REFORMING LITIGATION PROCEDURES AS A TOOL FOR EFFECTIVE CASE-FLOW MANAGEMENT - EXPERIENCES FROM MALAWI

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A. Introduction

In terms of its customs and traditions, Lesotho has reasonably well kept itself intact and original. It is a State that was started by a Monarch, and is still led by one[1]. Its Customary Laws have been in written form for a very long time, and are to date applied in its Customary Courts[2]. History has it that, unlike most African Countries, it was never colonized[3]. This notwithstanding, the Country has not been immune from receiving within its midst a number of foreign practices, systems, and influences. Foreign religions started coming to Lesotho as far back as in the 19th Century[4]. Interaction with the British and the Dutch/Boers, although initially through wars, also started around the same time. Thus presently, despite being a monarchy, the Country has a written Constitution, with both a Bill of Rights and a Democratic System of Government[5]. It also runs, parallel to its already well established Customary Legal and Judicial System, a flourishing Roman-Dutch Legal and Judicial System[6].

In terms of so receiving similar foreign practices, systems, and influences, Malawi's history mainly differs from that of Lesotho from the angles that it is not a monarchy, and that it became a British Protectorate, not out of choice, but after being colonized by Great Britain. Otherwise, it too is a Democracy, and it too has a written Constitution, with an entrenched Bill of Rights. Resulting from these same links, its Legal and Judicial Systems are based on English Common Law. It would thus appear that with a largely similar history shared by most other African Countries, what is now obtaining in Lesotho and in Malawi is, only with minor variations, just a mirror reflection of what is also obtaining in most of the remaining Countries on this Continent. Considering that we are gathered at this Symposium as Judges in Lesotho and in other African countries, the judicial systems we run, which we received almost in a uniform manner from our western colonial masters or friends, and which are dominant in our multiple jurisdictions, ought for one reason or another to be an area of common interest to us all. Considering that our symposium is on Judicial Independence, Accountability, and Reform, it will be conceded, I apprehend, that as Judicial Officers have no platform to explain themselves or their

[1] Lesotho-Wikipedia, the Free Encyclopedia; Then known as Basutoland, Lesotho came into being in 1822 under King Moshoeshoe I. It is now under His Majesty King Letsie III.
[2] Ibid; Following the appointment of a Council to advise the British Resident Commissioner in 1903, the Customs of the Basotho were codified in the Laws of Lerotholi.
[3] Ibid; External involvement in its State Affairs only came about after Lesotho had fought a number of wars both with the British and the Boers, when in 1868 King Moshoeshoe I asked Queen Victoria to make Basutoland a British Protectorate.
[4] Ibid; King Moshoeshoe I is indicated to have invited missionaries into his land in or around 1837
[5] Ibid; Basutoland became independent from Britain in 1966 under the name the Kingdom of Lesotho.
[6] Ibid; Lesotho's Western type of Judicial System comprises of a hierarchy of Courts starting with Magistrates' Courts at the bottom, the High Court in the middle, and the Court of Appeal at the very top.

work to the public they serve, the speed, the efficiency, and the effectiveness with which they deal with the disputes that come before them are virtually the only means through which they can demonstrate that they are transparent and accountable to the public. With a view, therefore, to making our Judiciaries more efficient in the delivery of justice to the people we serve, and with a view through such efficiency to be more transparent and accountable in the manner we discharge our Constitutional mandate, sharing views in this area and comparing notes thereon, has the potential of reaping for us all results that will be mutually beneficial. This paper is an attempt at us, as Judiciaries in Africa, sharing views on this common area of interest with a view to improving our service delivery in our sister jurisdictions.

We need to begin by acknowledging that in life's complications, concerns for justice are so wide and varied, and that they readily go beyond the domain of our customs and traditions. I sincerely doubt whether our traditions and customs, if they had to date remained the only means of accessing justice in our communities, could have coped with serving the needs of the populace satisfactorily all this time. Received Laws and Practices, therefore, have helped us quite a lot in these jurisdictions, by handsomely supplementing on the options offered by our various Customary Justice Systems, by making available to the populace in our jurisdictions a viable alternative means of them accessing justice through formal means in the countless legal situations they encounter in their daily lives. While this is, and has been, the case in the centuries that we have benefited from these received systems of ours, we need to realize that with population growth, development, and democratization, among other phenomena, legal problems in society have multiplied, and that they have thus increased the strain we are currently experiencing in the running and in the management of our Legal and Judicial Systems.

In particular, with the kinds of Democratic Constitutions our Countries have adopted, the Human Rights Agenda has become both prominent and dominating. In this instance apart from our people being promised, at Constitutional level, widespread enjoyment of the multitude of rights and freedoms the Bills of Rights in these Constitutions champion, they have also been promised, at the same level, the right to demand and access justice. A question that may in our times be relevant to ask, therefore, is what it is that we need to do within our existing systems of justice-delivery, if we are to continue offering quality, timely, and satisfactory justice to the people we serve, the increasing work-load we now face notwithstanding. Our Countries having attained complete independence decades ago from those that brought these formal systems to us, we must realize that if we are to achieve any improvements in the manner we offer justice to our people, the solution will not again be brought by those who in the first place brought those systems to us. It will instead have to come about through our own efforts. It will not matter where we borrow the improvements from, if we need to, even if some may be borrowed from those that brought the systems to us, because whereas most such jurisdictions have moved on by improving on the systems they brought to us, we have tended to live

in the past by sticking to that which they taught us long ago, not having made much effort to modify or change the said systems.[7]

Now, while it might appear that I am suggesting that in Africa we need to give thought to assessing the efficacy of our received justice-delivery systems, the truth of the matter is that currently all over the World[8], Legal Systems and Judiciaries are undergoing various reforms with a view to making "justice" more readily accessible to the Court User. In some instances, as already acknowledged, even our former Colonial Masters and/or Protectors[9] have gone ahead and made improvements and changes to the way they run their justice-delivery systems so as to make them more efficient and effective. In this regard, we need to be vigilant if we are not to be caught napping. A candid look at the systems we operate will, in all likelihood, show that the Laws and Practices we have employed without question for so long are in serious need of an immediate overhaul. It is on this account, I believe, that our discourse on the twin topics of Judicial Independence and Accountability ought necessarily to embrace Reforms in the manner we go about our business.

Civil and Criminal litigation in most jurisdictions following the Roman-Dutch or Common Law Systems is conducted on adversarial basis. Not all steps we follow in these proceedings are necessarily efficient, effective, and cost-saving. We thus need to explore, even by looking at reforms elsewhere, to see how we can best serve the public with speedy and affordable justice in these areas. While we must acknowledge that not all changes that we may desire can be managed overnight, since Rome was not built in a day, we need to be contented that there are gains we can achieve in the short term, while it may take a bit longer to achieve all the other desired gains. Our most readily available tool to attain early results in the endeavour to improve our justice systems is first to tap on subsidiary legislation which, with fulfillment of minimal procedural requirements, our own Chief Justices can promulgate.[10] Beyond this, however, for more profound changes in our operations, that will require substantive legislative intervention, since we are the people managing the systems, we are accordingly the people best placed to suggest needed legislative changes to the other Branches of our Governments, for even that level of change to be attained. Realizing that while received Laws and Practices have served us well this far, but that there is major room for improvement thereon if in today's litigious society we are to cope with the increased workload, and in a bid to make justice more readily accessible to those that are in search of it within its jurisdiction, Malawi has for some years now been struggling to learn from emerging trends

[7] In Malawi, with its historical links with Britain, certain older versions of English Law are still part of Malawi Law, when they have been repealed and revised in the jurisdiction they came from

[8] Many countries now boast of Law Reform Commissions which work tirelessly towards the improvement of both substantive and procedural laws in their countries. Eg The Malawi Law Commission under chapter XII of the Constitution and the Law Commission Act (cap 3:09) of the Laws of Malawi. Austarlia, among many other countries has a very vibrant Law Commission.

[9] A recent and vivid example to all countries that fell under the British Empire is the Lord Woolf's Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales 1996, which has had far-reaching effects on the landscape of conducting civil litigation in that jurisdiction

[10] Most Court Statutes, like under Section 67 of the Courts Act (cap 3:02) of the Laws of Malawi, empower the Chief Justice to make rules of Court prescribing anything that may better effectuate the purposes of the Statute including varying, supplementing, revoking or replacing existing rules of procedure and practice.

elsewhere in the world of better managing Civil and Criminal litigation with a view to improving the efficiency and efficacy of its Judiciary.[11] This paper attempts to share some of the strides Malawi is making in this regard. I should hasten to say Malawi has not yet secured the goal it is aiming at, but it is steadily on the way thereto, and it is determined to succeed.[12]

B. Civil Litigation

Replacement of English Rules

Civil litigation, the way we know it, consists in suits between private parties, even if the Plaintiff or the Defendant may at times be a public institution. In such cases, generally in the adversarial systems that are common in our countries, the progress of cases is party-driven.[13] In Malawi, which has for some years now been working on finalizing its local Civil Procedure Rules to govern the Practice and Procedure of Civil Business in the High Court of Malawi, at present the Practice and Procedure of the said Court is governed by the 1999 version of the Rules of Supreme Court in England and Wales.[14] The Rules we intend to adopt will see to it that we make a clean break with the English Rules we have so far been using. The proposed rules apart from being detached from the Rules that preceded them will empower the High Court to fill such gaps as might be found within them to issue directions aimed at doing substantial justice by way of filling such gaps.[15]We believe that if we are to stand on our feet, it is necessary to cut this umbilical cord that has linked us to the United Kingdom for so long, as that is what will encourage local jurisprudence to grow. At the same time the arrival of the new rules will recognize that while they are meant to apply to all civil proceedings in the High Court of Malawi, exceptions will exist in cases where specific rules are already in place for the conduct of specific categories of disputes under different enactments.[16]

It needs to be pointed out also that the overriding objective of our intended Rules is to enable the Court to deal with all cases that come before it justly, and with minimum delay and expense.[17] *Inter alia*, dealing with cases justly will be defined to include addressing the real issues between the parties, saving on expenses, ensuring speed and fairness in the conduct of the proceedings, and allocating Court resources appropriately in light of the other cases the Court must also attend to.[18] By the

[11] Under Malawi's 1994 Constitution, through creation of the Law Commission the country's ambition is to repeal and/or amend all its Laws so as to bring them into conformity with its new Constitutional dispensation

[12] Malawi is actively working on creating a local regime of Civil Procedure Rules to replace the Rules of Supreme Court of England it has throughout been using, and it also has a set of wide-ranging reforms in the Criminal Procedure area, which Parliament has just passed into Law.

[13] Robert B. Standler; Differences between Civil and Criminal Law in the USA

[14] Act No. 4 of 2004 Courts Amendment Act, Section 4

[15] Draft Civil Procedure Rules, 2010; Chapter I Rule 11

[16] Ibid; Chapter I rule 3

[17] Ibid; Chapter I rule 4

[18] Ibid; Chapter I rule 5

intended Rules the High Court will be urged to manage cases actively, for example, by encouraging cooperation between the parties, identifying issues in the proceedings at an early stage, promptly deciding what issues will go to trial, resolving what can be so resolved at the outset without a hearing, deciding the order in which issues, if they are many, will be resolved, encouraging parties to first attempt resolving their disputes through available Alternative Dispute Resolution mechanisms before going to trial, fixing timetables and other controls for the cases before the Court, weighing the costs of the steps to be taken in the proceedings, waiving the personal presence of parties unless absolutely essential, and taking advantage of technology, apart from ensuring general speed and efficiency in the conduct of all such proceedings.[19] The Rules to come, will additionally oblige parties to the proceedings before the Court to help it by at all costs avoiding undue delay, expense, and technicality.[20] The new Rules also intend to substitute simpler vocabulary to replace the mind-bogging terms that can be so replaced to enable even an unsophisticated user to understand and use the Rules.[21] They also introduce simpler ways of managing both interlocutory and substantive business in all proceedings.[22] An attempt has also been made in the same Draft Rules to provide simple templates for the Forms litigants will be expected to use in the conduct of their cases.[23]

(a)***Pre-Trial Procedure Stage***

To demonstrate how it is being expected that the proposed rules will help make our system more efficient and effective, it will be useful to examine the usual steps the Rules currently provide for in civil litigation, and to see how the experiences we encounter with their application are likely to be addressed by the rules we intend to substitute them with.

(i) *The Commencement*

If in Lesotho the received rules of procedure being used in the formal Courts for managing Civil Proceedings have not yet been streamlined to accommodate new ways of achieving speed and efficiency, chances are that, as is presently the case in Malawi, there are multiple ways of commencing civil proceedings in the High Court.[24] To the litigant, sometimes even with use of a Lawyer, it is not clear which of the available originating processes should be resorted to in what situations. Mistakes are frequent and where Courts can save a case, changes are ordered from one mode of commencement of proceedings to another.[25] Where, however, the situation is

[19] Ibid; Chapter I rule 7
[20] Ibid; Chapter I rule 9
[21] Ibid; Chapter I rule 12 rule introduces a Dictionary in a Schedule for terms to be used in the new Rules
[22] For example, where circumstances so demand, under the Civil Procedure Rules currently in draft form (i) Service of Documents will extend to service by Fax and E-mail, among other modes of service and (ii) it will be possible to present evidence through a telephone call, video link, etc.
[23] Ibid; Chapter 18 rule 1
[24] Order 5 of the Rules of Supreme Court, 1999 is on the mode of beginning civil proceedings in the High Court. It provides for commencement by Writ, by Originating Summons, by Originating Motion, and by Petition
[25] E.g. Order 28 rule 8 of the Rules of Supreme Court, 1999 empowers a Court to order a matter erroneously commenced by Originating Summons to continue as if begun by Writ

beyond redemption, matters end up being dismissed, with liberty to commence afresh under an appropriate originating process. Litigants, obviously, must find these experiences quite bewildering, apart from seeing them as time-wasting, and as being of delaying effect to them in their pursuit of a remedy. It is thus intended in Malawi, should we successfully debate and agree on the proposals as they stand now to, except in the case of special provision on how to commence proceedings under particular Statutes, only have one type of Originating Process i.e. a Summons[26] for the commencement of all Cases in the High Court, instead of having Originating Motion, Originating Summons, Petition, and Writ of Summons as possible and alternating Originating Processes.

(ii) *Progress Calendar*

Under the type of rules we inherited, between the commencement of an action and the substantive hearing of the same, are interposed a number of steps the parties have to graduate their case through before it is deemed ripe for hearing. For example, if an action is commenced by Writ, there is service of this originating process that has to be effected within the lifetime of the said Writ. If effectively served, there are requirements about proof of service, acknowledgement of service, service of Defence and/or Defence and Counterclaim, with proof thereof. Where this has been done, room still exists for service of a Reply, or a Reply and Defence to Counterclaim etc.., before pleadings can be deemed to be closed. While the rules set a timetable for compliance, with these multiple stages in the growth of a case to be undergone, rarely is the said timetable followed religiously. In a way, therefore, the parties respect the calendar the rules have set for them in taking a civil case from commencement to hearing more in breach than in observance.

Besides, if a party is out of time with any of the procedural steps the Rules have laid down, the same Rules readily allow for extensions of time, and this does not always have to be done with the leave of the Court. Even where judgments result from the defaults, it is not so difficult for the affected party to, on application, have the said judgments set aside. Courts have power under the rules to impose penalties for breaches of the rules, mainly in the form of ordering the party at fault to bear the costs associated with his wrong. As it turns out, however, the parties do not seem to quite mind the penalties, if any, so imposed by the Courts for default. Indeed, notwithstanding the numerous breaches the parties commit, their cases still survive anyway. Even where a party has had the misfortune to have his action dismissed for one form of breach of the rules or another, procedures within the same rules are industriously employed to resurrect, or otherwise restore their actions back to life. Most times they succeed. There are, therefore, gross delays in the maturity of cases for trial owing to compliance, which is mostly preceded by non-compliance, with the rules governing the calendar of a civil case at interlocutory stage. Further still, even where pleadings are deemed closed, under such rules multiple steps still remain to be taken by the parties, including the taking out of Summons for Directions, conducting discovery and inspection of documents, and preparing and filing the Court Bundle, before hearing can start.

[26] Draft Civil Procedure Rules; Chapter 2 rule 1

The solution we are looking forward to bringing on board against the headaches just articulated is, as far as possible, aimed at shortening the period of time to be spent by the Litigants between the issue of the Summons commencing their matter and the substantive hearing of their case. The Rules we are working on will provide simple-to-use templates of Forms parties to a case will be in a position to complete without need of technical assistance.[27] The information to be entered in the spaces provided will basically be routine, and it will be in respect of details such as Court Registry, Case Number, particulars of the parties, Address of Service, and details of Lawyers, if any, involved in the case. Each such Form will then provide space for the concerned party to endorse in his "Statement of Case," whether he is a Claimant or a Defendant. Further, while the acceptable mode of filing these Forms will be to have the requisite information typed in, it will be permissible for a party that cannot secure typing facilities to, in lieu of such, instead file in Forms completed in neat legible handwriting.[28]

As regards problems of service, in order to reduce the delays we are currently suffering from under the rules as they presently stand, the new Rules will allow, in addition to traditional methods of service, service by fax and by e-mail.[29] Further, where personal service is not practicable, but it appears likely that an alternative way of serving would bring the document intended to be served to the attention of the person so meant to be served, on application to the Court, it will be possible to effect service through a Chief or a Minister of a Church near where the addressee is believed to be, or through advertising in a newspaper, or through a broadcast on the radio, or to resort to any other mode of service the Court might approve of.[30]

Concerning delays that have been associated with countless exchanges of processes between parties, apart from requiring the parties to be brief and simple in their "Statements of case," in whatever pleading they are filing and serving, where a Defence has been filed and served, the Rules will not oblige a Claimant to file and serve a Reply. In fact if he wishes to so file a Reply, he will need to have the leave of the Court,[31] otherwise the mere fact that he has not filed a Reply will be taken to mean that the allegations made against him in the Defence are denied.[32] Indeed, it will be a requirement of the new rules once a Defence has been filed and served, that unless some interlocutory application has been previously set down, the Court will be expected to set the matter down for a First Court Hearing not later than 28 days after the date the Defence was so filed.[33] The reason a First Court Hearing must be set down so early in a case is to enable the Court to make Orders it considers appropriate for the proper conduct of the proceedings.[34] On this occasion, *inter alia,* the Court will give directions over a number of pertinent concerns, including requests for particulars, the

[27] Draft Civil Procedure Rules; Schedule 2 Part B
[28] Ibid; Chapter 18 rule 2 which will require 12 point font for both the type-written and the hand-written documents
[29] Ibid; Chapter 6 rule 13
[30] Ibid; Chapter 6 rule 33
[31] Ibid; Chapter 5 rule 16
[32] Ibid; Chapter 5 rule 15
[33] Ibid; Chapter 8 rule 2
[34] Ibid; Chapter 8 rule 3

filing of further pleadings, amendments to pleadings, disclosure of documents or information, liability or otherwise of the matter to Alternative Dispute Resolution, service or exchange of expert reports etc. At the same time the Court will fix a date for a Conference for further Orders to be made that would bring the case closer to trial. Where several conferences take place, culminating in a Trial Preparation Conference, for active management of the proceedings, the same Judge that had the matter at the First Court Hearing must preside.[35]

Further, at each such conference the Judge must, *inter alia,* ensure that all directions or Orders previously given have been complied with, and that the case is making steady progress towards a hearing on precisely identified issues and in the light of the evidence to come, upon taking into account whatever issues get admitted and resolved during the conferences, to estimate the time that will be needed for the hearing.[36] For there to be steady progress in the preparation for the hearing and disposal of the case, conferences need not always involve parties physically meeting in one place. Where the Court and all parties are able to participate, the Rules will allow room for conferences to be held by telephone, by e-mail, or by other means.[37] With the Court throughout bearing in mind the overriding objective of the Rules, and with the various innovative ways of speeding up the calendar for preparatory steps, it is believed that cases will ripen for hearing much faster than before, should they not be resolved earlier in the process.

(iii) <u>*Interlocutory Applications*</u>

Under the Rules we inherited, if we have not made progressive changes to them yet, it will be seen that further to the slow and incremental stages of getting a case to be ready for trial, which account for long delays in bringing any given case to trial, there is a thick forest of interlocutory applications parties can, and often do resort to between the commencement of an action and its substantive hearing. With the litigation basically in their hands, how speedily or how slowly parties manage to move their case depends on the attitude they adopt towards the role they want their interlocutory applications to play in the case they are dealing with. A clever but malicious party can, if it wishes, without ever getting close to the case qualifying for a date of hearing, easily wear down the opponent party with application upon application of interlocutory nature in its case, and yet still appear to be operating within the rules in so doing. Per the same Rules, some of these interlocutory applications come up before Registrars, while others come up before Judges. While this is so, when a party is dissatisfied with a Registrar's ruling, he appeals to a Judge in Chambers, and if further dissatisfied there the application ends up in the Supreme Court of Appeal or the Court of Appeal, as the case may be. It may well be very long, therefore, before the case has matured for substantive hearing.

As can be seen, therefore, opportunity for delaying trial is almost built into the Rules, in Malawi's case, presently being used. They offer almost open-ended opportunity for either party to a civil cause to bring in countless interlocutory applications. Now, when the Rules themselves, almost naturally accommodate delay, and this is coupled with

[35] Ibid; Chapter 8 rule 8
[36] Ibid; Chapter 8 rules 12, 14, and 15 among others
[37] Ibid; rule 22

some members of the Bench, and some members of the Bar not fully understanding the said rules, and thus misapplying them, as well as by some Legal Practitioners taking advantage of the loop-holes found in the Rules, by exploiting them to their advantage, then the end- result is that the Court User experiences nothing less than full scale horror and torture when he comes to the Courts to seek a remedy. It is therefore through use, misuse, and abuse of the Rules[38] we have so far used without much alteration since colonial or external administrations left them for us, that instead of really being of meaningful service to our people, we rather haunt them in our Chambers and in our Courts with the brand of justice we offer.

Operating under the umbrella of these received Rules, Court Users meet, *inter alia*, with (i) endless amendments of pleadings and other processes, (ii) unlimited interlocutory applications that appear to even over-shadow or to displace substantive matters, (iii) countless Injunctions and Stay Orders as interim reliefs, which sometimes are sustained for so long they begin acquiring the look of being permanent reliefs, (iv) endless appeals, even to Courts of Appeal, over petty interlocutory matters, and (v) in the face of all this drama, intolerable and almost inexplicable impotence on the part of the Courts from taking charge of proceedings, and managing decent and timely progress and conclusion thereof. For the litigant, therefore, much as he is compelled by our staff to show great respect to the Court lest he be in contempt when he comes to the Courts, he probably obliges to all these demands more under duress than under any other consideration.

As just seen above, in the Rules Malawi is presently using from the 1999 version of the English Rules of Supreme Court, interlocutory applications bring about too much delay in the conduct of proceedings. Through its new Rules that are still in the making, Malawi would like to seriously cut down on interlocutory applications. That is why, as just seen, as soon as a Defence is filed, if no interlocutory application has by then already been taken out and set down, a first Court hearing is set down, with sequel conferences, so that the very matters that would have stolen time through multiple interlocutory applications from the parties are raised and dealt with at conference level, with directions or Orders being issued and compliance thereof being progressively monitored. Besides, where need arises for an urgent application to be made and circumstances justify such, the Rules to come will allow for oral applications to be made if the Applicant undertakes to follow up with a written application within the time he is directed to.[39] In this area on the subject of Injunctions, it is intended that the new Rules should allow Registrars to issue Injunction Orders where the parties consent to such Orders,[40] instead of always looking for a Judge when an Injunction is being sought. Should the proposed changes in the summary manner of attending to and dealing with issues that would have come up through multifarious competing applications materialize, it is hoped that there will be immense saving of time, and that disposal of cases will improve quite a lot.

(b) ***Trial Stage***

[38] Hon. Justice Uwais, GCON, Chief Justice of Nigeria: Minimizing Delays in the Administration of Civil Justice
[39] Draft Civil Procedure Rules; Chapter 2 rule 6 and Chapter 7 rule 13
[40] Ibid; Chapter 19 rule 1(n)

(i) *Oral Case Presentation*

As if the problems a civil case litigant who uses the received rules that are still in force in our country encounters at pre-trial stage are not enough, an examination of the procedure these rules provide in relation to the hearing itself will show that the litigant has to put up with additional nightmares when his case strikes the luck to reach hearing stage. In adversarial legal systems, such as most commonwealth countries practice, great reliance is placed on the oral or advocacy skills of the Legal Practitioners representing the parties when it comes to the actual hearing of a civil case.[41] The lawyers are the ones expected to elicit oral evidence from witnesses, and to follow this up with forceful persuasive arguments. Among the advantages of having such live examination of witnesses in Court are, of course, the opportunity the Court gets to assess the demeanor of the said witnesses, the chance for the Court to see the credibility of the said witnesses tested during cross-examination, and the giving of an opportunity to the parties to present their cases in the most persuasive manner they believe they can manage, apart from satisfying the longing most litigants have to publicly and openly ventilate their grievances in Open Court.

Good and advantageous though oral presentation of cases has traditionally been, it is very time- consuming. At times the publicity which goes with oral testimony in open Court, bringing as it does the chance for certain players in the case to be in the limelight, focus gets lost, and the proceedings are turned into some kind of drama, or into a platform for frivolous ostentation. A shift has thus, in some countries, been made from oral presentation of testimony to written presentation of testimony. In Malawi, unlike was the case for a long time before, through its decision in the year 2003[42] to adopt the 1999 version of the Rules of Supreme Court as current Civil Procedure Law in Malawi in the higher courts, the practice in place is that evidence-in-Chief comes by way of Witness Statements filed in Court in advance as part of the Court Bundle in a case. It has, however, taken time for our Legal Practitioners to adjust to this new practice. Temptation to still seize the opportunity to display Advocacy skills of effectively steering a witness into orally presenting to the Court, and to the audience that is normally available, through calculated and incisive questioning, is thus still high. It therefore, at times, leads some Legal Practitioners to going beyond just linking a witness to his Witness Statement, and then getting him to adopt it as his evidence-in-chief. Under cover of wishing to highlight some of the evidence in the Witness Statement, some lawyers find a way of eliciting orally, once again, what has already been adduced through the Witness Statement. This in a way amounts to double presentation of evidence-in-chief, and a lot of time gets wasted in the process.

Where such written statements are properly utilized, however, a witness does not have to go through painstaking examination-in-Chief. Once he has successfully introduced his pre-filed written evidence and tendered whatever real or documentary evidence he is capable of tendering, he almost immediately faces cross-examination, and since Witness Statements are exchanged in advance between the parties, ideally the adverse party ought to be better prepared to conduct a short but focused cross-examination.

[41] J Hunter and K. Cronin: Evidence, Advocacy and Ethical Practice, Butterworths Sydney 1995.
[42] Act No. 4 of 2004 Courts Amendment Act, Section 4

Unfortunately, old practices die hard, and quite a number of times Counsel look at cross-examination as the chance to relive their old Advocacy skills, by taking so much time cross-examining a witness as if time did not matter. Time, therefore, that was meant to be saved by moving from oral to written evidence is, in such cases, either not saved at all or not saved as much. This is all because of a hangover belief that a Court is best persuaded by spectacular oral testimony. Written evidence as an emerging trend of shortening hearing time, however, is taking root in countries such as Australia and England and Wales, even as we still face teething problems with it in Malawi.

Under the Rules that are about to come in Malawi, with the Court retaining the discretion to direct which mode of giving evidence should be adopted, evidence will come either through oral testimony or through sworn Statements.[43] Where evidence comes *via* Sworn Statements, since such will have been served in advance, there is no need to have the same read out loud in Court. A party wishing to cross-examine needs to give notice, and if he does so, cross-examination will follow on the contents of the sworn statement soon the witness who made the same is called on to identify and present it.[44] Further, where the sworn statement carries some annexures that have been filed and served, they will become evidence unless a Court rules them inadmissible. As such, if an adverse party requires production of the originals thereof at the trial, the rules will also require him to give notice.[45] In cases where oral evidence is to be the mode of taking evidence, where it becomes impracticable for a witness to come to Court to testify, the Rules will empower the Court to allow such witness to give evidence by telephone, by video, or by any other form of communication. In such cases there will be safeguards such as, in the case of evidence by telephone, a Certificate by a Magistrate, a Policeman, or a Chief who was present during the phone call, identifying the caller and confirming that he gave his evidence freely.[46] The new rules will also ensure that Child Witnesses testify without intimidation, restraint or influence, for example by screening them from view of the rest of the Court except the presiding Officer, or by letting them testify when the Court sits in a place other than the Court room, or by letting them only testify in the presence of the Lawyers for the parties, or by appointing someone to sit besides them as they give evidence etc.[47]

(ii) *Closing Submissions*

Another area where writing is substituting oral skills in a civil trial is at the stage the parties must make submissions in it. Modern case management methods (for us in Malawi chanced through adoption of the 1999 English Rules) require that apart from Witness Statements, a party also files a chronology of events leading to trial in summary form, skeleton arguments for the position the said party takes in the dispute, and a list as well as copies of the Legal provisions and the authorities to be relied on in the case. This information, exchanged before trial between the parties, as new case management practices will require, helps the parties to focus on whatever issues remain to be resolved between them, and to reduce the element of surprise when hearing actually

[43] Draft Civil Procedure Rules, Chapter 13 rules 2 to 4
[44] Ibid; Chapter 13 rules 6 and 7
[45] Ibid; chapter 13 rule 8
[46] Ibid; Chapter 13 rule 9
[47] Ibid; Chapter 13 rules 23 and 24

starts. Oral submissions have not however been totally replaced, and there are occasions parties still prefer to submit orally rather than in writing. With the ever-existing danger of Counsel, taking far more time than necessary when so submitting, a lot of time is consumed and cases end up taking much longer than they ought to. Generally, however, Counsel try to put in the best of their Advocacy skills when given a chance to so submit orally in favour of their client's case.

(c) ***Specialty Civil Courts***

Apart from taking steps to localize and simplify its Civil Procedure Rules, one other method Malawi has resorted to in trying to improve the efficiency of the Courts in dealing with the problem of congestion of Civil matters in Malawi, has lately been the trend to create specialized Courts to deal with specific types of cases. With focus always maintained on cases of a particular class the Judges or Judicial Officers sitting in such Courts tend to specialize and to acquire the ability to bring their cases to early determinations. Labour disputes and employment-related matters in poor countries tend to be numerous. Most claimants in such cases are desperate people who would want to see a remedy as soon as possible. In this regard Malawi has taken steps to accord such matters special attention by creating an Industrial Relations Court[48] as one of the High Court's Subordinate Courts, with primary jurisdiction over such matters. As a result of this, although by virtue of the fact that the High Court has unlimited original jurisdiction over all sorts of cases under any law, including labour and employment matters, the immediate and visible relief this development has brought about has been a severe depletion of cases of this type being commenced in the High Court. This is quite an off-load of business from the shoulders of the High court, which would otherwise have continued to receive and attend to all these cases. Apart from this, however, the specialized Court that has been put in place, with flexible rules of pleading and of presenting evidence, is bringing speedy justice to the multitudes of parties with employment-related grievances.

We also have a second specialized Court in Malawi, which has further assisted to reduce the work-load in the General Division of the High Court. Early in the year 2007 a Commercial Division of the High Court was opened. The aim was to see to it that commercial matters, which ordinarily demand swift solutions if business life has to keep ticking, are dealt with far more expeditiously and justly than they had hitherto been the case when they competed for the attention of the Court in the General Division of the High Court side by side with homicides, divorces, and defamation cases, among others. The Judges assigned to the Commercial Division are committed day in day out to dealing with only cases that fall within the recognized family of Commercial cases, and determinations are rendered very speedily, much to the delight of the people in Commerce and Industry. Business dealings cannot wait forever when a dispute arises in them. Timely determinations therefore help in resolving anxieties that could have serious impact on the economy. Apart, therefore, from this move having freed the General Division of our High Court from a significant portion of the work-load that had been part and parcel of its business, the benefits it has brought to Court users are also

[48] See: Section 110 (2) of the Constitution of Malawi and the Labour Relations Act (cap 54:01) of the Laws of Malawi

quite high. Jurisdictions among us that have not yet disengaged Commercial cases for special attention from their general business, may find it worthwhile to explore more on its success story so far.

C. <u>Criminal Litigation</u>

Criminal cases, as we know them, are matters between the State and the individual, although sometimes a juristic person could be the Accused. Criminal Law is concerned with bringing to trial people who are alleged to have transgressed a piece of penal law, for which they get punished once they have been proved guilty and convicted. Crimes are wide and varied, and while most criminal cases are tried and resolved in subordinate Courts, only very serious cases are reserved for superior Courts.[49] Now, regardless of which level of Court a person is entitled to be tried in, one among the cardinal considerations Courts ought to bear in mind is the obligation to respect the Accused person's right to a speedy and fair trial. In Malawi, as must be the case in most countries with relatively new Constitutions, including Lesotho, this right is entrenched in the Bill of Rights section of the Constitution.[50]

Comparing the manner Criminal Proceedings are conducted in our Courts against the bundle of rights a Criminal suspect has been Constitutionally guaranteed under the umbrella of, and alongside, the right to "speedy and fair trial," an honest assessment will in all probability lead to the conclusion that most jurisdictions still have a long way before they can fully claim that they meet the ideals their Constitutions hold. Much as the pattern of conducting criminal trials appears to be set, and to be confined within the fixed and appealing tenets of the type (i) innocent until proven guilty, (ii) *onus probandi* lies on the State throughout the case, and (iii) the State is obliged to prove the guilt of the Accused at no lower level than that of proof beyond a reasonable doubt, which tenets tend to make us feel as if we are quite considerate and generous towards the Accused, keeping Constitutional requirements in mind, we might very well find that there is a lot more we need to do to alleviate Accused persons found in our jurisdictions from the ordeals they go through in the process of seeking justice in our Courts.

In Malawi, through the auspices of the Law Commission, which is a creature of our 1994 Constitution,[51] a comprehensive review of the Criminal Procedure and Evidence Code has been carried out and completed by a Law Commission that was appointed[52] to look into Criminal Justice Reforms. The recommendations made, which included a Draft Statute and a number of Draft Rules, were passed into Law at the end of 2009, but they need to be gazetted before they can come into effect as Law.[53] The proposed reforms have focused on pre-trial and trial procedures in Criminal matters, and they have ventured into filling in the gaps exposed upon testing the existing Code and Practice against the broad innovations the Constitution has brought about, including the human rights principles that emphasize individual rights and freedoms.

[49]For Malawi see: Section 13 of the Criminal Procedure and Evidence Code (cap 8:01) of the Laws of Malawi
[50] For Malawi se: Section 42(2)(f)(i) of the Constitution of Malawi
[51] Malawi Constitution; Section 132 establishes the Law Commission and empowers it to review and make recommendations for the repeal and the amendment of Laws
[52] Constitution of Malawi; Section 133
[53] Constitution of Malawi; Section 74

The reforms the Law Commission recommended are aimed at ensuring that the Malawian Criminal Justice System becomes more efficient, accessible, fair, and accountable than it has been hitherto. The Commission thus had recourse to various progressive legal systems, both in Africa and in other jurisdictions, so as to capture the best practices.[54] The Law Commission in question also made it a point to consult as widely as possible among stakeholders within the Country so as to cater for the needs of special interest groups, and to take on board gender concerns, as well as cultural norms and values, apart from taking care of the other aspirations contained in the Constitution. Now that what were mere proposals have been transformed into an Act of Parliament, although some recommendations may have been modified by Parliament, to begin reaping from the efforts of the Law Commission in this area, we simply await the single step that will bring this Law into force. Out of the wide-ranging and detailed changes this reform exercise proposed in the field of Criminal litigation, for our purposes, focus needs to be limited to proposals that are liable to improve the speed with which Criminal cases can be dealt with when the revised Law becomes operational.

(a) *Pre-Trial Considerations*

The last re-enactment of the Criminal Procedure and Evidence Code in Malawi came into force on 1st February, 1968,[55] and it largely followed in the footsteps of the provisions of the Criminal Procedure Code of 1929, which was passed when the Country, then known as Nyasaland, was under the British Colonial Administration. Under this Law, which has largely remained unchanged over the decades that have gone past, Criminal Proceedings tend to start with the dreaded arrest, and then progress slowly towards hearing and conclusion. At the time this Law came into being, unlike now, populations were low and so Courts were not dealing with as many cases. At that time also, it is a fact that human rights considerations had not yet gained prominence, or taken root. Liberty, then, was not as valued as it is today, where it is only second to the right to life, whether one looks at it from the point of view of International Human Rights Instruments[56] or from Constitutions like ours.[57] Similarly, even if for some reason it took long to complete a case, it could not have attracted as much attention as like delay these days will do. In the review of the Criminal Procedure and Evidence Code that took place, therefore, the Law we have been using was observed to be in need of strengthening if, among other considerations, the Constitutional aspirations of achieving speedy and fair trials for Criminal suspects are to be attained.

Pre-trial Custody time Limits

A major concern that surfaced when the existing Code was looked at in the pre-trial phase of criminal matters was its failure to adequately provide for the regulation of pre-trial custody. While it was noted that the Constitution treats the first forty-eight hours

[54] Per Law Commission Report No. 10, among the jurisdictions referred to are England, South Africa, Australia and Canada

[55] It was done as Acts Nos. 36 of 1967 and 23 of 1968

[56] Eg The Universal Declaration of Human Rights; Article 3, and The International Covenant on Civil and Political Rights; Article 9,

[57] Malawi Constitution; Section 18

after an arrest as acceptable if the arrest is lawful, the Code did not have strong follow up provisions to ensure that the State throughout appreciates that it has an obligation to ensure that any continued incarceration remains lawful. As a result, many arrested people illegally languish in custody for ages, way beyond the initial forty eight hours of lawful detention, before they are brought to the door of any Court of Law. Delays in Criminal litigation, it was noted,[58] are thus significantly contributed to by this weakness in the existing Criminal Procedure Law. In the light of the Constitution guaranteeing Accused persons the right to be presumed innocent until proved guilty, and the right to speedy trial, the revised Code is therefore going to have substantive provisions on Pre-Trial Custody Time Limits.[59]

In the provisions to come, Lawful custody during this period is to be understood as custody sanctioned by a Court Order, pending trial. Time is to begin running just after the expiry of the first forty-eight hours after arrest. Both for purposes of trial in a Subordinate Court, and for purposes of a committal for trial in the High Court, the maximum period for being held in custody will be thirty days only. Once committed for trial in the High Court for offences triable in that Court, the longest a person may spend in lawful custody, pending the commencement of his trial, will be sixty days. For serious offences, such as Treason, Genocide, Murder, Rape, Defilement, and Robbery, any person accused of the same may be kept in lawful custody for only up to 90 days pending the commencement of his trial. For good and sufficient cause, and on application to the relevant Court, at least seven days prior to the expiry of the material time limit, the Prosecution can apply for an extension of time. In total, however, such extensions ought not to exceed a period of thirty days. At the expiry of whatever time limit is applicable, either on its own motion or on application, the Court may grant bail. This, however, will not block any arrested person from applying for bail before the expiry of his period of lawful custody. When this Law comes into force, therefore, it will keep the State on its toes regarding the need to legalize pre-trial detention, and the periods of time allowed for legal detention from the date of arrest are relatively short for most offences, before it becomes illegal to continue keeping the suspect in custody while still waiting for the case to start. Soon an arrest is made, therefore, the Code, through these provisions will be playing a pushing role for progress in the Criminal process if the State does not want all its arrestees awaiting trial outside custody due to the fact that it can no longer keep them legally incarcerated.

Follow-up on Arrests without Warrant

One other concern in the pre-trial phase of Criminal litigation are arrests without Warrant. Under current Law, once the Police arrest a person without a Warrant, they are merely required to take the arrestee to the Court "without unnecessary delay." Practice on the ground has shown that delays in taking suspects to Court, including those arrested without Warrant, are the order of the day and that they are rampant. While the expression "without unnecessary delay" suggests urgency in taking such arrestees to the Court, with the non-observance of the provision detected, for certainty to prevail and for uniformity, it became necessary to align the provision in question with the forty-eight hour rule that is provided for in the Constitution[60] *vis-à-vis* the

[58] Law Commission Report No. 10; page 86
[59] Meant to be the new Sections 161A to 161J in the revised Code
[60] Constitution of Malawi; Section 42(2)(b)

length of lawful custody on initial arrest.[61]Police will be obliged, therefore, once they arrest without a Warrant, to take such arrestees to Court not later than forty eight hours.

Release and Caution

Delay was also noted in the pre-trial stage of Criminal proceedings owing to the inability of the Police to confidently dispose of some of the cases that need not even come to Court. The provisions in the Code in use did not provide for the Police to take concrete decisions to drop Charges and let Accused persons scot-free. Congesting Courts with matters they could do without, it was observed, had an effect on how speedily the Court dealt with all the business brought before it. In the absence of clear empowering provisions for police to exercise discretion on how to proceed in respect of matters they would consider to be far from serious, or to be merely technical offences, even when they have already effected an arrest, they have often felt obliged to still take such matters to the Court for effective disposal.

Matters of this type, apart from clearly just adding to the already heavy workload of the Court and causing inconvenience to all concerned, also tend to unnecessarily eat into resources, including Court time. Considering existing provisions urging Courts, even in Criminal matters, to promote reconciliation and encourage amicable settlement of disputes,[62] revision of our Law in this area took the form of proposing a provision giving the Police the power to "release and caution"[63] suspects. Under this anticipated provision, the caution against repetition of criminal conduct could be oral or in writing, and it is to be given by Police Officers not falling below the rank of Sub-Inspector. Further, it is to apply strictly in cases that do not amount to a serious offence, and which are not aggravated in degree, before the release of the arrestee. Appropriate guidelines are to be put in place through rules under the Code. Our hope is that fairly simple matters will, through this facility, be weeded out of the Criminal justice regime at quite an early stage. This is bound to ease the workload of the Courts, and to enable them to deliver justice much faster in matters that truly deserve their attention.

(b) *Commencement and Conclusion of Criminal Proceedings*

Regardless of how well Courts deal with issues of *Habeas Corpus* or of Bail, if there are no provisions in a jurisdiction giving the Prosecution and the Courts time-limits about when criminal proceedings should be commenced, chances are that a suspect arrested for crime could have Charges hanging over his head for intolerably long without relief, whether in the form of conviction or acquittal, coming his way. Unlike in Civil cases, where a number of processes may have to be filed in order for the Court to appreciate what is really in dispute between the parties to the case, in criminal proceedings a single document, i.e. the Charge, normally clearly spells out what is in issue. There is a tendency in the practice of the Criminal Law to take things easy and to believe that criminal proceedings can commence any time the prosecution choose to bring them. It tends to work a great injustice against the concerned suspect, where for some reason or another the Prosecution do not commence proceedings early enough. A number of

[61] Law Commission Report No. 10; pages 39 to 40 on the revised Section 35 of the Code
[62] Cap 8:01 of the Laws of Malawi; Section 161
[63] Meant to be a new Section 32A of the revised Code

times, practice shows, the Prosecution will start their cases weeks, or months, and sometimes even years from the time the matter arose.

I am sure examples exist in our jurisdictions where all that has been done by the prosecuting authorities is to charge a suspect and to have plea taken. Ordinarily trial should follow soon after, or within a reasonable time of a plea of Not Guilty being recorded. There are, however, occasions when several months or even years intervene between the taking of the plea and the calling of evidence that will lead to the disposal of the case. It certainly cannot be a satisfactory state of affairs for a suspect to live under the shadow of a Criminal allegation for, say, five years without knowing his fate. In this regard it would be worse if all that waiting was viewed as being quite legitimate, regardless of whether the person is in custody on legally extended remand or is on bail. Facing a criminal allegation imposes restraints on a suspect, some of them not overtly visible as they relate to restraint of the mind, and it is important that Courts, through improved Procedure Codes and Case Management, should ease the situation of criminal suspects by ensuring that, not only are their cases commenced in time, but that once so commenced the proceedings are conducted, and concluded, within a reasonable time.

Case Commencement and Case Conclusion Time Limits

In Malawi, the way we have opted to deal with this problem, is to introduce Prosecution Time Limits in the revised Criminal Procedure and Evidence Code, both as regards the commencement and the conclusion of certain categories of Criminal matters, especially in Subordinate Courts, which deal with the bulk of Criminal cases at first instance. The revised provision,[64] if it has been passed in the same form as was proposed by the Law Commission, is meant to direct that all offences that are triable in Subordinate Courts, other than those that are punishable by imprisonment in excess of three years, should be commenced within twelve months of the complaint arising, and also that they should be concluded within twelve months of so commencing. If the alleged offender is at large, time will run from the date he gets arrested for the offence. If the State can show that the failure to complete prosecution in time is not attributable to it, room will be made available for them to secure an extension from the Court to complete the prosecution. Failure to commence prosecution in time, or to complete it within the prescribed time, must otherwise free the person accused from ever being tried for the offence in question outside the time limits. Since delays in commencing, and concluding, Criminal proceedings are not peculiar to Subordinate Courts, like Prosecution Time Limits as are given in respect of trials before Subordinate Courts, are to be introduced in the High Court as well.[65] As can be seen, therefore, there will not be much free time for the State to toy around with delaying tactics once the Law prescribing these time limits in the affected category of cases comes into force. In respect of matters not caught in this bracket of cases, however, as earlier shown, pre-trial custody time limits will ensure that even they are not left without being attended to for too long if the State does not want the suspects in those cases all sent home to await their delayed prosecution on account that the State has already exhausted its allotted quota in terms of time for legally detaining them.

[64] Law Commission Report No. 10; pages 122 to 123
[65] Ibid; page 140: Meant to be a new Section 302A of the revised Code

Plea Bargaining

In Malawi this far "Plea Bargaining" has not been part of our Law, but in the review of the Criminal Procedure and Evidence Code above-referred to a decision has been reached to incorporate that practice into our Law.[66] The pros and cons of this concept having been adequately weighed, it was agreed that, if practiced with enough safeguards, Plea Bargaining could bring needed relief in the administration of Criminal justice, and at the same time ensure immense speed in the disposal of the cases it is practiced in. By this practice, and in strict compliance with the Rules to be promulgated by the Chief Justice, subject to approval from the Court, it will be open for Accused Persons and Prosecutors to work out mutually satisfactory dispositions of cases, through the Accused either pleading guilty to a lesser offence or to one or more Counts in a Charge with multiple Counts. Under the Rules the Chief Justice will be expected to first make under the revised Code[67] will be guidelines, including those requiring (i) parties to avoid entering into such negotiations just for the sake of expediency, (ii) the Prosecution to keep the victim of the crime being bargained on fully informed of the negotiations going on, (iii) the Court, upon being advised of a plea bargain agreement, to ascertain that the Accused person fully understands it and its implications, and (iv) the Court to retain the discretion not to accept a plea bargaining agreement, if it doubts the *bona fides* thereof. Successful plea bargains will, therefore, be principled accomplishments of speedy and fair disposal of cases, and they will thus also help in bringing about efficiency in the management of the workload Courts face.

Plea and Directions Hearing

Noted also in Malawi is the inadequacy of the provision for taking plea in the High Court in the Code of Criminal procedure now in use. The Law Commission's recommendation was one to delete the existing provision, and to replace it with a more elaborate one in the revised Code.[68] The plea exercise is, therefore, to be made a thorough and exhaustive assignment for the Court, by incorporating in it a Directions Hearing. The purpose of having such a hearing at the time plea will just have been taken will be to ascertain if all necessary steps in preparation for trial have been taken, and to ensure that sufficient information regarding a trial date in the matter is also provided at that early stage in the case. Whereas on a plea of Guilty the usual procedure of disposing the concerned case on a narration of facts in lieu of presentation of evidence will be followed and early disposal attained, on a plea of Not Guilty the Court will, in the Directions Hearing that will immediately take place with both parties participating, the Court will go into hearing them on various matters, including what issues they see in the case, whether any issues in the case relate to the mental or medical condition of the Accused, what number of witnesses will testify and in what form, whether and what exhibits may be admitted by mutual consent, and it will also deal with applications, if any, to submit any pre-recorded interviews with child witnesses as evidence-in-chief, check into the availability of Defence Legal Counsel, and handle any other significant matter that might affect the proper and convenient trial of the matter. Doing all this and giving directions that will secure a proper and efficient trial right on the very day plea will have just been taken, it is Malawi's belief, will leave the State

[66] Ibid; page 118 Meant to be a new Section 252A in the revised Co

[67] Law Commision Report No. 10; page 397: Draft Criminal Procedure and Evidence (Plea Bargaining) Rules

[68] Ibid; pages 141 to 142

with no time to idle around once it commences a prosecution. The intended Plea and Directions Hearing will thus go a long way into facilitating, with this joint and speedy focus on the case, speedy and efficient disposal of the commenced matter. There will be room for the Chief Justice to make rules to govern Plea and Directions Hearings.[69]

Adjournments

Between the start and the hearing of a Criminal matter is sandwiched the sensitive question of adjournments. Carelessly handled, adjournments can derail a case, and cause it not to be heard and disposed of in time or at all. In the light of the precious nature of personal liberty, Criminal Procedure Codes, even older ones, tend to prevent long adjournments of cases, by requiring frequent attendances at Court where an Accused person is in custody. Thus, even without a revision, the Code currently in use in Malawi demands that when a suspect is in custody, adjournments ordered in his case should not be longer than fifteen days.[70]

Whether in reality this provision is genuinely followed so as to benefit suspects is not quite clear. What I know is that quite early in my career when sitting in Subordinate Courts, to combat the serious problem of congestion of cases, we quickly learnt from the more seasoned Magistrates of a practice invention whereby cases that could not be heard within the coming fifteen days were merely adjourned to the prescribed time for purposes of "Mention." By this device an Accused person on remand would, as required by Law, appear before the Court on the fifteenth day, but if the adjournment was for "Mention" he was just brought from custody just to be seen by the Court, and for his Remand Warrant to be further legally extended. As can be seen, while superficially this practice appears to fulfill the requirements of the Law, it clearly does not serve the purpose the fifteen day adjournments were prescribed for in the Law. It thus deserves condemnation as it does not only lengthen the Accused person's incarceration, it also delays disposal of cases, when in fact it was designed to speed up disposal. While on the subject, at times it appears to me that the situation in the High Court is worse for the first instance sittings that come to it. For cases like homicides, which at times have to be conducted by the High Court at Centres outside the Registries that Court normally operates from, dependent as such assizes are on availability of funds for travel and related costs, there is no observance, even of appropriate periods of adjournment. If no funds are available for the Court to get to the selected venue of trial, and with other business always being available to occupy the Court, the Accused is next seen, not after 15 days or thereabouts, but when funds next permit, which could be a period of time too embarrassing to disclose.

The problems of compliance with available Law on adjournments aside, what is more problematic for the criminal suspect is that there does not seem to be a limit to the number of adjournments that can be had in a criminal trial. Prosecution and Defence in our Courts, if we sincerely appraise ourselves, literally take turns at seeking and obtaining adjournments. As a result cases will be in the Courts, making little or no progress for months or years, because each time the case is called, for some reason or another, it ends up being adjourned. It is, however, a very difficult thing to specifically legislate against adjournments, because reasons for seeking such are at large and varied.

[69] Ibid; pages 393 to 397

[70] See Section 250 of the Criminal Procedure and Evidence Code (cap 8:01) of the Laws of Malawi

They thus each need to be vetted on their own merits when raised before the Court for a just decision to be made. In Malawi, however, the very introduction of time limits within which certain criminal cases must be concluded once they have been commenced for the categories of cases concerned, should in a way help control adjournments. If a case has, for instance to be concluded within twelve months, a reasonable Court will definitely not allow it to be adjourned on flimsy grounds. We anticipate, therefore, that once the regime of concluding the majority of cases within a short space of time from commencement starts to operate, Courts will of necessity get stingy on adjournments of the Criminal matters before them even though there is no legislation limiting their discretion in such applications.

Judgment Time Limits

Related to concerns about the early commencement and disposal of cases, is the question of time limits for the delivery of judgments. No such time limits exist in the Code in use. Even in the revision under discussion, Malawi did not go so far as to suggest time limits in this area. Although the question whether legislation should issue, and in certain special Courts it has issued,[71]for the General Division of the High Court and for Subordinate Courts of the Magistrates' type, it was felt that this bold step should not yet be taken. The Law Commission upon considering the question took the view that it is a matter that could either be addressed by the Chief Justice in a Practice Direction or be left to an enforceable Code of Conduct for Judicial Officers.[72] Under the present arrangement, Judges and Magistrates are constantly reminded to deliver their judgments in time. A Code of Ethics for Judicial Officers is already in existence, but a supporting enforcement regime is still being worked on by a Committee set up last year by the Chief Justice.[73]

C. Conclusion

In the Civil law domain, if a person does not feel so seriously hurt by someone else's conduct against him/her, he/she will grumble for a while, but let go and then move on with life. Where, however, the sense of grievance is so deep, the injured party will go to all lengths to get redress. The mere fact that a person approaches a Lawyer to give instructions on the institution of some suit or other, or approaches a Court of Law so as to file a claim against another, should be a sign to us who work in the field of litigation that the person in question must be having sleepless nights over the matter in issue, even if the matter at hand might otherwise look simple to us. If we disappoint such person in the manner we attend to his/her problem, chances are we could make him/her desperate enough to decide to take the Law into his/her own hands. The burden is on our shoulders, therefore, just as it is also on our system of justice-delivery, to make sure that such person does not explore options beyond us and our systems. This we can only manage to do by giving such Law-abiding citizen the kind of effective and efficient service and remedy he/she deserves when he /she approaches our Courts.

In comparison, the kinds of stress Criminal matters bring to suspects and victims alike, as well as to their families and friends, is much more bothersome than that emanating

[71] Commercial Division of the High Court of Malawi and the Industrial Relations Court
[72] Law Commission Report No. 10; page 78
[73] Code of Conduct Committee

from Civil wrongs. We who serve these parties, therefore, whether as Prosecuting Advocates, or as Defence Counsel, or indeed as Courts (Trial or Appellate), should realize that although the contending parties' interests are in competition with each other, their meeting point is that at the bottom line they all wish justice to be done, and for that matter, that it should be done at the earliest possible time if their anxieties are to be put to rest. Either way, therefore, whether it is Civil litigation or Criminal litigation that we are engaged into determining, we should be alert to the fact that we are dealing with matters the parties have passionate ties with. Should they gain the impression that we are ill-handling their concerns, or that our Judicial Systems are too clumsy to satisfy their expectations, risk exists that whoever is aggrieved, on whichever side of the matter, could easily opt to taking the Law into his/her own hands.

We and the Systems we run ought, therefore, to appreciate that we offer to the public their last hope for a sane and civilized solution to their legal concerns, and that if we disappoint them, we leave them with no viable options to pursue. We should be the first, therefore, in our use of the Laws and Practices in our systems of justice, the same being tools of our trade, to detect whether they are sufficiently helping us to effectively deliver the services we hold ourselves out as having the ability and competence to deliver to the public. In event of our discovering them to have, over time, started malfunctioning or to have become so blunt as to require sharpening, as we have discovered in Malawi, we should be the first to call for appropriate reforms, and even to suggest the way forward.

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