in this matter was granted on 4th October, 2006. The Applicants allege that the Respondents have acted and continue to act illegally and irrationally by arbitrarily depriving them of what they are entitled to in terms of food rations, clothing and other hygiene equipment and cell space under the Prison Regulations of the Prisons Act. Thus the Respondents are in breach of Section 19 subsections (1), (2) and (3) of the Constitution of the Republic of Malawi. The Applicants

argue that the Respondents do not dispute the constitutional violations as alleged by the prisoners but they say they do not have resources to comply with the prescriptions of the Prisons Act at once. The Applicants argue that life in Malawi Prisons is regulated by the Constitution, the Prisons Act and International Law, which laws aim at establishing minimum standards under which prisoners should be held. The Applicants suggest that the practical rationale for these minimum standards is not to make prisons places of comfort and luxury like hotels, but places for penal reform where occupants do not lose their basic human dignity just because they are under the incarceration of the State. The specific prescription by the Prison Regulations as to how much food and what food a prisoner is entitled to per day, and what cell equipment, inclusive of clothing and beddings, are minimum standards that must be complied with by the Respondents, so the Applicants argue. They further argue that lack of resources cannot be an answer to these statutory standards. They also argue that the act of giving prisoners one meal a day is not in tandem with the right to human dignity under Section 19 (1) of our Constitution. Food is very basic to the sustenance of human life, and providing

prisoners with a single meal of nsima and beans over long periods of time is cruel and inhuman, the Applicants argue. Similarly the omissions by the Respondents to provide basic clothing and beddings as complained of by the prisoners is cruel, inhuman treatment while the overcrowding complained of by the prisoners must be interpreted by the court as degrading treatment. The Applicants suggest that there is no other way of interpreting a situation where there are half naked prisoners surviving on a single meal of nsima and beans or peas a day and living in overcrowded conditions. The Applicants have referred to a report of the Malawi Prison Inspectorate, a body constituted under Section 169 of the Republic of Malawi Constitution. That body is charged with the monitoring of conditions, administration and general functioning of penal institutions, taking due account of applicable international standards. In its 2004 report the Malawi Prison Inspectorate states that:

> **"In most of the prisons visited, the inspectorate noted that diet for prisons continue to be poor."**

The prisoners complained of being served with monotonous diet of nsima (mgaiwa) and beans/pigeon peas once a day. The inspectorate also observed that:

> **"However it is pleasing to note that this diet is supplemented by vegetables in almost all the prisons."**

On overcrowding the Inspectorate noted that congestion continues to be the most serious problem in our prisons. The prison population continues to grow as a result of rising crime rate while the prison structures remain the same. The prison conditions have not improved since 2004 when the report was issued. The minimum standards under the Prison Regulations are in tandem with international standards in the Minimum Rules for the Treatment of Prisoners as adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955. The United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is simply reflected in our Constitution. The practice promulgated by S 169 of our Constitution is at par with what obtains in Europe. The Applicants cited in support the case of **Linton V Jamaica**

UNHCR Communication No. 258/1987, 22nd October, 1992 which held that withholding food or water is inhuman treatment. Also cited were four other foreign cases in support of the proposition that lack of fresh air, sunlight and exercise can amount to inhuman treatment. (see **Mc Cann V Queen** 1976 IFC 570 (TD); **Sieivper Sand, Sukhran and Per Sand Vs Trinidad and Tobago** (UNHCR) Communication No. 938/200, 19th August, 2004; **Conjwayo V Minister of Justice of Zimbabwe** (1992) 12 Commonwealth Law Bulletin 1582; **Dennis Labban V Jamaica** (UNHCR); Communications No. 799/1998, 13th May, 2004). The Applicants cited **Jaipal V State** 18th February, 2005 Commonwealth Human Rights Law Digest 5 CHRLD 359-520 Issue 3 Summer 2006 at 417 as authority for the proposition that overcrowding and lack of resource is unconstitutional. The Applicants invite this court to take judicial notice of press reports that the prevalence rate of HIV/AIDS in our prisons is very high. The 2004 Prison Inspectorate report observed that due to overcrowding there were 12 deaths per month in our prisons, making the situation a matter of grave concern according to the International Committee of the Red Cross Mortality Rate. The Applicants pray that this court holds

that the conditions under which they are being held do amount to cruel, inhuman and degrading treatment and to declare the acts and omissions of the Respondents complained of by the Applicants as unconstitutional.

The Respondents' arguments are that they are not proper parties to these proceedings. They cited the case of **State Vs Attorney General, ex parte Dr Cassim Chilumpha** Misc. Civil Cause 302 of 2005 where the court held that in a Judicial Review application the correct party should and is the authority that actually exercised the statutory duty or power. Also cited was the case of **The State and Attorney General, Mapeto Wholesalers and Faizal Latif, ex parte, Registered Trustees of Gender Support Programme** Civil Cause No. 256 of 2005 where Mkandawire J, observed that judicial review proceedings are not legal suits and are not covered by the provisions of the Civil Procedure (Suits by or Against the Government or Public Officers) Act, whereby invariably the Government is sued through its Principal Legal Advisor who happens to be the Attorney General. His Lordship was able to observe that:

"The position is now well settled that the Attorney General cannot be the Respondent unless it is shown that the office of the Attorney General was party to the decision which is being challenged."

It was argued that nowhere in this instant case has it been shown that the Attorney General made the purported decision being challenged. Again it was argued that it has not been shown with sufficient particularity as to when the purported decision was made by the Respondents and which particular authority made the purported decision being challenged.

In so far as the Attorney General did not make the said decision and is so far as it has not been shown as to who actually made the decision being challenged, the Respondents are not proper parties to these proceedings, so the Respondents argue.

The Respondents also argue that in terms of Order 53 Rule 4 of RSC it is not clear whether the application for judicial review was made promptly as the Applicants have not demonstrated as to when the decision under challenge was made. The Applicants affidavit would suggest that the

grounds of judicial review arose in 2004 following the Malawi Prison Inspectorate Report. If that be the case and since Order 53 r4 RSC requires that judicial review proceedings be commenced within three months from the date when the grounds for application arose, the present application is time-barred.

The Respondents also argue that the present matter is non-justiciable. The matter, it is so argued, concerns issues raising questions with which the judicial process is not equipped to deal. They argue that nature and subject-matter of power may render disputes about a particular exercise unsuitable for judicial review because they raise politically sensitive issues of national policy or national security. The dictum of Lord Diplock in **Council of Service Unions V Minister for the Civil Service** [1985] AC 374 at 411 was cited in support. Also cited was the case of **R V Criminal Injuries Compensation Board, ex parte P** [1995] I ALL.E.R. 870 which held that decision about allocation of resources by a public power are not generally justiciable as decisions involving a balance of competing claims on the public purse and the allocation of economic resources, are matters which courts are ill-equipped to deal

with. The case of **Ministry of Finance ex parte SGS Malawi Limited** Misc Civil Application No. 40 of 2003 was also cited where Mwaungulu J, pointed out that matters involving social and economic policy, matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review proceedings.

The Respondents observe that the issue at the core of this judicial review application involves the allocation of State resources to prisoners. The allocation of resources involves issues of value judgment regard being had to economic and policy considerations and these are matters according to judicial practice non-justiciable in judicial review, so they argue. Thus they pray that the application be dismissed because the matters here are non-justiciable, hence unarguable.

The Respondents also argue that there are alternative remedies available to the Applicants. It is trite law that a court may in its discretion refuse to grant permission to apply for judicial review. As a general principle an individual should normally use alternative remedies where

they are available rather than judicial review (see **R V Epping and Harlow General Commission ex parte Goldstraw** [1993] 3 ALL ER 257). Thus in the present case the Applicants should have recourse to Section 108 (2) of the Constitution for remedies provided under Sections 46 (3) and (4) of the Constitution.

The Respondents also argue that the general principle is that most statutory provisions do not lend themselves to enforcement by mandamus. The provision of amenities and facilities pursuant to the Prisons Act, Cap 9:02 of the Laws of Malawi does not impose unqualified obligation on the public authorities as it largely depends on availability of resources in the country. The respective public bodies are merely obliged to make reasonable effort to provide for the meals, foodstuffs and clothing to prisoners as per **R V Bristol Corporation ex parte Handy** [1974] 1 WLR 498 and as provided for in the Principles of National Policy Section 13 (b) and (c) of the Constitution. The claims by the Applicants are not expressly covered or guaranteed under Chapter IV of the Constitution of Malawi as that chapter centres on civil and political rights for which remedies and procedures for redress are provided in the case of violation.

Under S 13 of the Constitution the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the goals of nutrition and health. These principles of national policy are directory in nature. Citing passages in **<u>Minister of Health V TAC Case</u>** CCT 59/04 p 5 and p 7 decision of the South African Constitutional Court, the Respondents go on to argue that the obligations imposed on the State by the Constitution in regard to access to housing, health care, food, water and social security are dependant upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources. Therefore given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. There are budgetary and policy decisions that are involved in the realization of these rights. The Constitution accepts that it cannot solve all society's woes overnight, but must go on trying to resolve these problems, progressively.

The Respondents argue that before one can move the court to determine that a violation of a socio-economic right has occurred, several issues need to be looked at including a review of government policies and legislation and may involve research in a particular field of rights. The provision of housing, nutrition and clothing as stipulated in the Prisons Act should be read subject to Section 13 and 14 of the Constitution taking into account the availability of resources in the country. A judicial review would not fully address the issues. The Respondents pray that the reliefs sought ought not to be granted as granting the same would cause substantial hardship to the administration of prison facilities.

This court has evaluated all the material placed before it including the skeletal arguments and the oral arguments advanced by counsel on both sides. The court has also examined the applicable law together with relevant international legal instruments and the case law, both local and foreign.

An issue as to whether the Respondents were proper parties to these judicial review proceedings must be addressed first.

The law on parties to a judicial review was correctly put by Mkandawire J, in the **State V Attorney General, Mapeto Wholesalers and Faizal Latif exparte Registered Trustees of Gender Support Programme** Civil Cause No. 256 of 2005 and also as held in **State V Attorney General ex parte Dr Cassim Chilumpha** Misc. Civil Cause No. 302 of 2005. A judicial review is not a civil suit and is not covered under the provisions of Civil Procedure (Suits by or against the Government or Public Officers) Act Cap 6:01 of Laws of Malawi. A judicial review application is mostly brought on behalf of the State and against the authority that actually exercised the statutory duties or powers under review, ex parte the Applicant. It is not a suit brought against the government through its Principal Legal Advisor who is the Attorney General. Thus in a judicial review the Attorney General cannot be a Respondent unless it is shown that the Attorney General was a party to the decision or action which is being reviewed.

In the instant case the documentation appears to be confusing. The documents on filing for judicial review showed Gable Masangano as the plaintiff and the Minister of Home Affairs and the Commissioner of Prisons as the 1st and 2nd defendants respectively. The skeletal arguments and other documents show Justice Mbekeani (suing on his own behalf and on behalf of all prisoners in Malawi) as the Applicant and the Attorney General as the 1st Respondent, the Minister of Home Affairs and Internal Security as the 2nd Respondent and the Commissioner of Prisons as the 3rd Respondent. It was explained that Justice Mbekeani was subsequently replaced by Gable Msangano, again suing on his own behalf and on behalf of all prisoners in Malawi. It must be emphasized that a judicial review is not a civil suit. No one sues in a judicial review. It is an application to have a decision or action reviewed. Therefore Justice Mbekeani and Gable Masangano were incorrectly described as plaintiffs suing on their own behalf and on behalf of all prisoners in Malawi.

It is not clear when and how the Attorney General was made a Respondent to the judicial review. There does not seem to have been an application or an order of Court

adding the Attorney General as a Respondent. It is also not clear why the Attorney General was made a Respondent to the judicial review proceedings in this matter. It must be appreciated that the present matter is a 2006 matter and has been before various panels of the Constitutional Court before it was brought before us in 2009. That notwithstanding we are of the firm view that the Attorney General was incorrectly introduced as a Respondent to the present judicial review proceedings. The mere fact that the Attorney General is Principal Legal Advisor to Government does not make the Attorney General a Respondent in a judicial review concerning a public institution or a department of the Government. This matter is about Prisoners' Rights within Malawi and the manner in which prisoners are treated by Prison authorities. The 2nd and 3rd Respondents being the Minister of Home Affairs and Internal Security under which prisons in Malawi directly fall and the Chief Commissioner of Prisons are the proper parties, not the Attorney General. So we find.

An issue was raised that the present proceedings are time barred. The law was correctly argued that Order 53 r 4 of the Rules of the Supreme Court Practice provides that an

application for leave for judicial review be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considered that there is good reason for extending the period within which the application shall be made. However, this court is unable to appreciate the Respondents' argument that the grounds of judicial review herein arose in 2004 when the Applicant was arrested. It is clear from the application that the grounds of application were a daily experience even at the time the application was made. The argument that the application is time-barred is ill-conceived and cannot stand. We firmly believe that this application is not time-barred.

The Respondents have also raised an issue that the present matter is non-justiciable. A matter appropriate for court review is said to be justiciable. Thus justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority. Justiciability seeks to address whether a court possesses the ability to provide adequate resolution to the issue before it, and where a court feels it cannot offer a final determination to the issue, that issue will be said to be non-justiciable. The concept of

justiciability or non-justiciability must be viewed separate from the issue of jurisdiction. The concept of non-justiciability is more akin to the concept of exercise of judicial restraint, rather than the court having no jurisdiction. In articulating the doctrine of non-justiciability in **Buttes Gas and Oil Co V Hammer** (No. 3) [1982] AC 888 the House of Lords referred to there being "non judicial or manageable standards" by which a court can judge those issues; or because adjudication of such issues would cause "embarrassment" to the forum's executive as a basis for classifying a matter as non-justiciable. The doctrine of non-justiciability has had a fair amount of criticism because it renders litigation between private parties non-justiciable. It seeks to protect forum executive and undermines private rights while weakening the doctrine of separation of powers (see Sim Cameron "Non-Justiciability in Australia Private International Law: A lack of Judicial Restraint" [2009] MelbJIL 9; (2009) 10(1) Melbourne Journal of International Law 102). In fact it has been argued that there are strong reasons to doubt the desirability of the doctrine on non-justiciability in that it has the potential of obstructing confidence and certainty in the expectation of access to the courts for private litigants.

The case of **Buttes Gas and Oil Co V Hammer** (Supra) was predicated on a misunderstanding of the political question doctrine of the United States of America and the merit-based approach of Canada. Thus the application of the doctrine in the United Kingdom is in the decline. The judiciary must prioritize private rights over political concerns and maintain access to the courts.

In so far as the Respondents argue non-justiciability of the matters before us, it is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison as complained of by prisoners. Prisoners may have their right to liberty curtailed by reason of lawful incarceration; they

however retain all their other human rights as guaranteed by the Constitution whose guardians are the Courts. What happens in prisons is no longer sacrosanct. Cited before us were the cases of **Council of Service Chum V Minister for the Civil Service** [1985] A.C. 374 more especially the dictum of Lord Diplock at page 411, **R V Criminal Injuries Compensation Board ex parte** P. [1995] 1 ALL ER 870 and **Ministry of Finance ex party SGS Malawi Ltd** Misc Civil Application No. 40 of 2003 to support the contention that the matters before this court are non-justiciable. In the latter case it is said that Mwaungulu, J pointed out that matters involving social and economic policy, matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review. We have not had the opportunity to read the opinion of Mwaungulu J, in the case cited. However, it seems that Mwaungulu J, was addressing the issue of policy consideration and not issues of prisoners' rights. We do not think that a court should adopt a hands-off approach where there is a complaint of violation of prisoners' rights or human rights. In fact in **Kuwait Airways Corporation V Iraqi Airways (Nos 4 and 5)** [2002] 2 AC 883, at 1101 per Lord Steyn agreed that the doctrine of non-justiciability is

not a categorical rule. Thus when **R V Criminal Injuries Compensation Board ex parte P** (Supra) held that decisions about allocation of resources by a public power are not generally justiciable it does not mean that the same is categorically non-justiciable. A court will examine each case and the circumstances before it can say that the matter is not subject to the courts supervisory control, i.e. that the decision is of a particular nature which lies outside the domain of the Courts as being the preserve of another arm of Government. That in our view would be consistent with the provisions of S 103 (2) of our Constitution which states that:

> **"The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence."**

This provision also reflects the independence of the judiciary which is a key pillar in the administration of justice. Even in the United Kingdom prison decision-making has been opened up very much to judicial review since the House of Lords decision in **R V Board of Visitors of Hull Prison Ex parte St Germain** [1979] QB 425 where it was held that an allegation that disciplinary proceedings

before the board of prison visitors had not been conducted in accordance with the law was justiciable. On the argument that social-economic rights are non-justiciable we would like to suggest that modern legal and judicial thinking has significantly diminished the importance of such an assertion. Eric C. Christiansen, an Associate Professor of Law at Golden Gate University School of Law California in his article "ADJUDICATING NON-JUSTICIABLE RIGHTS: SOCIO-ECONOMIC RIGHTS AND THE SOUTH AFRICAN CONTITUTIONAL COURT" had this to say:

> **"It has historically been argued and traditionally accepted that socio-economic rights are non-justiciable. Advocates of this position have asserted that, while rights to housing, health care, education and other forms of social welfare may have value as moral statements of the nation's ideals, they should not be viewed as a legal declaration of enforceable rights. Adjudication of such rights requires an assessment of fundamental social values that can only be carried out legitimately by political branches of government, and the proper enforcement of socio-economic rights requires significant government resources that can only be adequately assessed and**

> **balanced by the legislature. Judges and courts, according to this argument, lack of the political legitimacy and institutional competence to decide such matters.**
>
> **Nevertheless, a steadily increasing number of countries have chosen to include socio-economic rights in their constitutions – with varying (and sometimes unclear) levels of enforcement. At the core of such "social rights" are rights to adequate housing, health care, food, water, social security and education. Each of these rights is enumerated in the 1996 South African Constitution. Moreover, most of them have been the subject of full proceedings before the South African Constitutional Court."**

Clearly therefore matters of prisoners' rights are matters that this court can deal with just like the South African Constitutional Court has dealt with the various matters of socio-economic rights (See **Minister of Home Affairs V National Institute for Crime Prevention and Re-Intergration and Others** (CT 03/04 [2004] 2ACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 CC 3rd March 2004). In **Conjwayo V Minister of Justice and Others** [1992] (2) SA56 at page 60 Gubbay C J said:

> **"Fortunately the view no longer obtains that in consequence of his crime forfeits not only his personal rights, except those which the law in its humanity grants him. For while prison authorities must be accorded latitude and understanding in prison affairs, and prisoners are necessarily subject to appropriate Rules and Regulations, it remains the continuing responsibility of courts to enforce the constitutional rights of all persons, prisoners included."**

In **Mothobi V Director of Prisons and Another** (duplicate of A0770020 (CIV/APN/252/96) [1996] LSCA 92 (16th September 1996) the Lesotho Court of Appeal dealt with and adjudicated on Prisoners' Rights with respect to prison accommodation and amenities. In that case Justice W.C.M. Maqutu was able to order that the applicant be kept in a certain block of the same prison and not the other. The judge was also able to order that dirty walls of the prison be painted, windows washed and kept open when prisoners were not there. The judge further ordered that water toilets be provided inside the cell within 90 days, saying this should be easy and relatively cheap. His Lordship did say that after visiting the prison that:

> **"I was horrified by what I found about the sanitary condition of the cells in Block B. No human being should sleep in a room that has human excrement of others. I endorse the long term reforms but insist that water toilets be provided inside the cells in Block B within 90 days. This should be easy and relatively cheap."**

Closer home it was reported in Salc Bloggers, being a discussion of human rights issues in Southern Africa that the Malawian Constitutional Court on 27th August, 2009 handed down a judgment in the case of **Evance Moyo** who was kept at Maula Prison, ordering his release from prison. In that case the Court had found that Evance Moyo's constitutional rights were violated in respect of not being accorded the special treatment owed to juvenile prisoners by him having been placed in the overcrowded Chichiri Prison Conditions (http://salcbloggers.wordpress.com/2009/08/28/evance-moyo-judgment-handed-down-in-........... accessed on 21st October, 2009). This provides yet further evidence that the issues before us cannot categorically be described as non-justiciable. We will therefore proceed to deal with them. The reference to Section 13 of our Constitution on principles of national policy and Section 14 of the same Constitution on

the application of the said principles of national policy that they are directory in nature as a basis for saying that the present matters are non-judiciable does not provide a sound basis for the argument. In any event Section 14 of the Constitution further provides that:

> **"Courts shall be entitled to have regard to them in interpreting and applying any provisions of this Constitution or any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution."**

No part of our Constitution is a no-go area for the courts in so far as Section 9 of the same Constitution places the responsibility of interpreting, protecting and enforcing the Constitution on the Judiciary.

The Respondents argued that the Applicants have alternative remedies which they could pursue under Section 108 (2) of the Republic of Malawi Constitution, the remedies being under Section 46 (3) and (4) of the said Constitution. Section 108 (2) of the Constitution is about the original jurisdiction of the High Court to review any law and any action or decision of Government for conformity

with the Constitution. Section 46 (3) and (4) provide that a court that finds that rights or freedoms conferred by the Constitution have been unlawfully denied or violated may make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and also may award compensation. In fact Section 46(3) provides also that where a court finds that a threat exists to such right and freedom, it shall have power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated. With respect it is difficult to appreciate the Respondents' argument on alternative remedies as argued by them. What Section 46(3) and (4) of the Constitution provide for are the very reliefs that the Applicants are seeking. Perhaps the Respondents had in mind that the present judicial review is under Order 53 of RSC and therefore different from a judicial review as provided for in Section 108(2) of the Constitution. Apart from the question of procedure we are unable to see the difference in substance on the remedies or reliefs sought under these judicial review proceedings. The argument of alternative remedies being available for the Applicants and therefore that these had to be

exhausted first before the present proceedings were commenced is not made out.

So far we have dealt with the competence of these proceedings. Having established that this Court can and should deal with the matters complained of by the prisoners we now proceed to determined whether we should grant the reliefs sought or not. In doing so, we will rely on the affidavit evidence and counsel's submissions, this being a judicial review. To recapitulate, the Applicants complain that ever since their imprisonment, they have been subjected to torture and cruel, inhuman and degrading treatment or punishment which is an infringement of their rights which are non-derogable as per Section 44 of the Constitution. They complain of violation of what they describe in argument as prisoners' rights. We do not understand Prisoners' Rights to be a special category of rights apart from human rights. Prisoners' rights must be understood to mean the rights that prisoners have as human beings as they remain incarcerated in a prison. Thus prisoners, even though they are lawfully deprived of liberty, are still entitled to basic or fundamental human rights.

On the specific complaint by the Applicants on torture and cruel, inhuman and degrading treatment or punishment Section 19 (3) of the Republic of Malawi Constitution provides that no person shall be subjected to torture of any kind of cruel, inhuman and degrading treatment or punishment. Internationally, Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In fact the international community has struggled against torture and other cruel, inhuman or degrading treatment or punishment such that in December 1975 the General Assembly of the United Nations adopted a resolution on the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Declaration preceded the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which defines torture as:

> "........**any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted**

on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

In the case at hand, the complaint regarding torture and cruel, inhuman and degrading treatment or punishment relates to insufficient or total lack of diet, insufficient or total lack of clothing and accessories, insufficient or total lack of cell equipment and insufficient or total lack of space in the congested cells. The Applicants' complaint is premised on the standards set in the Malawi Prisons Act Cap 9:02 of the Laws of Malawi. The Applicants also rely on the Findings and Recommendations of the Prison Inspectorate of 2004. According to the Applicants the Regulations under the Prisons Act Cap 9:02 of the Laws of Malawi are in tandem with the Standard Minimum Rules for the Treatment of Prisoners as adopted by the First United Nations Congress on the Prevention of Crime and

the Treatment of Offenders (1955) and approved by the United Nations Economic and Social Council 1957.

On the issue of insufficient or total lack of ordinary diet and the issue of insufficient or total lack of foodstuffs the Applicants argue that they only have one meal served per day with no breakfast and comprising of maize meal and peas or beans. They argue that this is contrary to the 3rd Schedule of the Prison Regulations. It is argued that to provide prisoners with a single meal of nsima and beans over long periods of time is cruel and inhuman. The Third Schedule of the Prison Regulations is made under Regulations 53 providing for diet, clothing and cell equipment of prisoners. It is pertinent to note that Regulation 54 provides that an officer in-charge of a prison may vary the prescribed scale of diet or substitute one item of diet for another. The Third Schedule was amended by Government Notice No. 31 of 1982. It provides for ordinary diet of maize meal, or rice or cassava meal or millet meal with peas or beans, fresh vegetables or fresh peas or beans or sweet potatoes, chillies or pepper, dripping or groundnut oil or groundnuts (shelled) or Red Palm oil, salt, fruit (in season) for all prisons. For Class I and II Prisons, meat or

fresh fish or dry fish, cocoa or coffee, sugar and unlimited water. There are quantities for daily issues prescribed in the Schedule. The Schedule also provides for Penal Diet for Class 1 Prisons and Reduced Diet daily issues for Class 1 Prisons. The quantities given for Daily Issues are raw weight.

Now on the issues of insufficient or total lack of ordinary diet and insufficient or total lack of foodstuffs, it is not clear in the arguments of the Applicants that these quantities as prescribed under the Prison Regulations Third Schedule are not met. As pointed out the quantities prescribed are daily issues and not issues per meal. On the other hand, the Chief Commissioner of Prisons in his affidavit averred that in the SADC region to which Malawi belongs, the standard quantity of maize flour to be allocated to each prisoner is 0.680 Kg. That is also the quantity prescribed under our Prisons Act. He averred that this quantity is to carter for both lunch and supper and that the Prisons in Malawi meet this quantity. He averred that in Prisons that hold almost double the number of prisoners the prisons were initially designed to hold, such as Maula and Chichiri Prisons, the available cooking

utensils are not adequate. In some prisons with small prison populations and with adequate cooking utensils such as Bzyanzi in Dowa, prisoners get three meals a day. For the other prisons with high population and inadequate cooking utensils it is difficult to give the prisoners three meals a day as it would mean some prisoners would be having breakfast at lunch hour. The Applicants do not seem to dispute this state of affairs and impracticality as averred by the Chief Commissioner of Prisons. Maize meal and peas or beans are items listed as ordinary diet food stuffs. It is not correct to say that there is total lack of diet in Malawi Prisons or total lack of foodstuffs. Then of course the quantities as stipulated in the Prisons Act are said to be met on the daily basis. The Applicants have alleged insufficiency of diet and foodstuffs. Perhaps this does not apply to quantities. The Chief Commissioner averred that the 0.680 Kg given to each prisoner is more than enough for a single meal and the prisoners actually split the meal into two portions, one for lunch and the other for supper. That point does not seem to have been disputed. The Respondents further aver that on occasions the prisoners are fed fish, meat and vegetable dishes. These are alternatives provided for under Schedule 3. The Applicants

never challenged this aspect. Reliance was placed on 2004 Malawi Prison Inspectorate report which stated at page 12 that:

> **"In most of the prisons visited, the inspectorate noted that diet for prisons continues to be poor. Prisoners complained that they are always served with a monotonous diet of nsima (mgaiwa) and beans/pigeon peas once a day. However, it is pleasing to note that this diet is supplemented by vegetables in almost all the prisons."**

It is to be noted that the report makes no reference to failure by the Respondents to meet the minimum standards stipulated in the Prison Regulations. The Applicants argue that since the 2004 Malawi Prison Inspectorate Report matters have not improved. Against this argument is the averment by the Chief Commissioner of Prisons that farming/agricultural activities have been intensified in prison farms and have considerably improved the situation in our prisons. More farming land has been provided to the Prison Department such as Makande in Thyolo, Maula garden and Nkhate in Nsanje. The Prisons are also engaged in Poultry farming and from this prisoners

get eggs which are fed to the sick. Then they are planning to keep cattle for the benefit of Prisoners in terms of food and milk. All these matters have gone unchallenged.

Counsel for the Applicants cited to us the case of **Linton V Jamaica** UNHCR Communication No 258/1987 of 22nd October 1992 where it was held that withholding food or water is inhuman treatment. We wondered whether in the present case it can be said that the Respondents withheld and continue to withhold food from the Applicants. It has not been shown that the Respondents have failed to meet the minimum standards prescribed by the Prison Regulations in Malawi. We appreciate that the minimum standards in the Prison Regulations, and the Prisons Act of Malawi, were set up in the 1980s. We are now in a new century, 2009. Things have changes over the years. Prison Population has increased. What the Applicants have not shown this court is whether the rise in the Prison Population has resulted in corresponding reduction in the dietary provision for prisoners. We are not to speculate on that point. If what the Chief Commissioner of Prisons stated is anything to go by, then it can be safely stated in the words of Section 13 of our Constitution that the

Respondents are actively engaged in the promotion of Prisoners' Rights in so far as the provision of dietary needs for the prisoners is concerned. Eggs and poultry products are not listed in the Third Schedule of the Prisons Act even though the Respondents have introduced them. Then Prison farming has been intensified in order to meet the dietary needs of the prisoners. It is our observation that in so far as the food situation in our prisons the minimum standards set by the Prisons Act and Prison Regulations are met. We also observe that steps are currently being taken by the Respondents to improve the food situation and dietary needs in our prison and we would like to encourage them in that respect. The Inspectorate of Prisons in its 2004 report noted that there was goat rearing at Chikwawa, rabbit rearing at Dedza, fish farming in Dedza and Domasi and poultry farming in Domasi, supplementing the diet for prisoners.

We wish however to note that the minimum standards set by the Prisons Act have outlived their time and ought to be amended to raise those minimum standards to meet nutritional needs of the prisoners to address new health challenges of inmates. We were encouraged to learn that in

some prisons like Bzyanzi in Dowa, prisoners do get their meals three times a day. We were however at pains to appreciate how prisoners preserve the remaining portion of the meal they get in a one meal situation like Chichiri and Maula Prisons. The Respondents have not shown how the prisoners keep the other portion of the food until they use it for a second meal. We think that the situation of having one meal a day in some of our prisons is most unsatisfactory, even though the meal meets the daily portion as prescribed by the Prison Regulations. It is time the Respondents acquired additional cooking utensils and cutlery as well as repair the cooking pots not working for the prisons in the country to facilitate the provision of at least two hot meals a day to the prisoners in good time. Like the Prison Inspectorate in its 2004 report we are encouraged that vegetables are provided in almost all prisons in the country. We would however wish to encourage the Respondents to remove the monotony in the maize meal/peas or beans diet by diversifying within the options given in the Third Schedule of the Prisons Act. We make these observations and comments not because the Respondents have fallen below minimum standards, which we think they have not, but because of the realization that

we need to raise the level of minimum standards if not by law then by taking some progressive steps through policy.

We now turn to the issues of insufficient or total lack of clothing and accessories and insufficient or total lack of cell equipment under the 4th Schedule and 5th Schedule of the Prison Regulations respectively. The Fourth Schedule of the Prison Regulations provides for Prisoners' Clothing and Accessories for male and for female prisoners. For male prisoners the schedule provides for 2 shirts, 2 pairs of shorts, 2 singlets (cold season only), 2 1b soap monthly (where no laundry) and I 1b soap monthly (where laundry) and 1 pair of sandals at the discretion of the officer in-charge. For female prisoners 2 dresses, 2 pair of knickers, 2 petticoats, 2 singlets (cold season only) 2 1b soap monthly (where no laundry) and 1 b soap monthly (where laundry) and I pair of sandals at the discretion of the officer in-charge. According to the Fourth Schedule the pair of sandals for both male and female prisoners are to be provided at the discretion of the officer–in-charge of the prison. Such discretion must however be exercised professionally.

While we note that the Applicants have alleged and averred insufficient or total lack of clothing and accessories for the prisoners, we also note that no argument has been made to support the averment. For instance the Applicants have not demonstrated the basis for alleging insufficient or total lack of clothing and accessories although they also allege that the Prisons Act sets the minimum standards. They have not shown whether and how the minimum standards as set out in the Prisons Act are not met. They have not argued before us whether the minimum clothes and accessories set by the Prisons Act are not provided. We have seen no where in the documents and arguments of the Applicants indicating how much of the clothing and accessories are given to them for them to say these are insufficient. We have seen nowhere in the arguments of the Applicants suggesting that there is total lack of the clothing and accessories. It has not been argued whether the Applicants move around without clothes and do not receive the accessories, nor has it been shown what clothes the Applicants wear if not those provided by the Respondents.

We however note that the Chief Commissioner of Prisons in his affidavit argues that it is not possible to provide

clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocations of funds as Parliament approved a small fraction of the budget they presented to it. The Respondents also argue that the lack of sufficient clothing for the Applicants has been aggravated by the increase in the number of prisoners due to escalating levels of crime in the country. Even the arguments of the Respondent fail to show what in fact is given to the Applicants by way of clothing and accessories. Is it only one pair of short trousers or one shirt instead of two, for example? The Prison Inspectorate in 2004 was pleased to note that uniforms were being sewn and provided to some prisoners in the prisons they visited. Be that as it may, it is clear from the arguments of the Respondents that they concede the point that the applicants are provided with insufficient clothing. There is no mention regarding the accessories. The argument that it is impossible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds tantamount to arguing that the Respondents cannot obey the law for the reason given. There is a specific law on provision of specific quantities of clothing and accessories to male and female prisoners. That is a

valid law of the land which must be complied with. The law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the minimum requirement. The framers of the law setting the minimum standards surely must have known that the minimum standards are achievable and must be achieved. No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law and fulfill their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the Respondents have a responsibility to comply with the minimum standards set in the Prison Regulations by providing the minimum number of clothing and accessories as specifically stipulated in the Regulations.

The Fifth Schedule of the Prison Regulations provides for cell equipment for the prisoners. They are to be provided with 3 or 4 blankets for cold season, 2 or 3 blankets for hot season, 1 sleeping mat, I mug and, where no permanent

latrine is available, I latrine bucket or 1 chamber pot. The observations we made in respect of clothing and accessories equally apply in respect of the allegation of insufficient or total lack of cell equipment. The Applicants simply made the allegation but advanced no arguments to support the allegation. Again the Respondents in their reply made no reference to the allegation of insufficient or total lack of cell equipment. The Prison Inspectorate observed in its 2004 report that:

> "**In terms of blankets, the Inspectorate was impressed to note that DFID had provided adequate blankets for all prisoners in the country. Each prisoner had received or was expected to receive at least two blankets.**"

We can only observe that the stipulations in the Fifth Schedule of the Prison Regulations are the minimum standards that the law has set and ought to be complied with. Surely the legislature in setting those minimum standards must have known that it was physible and must have realized that they should provide adequate allocation of funds in the budget of the Respondents for the law to be complied with. Parliament cannot make a law like the

Prison Regulations and at the same time create a situation where the law should not be complied with by denying the Respondents the minimum sums of money they need to comply with the law. If that were the case, Parliament, which approves budgets from Government Departments, would be making a mockery of its own laws.

The next aspect we must consider is insufficient or total lack of space in the cells as they are always congested. An example was given that in a cell meant for 80 prisoners, 120 prisoners would be placed there. In fact the Chief Commissioners of Prisons concedes that in some cases prison population is almost double the number of prisoners the prison was designed to hold. The 2004 Malawi Prison Inspectorate report observed that congestion continued to be the most serious problem in our prisons. The prison population continues to grow as a result of rising crime rate while the prison structures remain the same with a total holding capacity of 4,500 inmates when at the time of reporting the figure had been over 9,000 inmates. The Prison Inspectorate Report 2004 observed that the problem of overcrowding in our prisons is aggravating by poor ventilation. It noted that death in custody remained a

matter of concern with a total of 259 deaths between January 2003 and June 2004. The Inspectorate recommended that similar structures to the model prison with a capacity of 800 inmates that was constructed in Mzimba District be constructed in the other three regions of the country. The Chief Commissioner of Prisons while conceding that the overcrowding in our prisons is a perennial problem on account of escalating levels of crime argues that Government is already devising and implementing policies aimed at decongesting and improving the living conditions in prisons. Mikuyu and Nsanje Prisons have been re-opened, new 300 capacity cell blocks had just been completed in the Mwanza, Ntchisi, Chitipa and Mulanje Prisons, new Mzimba Prison facility and that Government has also approved the building of a new maximum security prison in Lilongwe. While we commend the Respondents for the initiatives and the developments taking place in many of our prisons aimed at decongesting the prisons, the legal question which needs to be answered here is whether keeping inmates in overcrowded prisons aggravated by poor ventilation amounts to torture and cruel, inhuman and degrading treatment or punishment and therefore unconstitutional. The Applicants cited four

foreign cases that lack of fresh air, sunlight and exercise can amount to inhuman treatment. These are **Mc Cann V Queen** (1976) IFC 570 (TD); **SieivperSand, Sukhran and PerSand V Trinidad and Tobago** (UNHCR) Communication No 938/2000, 19th August, 2004; **Conjwayo V Minister of Justice of Zimbabwe** (1992) 12 Commonwealth Law Bulletin 1582 and **Dennis Lobban V Jamaica** UNHCR Commonwealth No 799/1998, 13th May 2004. They also cited the case of **Jaipal V State** 18th February, 2005 Commonwealth Human Rights Law Digest 5 CHRLD 359-520 Issue 3 Summer 2006 at 417 for the proposition that overcrowding and lack of resources is unconstitutional. The Nigerian Case of **ODIATE and OTHERS V ATTORNEY GENERAL** and **OTHERS** was cited, without its citation, for the proposition that overcrowding in prison leading to a risk of spread of disease and failure to provide treatment amounts to torture. **In Mothobi V Director of Prisons and Another** (duplicate of A0770020 (CIV/APN/252/96) [1996] LSCA 92) 16th September 1996 Justice W.C.M. Maqutu of the Lesotho Court of Appeal in dealing with awaiting trial prisoners at Maseru Central Prison observed that:

> **"In these days when there are water-flush toilets, there is no conceivable reason why any human should stay along with others in a cell meaning 8 paces and 8 paces with a bucket or pail containing his excrement and that of others for fourteen hours. Staying with one's excrement might be understandable but staying with that of others is simply torture."**

In the case at hand, we would like to observe that the Applicants complain of overcrowding. It is the same overcrowding which the Prison Inspectorate noted was aggravated by poor ventilation and which contributed to the death of 259 inmates in a space of about 18 months. In a room meant for a certain number of inmates one would find almost double the number. That overcrowding has been noted as one factors creating the spread of diseases in prison such as tuberculosis which has been said to be a major cause of sickness and death in prison, along with HIV (see Malawi Policy on Tuberculosis Control in Prisons, June 2007). Apart from poor ventilation and therefore lack of adequate fresh air in our prisons, inmates become packed like sardines, obviously making sleeping conditions unbearable for the inmates. 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. It seems to us though that the problem of overcrowding in our prisons is not attributable to the Respondents alone. In fact the Respondents appear to be at the receiving end of inmates. As has been stated, it is the rise in crime that accounts for the overcrowding for the most part. Perhaps use of alterative ways of dealing with offenders apart from sending them to prison is part of the solution to the problem. While we find that it is unconstitutional to place inmates in an overcrowded and poorly ventilated prison we would wish to state that the responsibility does not lie on the Respondents only, although they certainly bear part of the blame. It is their responsibility to provide more prison space and better ventilated prisons.

There was a supplementary affidavit filed by the Applicants alleging further violation of prisoners' rights or the Applicants' prison rights. It was alleged that prisoners are

denied their right to chat with their relatives since prison warders close the visitors' rooms so that the prisoners should not have a chance of chatting. It was alleged that prisoners are harassed and physically tortured by the warders in front of their relatives. It was further alleged that prisoners are not allowed access to communication unless they have money. It was also alleged that prisoners are denied access to medical attention and the right dose for a person to fully recover, and are even asked what offence they committed before receiving any medical attention. Sometimes they are given wrong dosage. According to the supplementary affidavit prisoners are not allowed to do some exercises and those found doing exercises are accused of planning to escape and are punished. Whenever donations are brought for prisoners, the prisoners just get half of the share. They do not know where the rest goes. We have not had anything to substantiate these averments. We are not in any doubt that the Applicants have the right to chat with relatives who visit them at times as regulated in accordance with Prison Rules and Regulations. It would be a violation of such prison rights to prevent or frustrate such chatting in designated places at designated times. If there are

designated rooms for chatting with relatives at designated times then that should be complied with provided always that security concerns are taken care of. As to harassment and physical torture in the presence of relatives there hasn't been material to support it. The 2004 Malawi Prison Inspectorate noted that the Inspectorate had received complaints of abuse of prisoners at Mzimba prison by one prison officer, which the Inspectorate condemned. Other than the abuse by that one officer there is no other evidence. There is no evidence of it continuing after the 2004 incident. Again we would like to state that it is contrary to Section 19 of the Constitution to abuse prisoners whether physically or morally.

The averment that only prisoners who have money are allowed access to communication is not quite clear. The question that arises is what that money is for. It is the right of every prisoner to communicate with relatives or legal practitioner in a regulated manner, regulated by the prison authorities.

Again it is the right of every prisoner to access medical treatment and such prisoner should not be asked what

offence he/she committed as a precondition for getting the medical attention or treatment. It is also the right of every prisoner to exercise but such exercise must be in accordance with a schedule as regulated by the prison authorities.

As regards donations given to prisons for prisoners, it is not clear how the Applicants come to believe that they only get half of what is donated. Pilferage may be there but there is nothing to suggest it is systematic. In any event prison authorities are under an obligation to prevent any missing of donated items for the direct benefit of inmates and to ensure that the same gets to the rightful beneficiaries.

We would like to reaffirm that prisoners' rights include right to food, clothing, accessories and cell equipment to the minimum standards as set out in the Prisons Act and Prison Regulations. Those standards are the minimum that the law dictates and obliges duty bearers to observe. Going below the minimum standards runs the risk of duty bearers not providing anything at all and coming up with seemingly plausible and seemingly convincing excuses. We also affirm that prisoners have a right to appropriate prison

accommodation which is not congested and which has appropriate ventilation. They have the right to access to medical attention and treatment like any other human being. They have the right to communicate with relatives and their legal practitioners within regulated limits. They also have the right to exercise within regulated times apart from access to reading materials. Prisoners have the right not to be subjected to torture and cruel treatment. In this case we hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore unconstitutional. Accordingly we direct the Respondents to comply with this judgment within a period of eighteen months by taking concrete steps in reducing prison overcrowding by half, thereafter periodically reducing the remainder to eliminate overcrowding and by improving the ventilation in our prisons and, further, by improving prison conditions generally. Parliament through the Prisons Act and Prison Regulations set minimum standards on the treatment of prisoners in Malawi, which standards are in tandem with international minimum standards in the area.

Parliament should therefore make available to the Respondents adequate financial resources to enable them meet their obligations under the law to comply with this judgment and the minimum standards set in the Prisons Act and Prison Regulations.

Pronounced in Open Court this 9th day of November, 2009 at Lilongwe.

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R.R. Mzikamanda

JUDGE

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R.R. Chinangwa

JUDGE

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E.J. Chombo

JUDGE