THE PRESUMPTION OF INNOCENCE AND PRETRIAL DETENTION IN MALAWI

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ABSTRACT

Malawi is one of the few countries in the world that explicitly protects the right to be presumed innocent before and during trial in its Constitution. While many countries today claim to uphold this right, most of them apply it only after trial has commenced—when it is arguably too late for the defendant to prepare an adequate defence. These countries have in effect chosen to prevent crime at the expense of the constitutional liberty of their citizens. While some Malawian courts have generally upheld the presumption of innocence before trial, statutory law allows them to consider the nature of the crime the defendant has allegedly committed in determining whether to grant bail or not. Courts should abide by the precepts of the Constitution and preserve the presumption of innocence before trial to avoid predictions of guilt and detention before trial as a means of crime control. Moreover, streamlining bail procedures for all criminal defendants and involving communities in bail procedures could strengthen the right to liberty and contribute to the fulfilment of the promises of dignity and freedom guaranteed to all individuals in the Constitution.

I INTRODUCTION

John Chima was accused of murder and spent 17 years in Zomba prison in Malawi awaiting trial. Although it is unusual for a prisoner to be detained for such a long period before trial, detainees in Malawian prisons are very frequently detained for months and even years before being charged with a crime. Detention of innocent people by police is a widespread problem in Malawi. As will be shown below, many Malawians are afraid to report crimes to the police for fear of being detained and becoming suspects simply for

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providing information. Pretrial detention, particularly without a charge, presumes guilt and allows even the innocent to be punished without the benefit of a fair trial. Presuming guilt is a hallmark of fascist and dictatorial systems of government that punish potential dissenters and suspects without regard to their human rights. This was all too familiar in Malawi especially between 1963 and 1994 when the Banda regime ruled using oppressive tactics such as detention and punishment of innocent individuals. In 1994, in an effort to embrace democracy, Malawi adopted a rights-based Constitution[1] that champions the civil, political, economic and social rights of individuals, including the accused. This new Constitution—which is unique in the world—protects the right to be presumed innocent, even before trial. The presumption of innocence requires that a person should not be punished unless found guilty in a court of law. It also requires that a judge or jury should not make any inference of guilt against an individual until conviction. Though the presumption of innocence is recognised in name by all Malawian courts and in practice by some of them, its potential has not been fully realised.

This article examines the constitutionally protected right to be presumed innocent in Malawi and other common law countries, and makes recommendations on how courts in Malawi can better vindicate it. Part II of this article examines the problems of pretrial detention and crime detection in Malawi as part of a broader social problem in Africa. It also reviews case studies of individuals in unduly prolonged detention without charges in Malawi. Part III analyses the historical basis for the presumption of innocence and its application in the common law world today. Part IV reviews Malawian statutory and case law and illustrates how Malawian courts have applied the presumption of innocence. Part V discusses the problem of preventative justice, which is exacerbated by Malawi's practice of lengthy detention and low evidentiary bar for arrest. Part VI provides some recommendations and a conclusion.

II PRETRIAL DETENTION AND CRIME DETECTION IN MALAWI

Two unique criminal issues—that on their surface may seem unrelated—demonstrate the importance of the presumption of innocence in Malawi. The first relates to lengthy pretrial detention of innocent individuals and a low evidentiary bar for arrests. The second relates to extremely poor crime detection by police.

1 Constitution of the Republic of Malawi Act 20 of 1994.

A Excessive pretrial detention

Recent media coverage has highlighted the abhorrent prison conditions in Congo,[2] Kenya,[3] and Zimbabwe[4] where inmate deaths occur due to poor health conditions and scarcity of food. While poverty and increased crime rates are the most common explanations, an underappreciated but equally important cause is poor pretrial detention policies. In most African countries, the larger proportion of the prison population consists of inmates held before trial.[5] These inmates include individuals who have never been charged with a crime and are often simply detained as suspects, sometimes for several years. And to make matters worse, the level of overcrowding in African prisons is often inhumane; there is a lack of hygiene, insufficient food, and a lack of medical care for both pretrial detainees as well as convicted prisoners.[6]

With a population of 13 million, Malawi is one of the world's 11 poorest countries.[7] Regrettably, the intense poverty in Malawi is accompanied with a high level of crime leading to a situation where the nation's criminal justice system is not equipped to respond to charged individuals fairly and efficiently. Malawian prisons are perpetually overcrowded and often hold double the number of inmates that they are built to accommodate.[8] Although the law requires that detainees should be held separately from convicted individuals, often in practice this does not occur. About 35 per cent of the inmates in Malawi prisons are pretrial detainees.[9] Additionally, homicide suspects are typically detained for over a year, sometimes for two to three years, because

2 *New York Times* (Congo) 25 July 2009, A8, available at www.nytimes.com/2009/07/26/world/africa/26Congo.html (accessed 20 May 2010).

3 *BBC News* (Kenya), 29 September 2004, available at http://news.bbc.co.uk/2/hi/3701398.stm (accessed 20 May 2010).

4 *Financial Gazette* (Zimbabwe), 10 September 2009, available at http://allafrica.com/stories/200909141444.html (accessed 15 April 2010).

5 '2.5m in pre-trial detention worldwide', *King's College London, News Archive 2008* (PR 19/08).

6 See Kampala Declaration of Prison Conditions in Africa, 1996. This Declaration sprung from the international seminar on 'Prison conditions in Africa', held in Kampala, Uganda in 1996. It is annexed to UN ECOSOC Resolution 1997/36 on 'International Cooperation for the Improvement of Prison Conditions' and reproduced in Christof Heyns (ed) *Human rights in Africa* Vol 1 (The Hague: Martinus Nijhoff Publishers, 2004) 882–824.

7 United Nations Development Program *Human development report 2009: Malawi,* available at http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_MWI.html (accessed 15 April 2010).

8 Department for International Development Malawi *Safety security and access to justice annual review* (2008), Annex E, 12.1, para 95 ('DFID 2008 Annual report'); US Department of State *Human rights report: Malawi* (2008) estimates that pretrial detainees make up 25 per cent of the prison population.

9 DFID 2008 Annual report, as above, Annex E.

bail is not presumed in homicide cases.[10] Conditions for inmates in Malawi are grim. On average, 200 prisoners die each year, 300 inmates per year are chronically ill and there is no food to feed the inmates for more than 50 days a year.[11] Indeed these prison conditions are appalling for convicted inmates, even more so for individuals who are arrested as suspects.

Attempts to reform African prison conditions, with a specific emphasis on the high numbers of prisoners detained before trial, started in 1996 in Kampala. With the Kampala Declaration on Prison Conditions, 40 African countries, including Malawi, resolved to reduce the proportion of prisoners awaiting trial in prisons. They resolved that the police, prosecuting authorities and judiciary should join the prison administration in various countries to reduce the number of prisoners on remand and ensure that remand inmates are detained for the shortest possible period.[12] In 2002, with the Ouagadougou Declaration, 34 African countries vowed to use detention in respect of persons awaiting trial, 'only as a last resort and for the shortest time possible'.[13] The techniques for reducing pretrial detention numbers included cautioning, improved access to bail 'through widening police powers of bail and involving community representatives in the bail process, restricting the time in police custody to 48 hours,[14] and setting time limits for people on remand in prison'.[15] While all of these methods would certainly help ease the detention situation in Malawi, an understanding of the reasons for the increase in pretrial detention—including preventative detention policies—is more important.

10 Indeed in Maula Prison alone, 15 suspects had, by 2008, been in prison for over seven years awaiting trial. See DFID 2008 Annual report, above note 8. Para 3 of Part I of the Schedule to the Bail (Guidelines) Act 8 of 2000 ('the Bail Act') provides that the police cannot grant bail to any person arrested for an offence punishable by death such as treason, murder, rape, armed robbery and burglary. See also sec 118 of the Criminal Procedure and Evidence Code, Cap 8:01 of the Laws of Malawi.

11 DFID 2008 Annual report, above note 8, para 96 (statistics from 2007), noting also that there were 11 500 prisoners in Malawi prisons in the year 2007.

12 Kampala Declaration, above note 6.

13 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002. This Declaration was adopted by consensus at a conference held 18–20 September 2002 in Ouagadougou attended by 123 delegates from 38 countries including 33 African countries. It was later endorsed by the African Commission on Human and Peoples' Rights at its 34th Ordinary Session held in Banjul, The Gambia from 6–20 November 2003. See Resolution on the Adoption of the 'Ouagadougou Declaration And Plan Of Action on Accelerating Prison and Penal Reform in Africa' ACHPR /Res 64(XXXIV)03, 20 November 2003.

14 Although the time in police custody before being taken to court to be charged or told the reasons for further detention is limited to 48 hours constitutionally, in practice this period is routinely breached.

15 Ouagadougou Declaration, above note 13.

B Low crime detection

Another factor that presents unique challenges in Malawi to protecting the innocent is a low evidentiary bar for arrests. Almost 90 per cent of arrests in Malawi are made by community police volunteers.[16] Community police volunteers are minimally trained individuals in communities who are unpaid by the formal Malawi Police Service but help to detect crime in communities. They have very little training on patrolling, evidence gathering, witness questioning or other basic policing skills and often rely on a low evidentiary bar to make arrests.

It has been estimated that up to 85 per cent of Malawians are unable to access the formal system of justice,[17] which includes courts, police, and lawyers. Instead, most of these have access to a system of 'primary justice' including traditional leaders who adjudicate disputes and hold village courts, community police volunteers who apprehend suspected criminals, and traditional counsellors who advise people of their rights. Further complicating the issue is that communities generally do not trust the formal courts and sometimes take the law into their own hands when a person is released with or without bail. Some defendants remain in jail pending trial because they cannot obtain two 'sureties' or respectable members of the community to appear in court and guarantee their appearance at trial. Finally, Malawi does not have a system of personal and physical identification, rendering efforts to track persons released with or without bail quite burdensome.

The lack of adequate police power and access to the justice system is apparent in crime detection statistics. In 2008, Malawi's crime detection rates were less than 20 per cent nationally, and less than 10 per cent in urban areas.[18] Crime detection rates include a formula of acquitted + convictions + cases withdrawn/reported cases.[19] Malawi's prosecution rates cases taken to court/cases reported are also extremely low and average about 11 per cent.[20] Not surprisingly as well, there is often a backlog of criminal cases in the courts of over 8 000 cases.[21] So in essence, if an individual commits a crime in Malawi,

16 Based on interviews conducted by the author with the Malawi Police Service officials. Technically, community police volunteers do not actually make 'arrests' but apprehend individuals and take them to the police station to be formally arrested.

17 DFID 2008 Annual report, above note 8, para 1.1(1).

18 See H Mia *DFID baseline survey safety security access to justice* (2008) (reviewing Millennium Development Goals indicators from 1 October 2006 to 30 September 2007).

19 As above.

20 As above.

21 In September 2007, there were 8 267 cases in the criminal case backlog throughout Malawi. See

he or she is extremely unlikely to be caught and even less likely to be prosecuted for it. Indeed in some cases, magistrates have had to affect arrests because police failed to arrest criminal suspects.[22] And police are often accused of not only failing to arrest individuals but also arresting wrong individuals. A recent survey demonstrated that a minority of Malawians trust the police.[23] Indeed, Malawian citizens are often afraid to report crimes to the police for fear of becoming suspects. There are also frequent reports of formal police bias, bribery and corruption.[24] Additionally, arbitrary arrests by police are common, as police sometimes arrest relatives of suspects when a suspect herself cannot be found, apparently in order to 'draw the wanted individual out of hiding'.[25] In this context, protecting defendant's rights presents unique challenges and the need for the presumption of innocence is especially acute.

C Three case studies of pretrial detention in Malawi

A few case studies of actual instances of individuals detained in prison will bring to light the impact of these three unique issues—overly aggressive pretrial detention, a low evidentiary bar, and inadequate crime detection.[26]

A 68 year old man named Charles Musata from Chitipa district in Malawi was arrested on 4 August 2006. He was alleged to have murdered his brother-in-law who was from a neighbouring village. The prison he is detained in does not have enough space for him to stretch his legs while he sleeps; hence he is forced to squat all night. This has caused him severe leg pains and, due to his age, his health has deteriorated in prison. Charles lacks any knowledge of the circumstances of the murder of the deceased. He claims that he was informed of the murder of his brother-in-law the night it happened. Charles claims that local custom demanded that he watches over the body until

Mia, as above.

22 See, eg, *Willy Sambo & Edward Anafi v Republic* Misc Criminal Appeal No 159/08 (unreported), where resident magistrate arrested two individuals because the state complained that the police had not arrested them.

23 See 'Malawi Afrobarometer round 4 survey', Afrobarometer slide presentation 26–28 (March 2008) ('Afrobarometer survey') (surveying a random sample of 1 200 Malawians and found that almost 70 per cent of Malawians believed that the police were corrupt and had personally witnessed or heard of police corruption); see also USAID 'Public opinion on corruption in select regions of Malawi', 6–31 October 2006.

24 US Department of State *Human rights report: Malawi* (2008); see also Afrobarometer survey, as above, 28 (almost 75 per cent of Malawians stated that they perceived the police to be corrupt).

25 US Department of State, as above.

26 The names of individuals have been changed to protect their privacy. They were interviewed by the Malawi Department of Legal Aid and the Paralegal Advisory Service Institute (PASI) in various Malawi prisons during the years 2008–2009.

morning. In the morning, he called the police to inform them of the murder. When the police arrived, they saw a club at the scene of the crime that had been made by Charles and sold to another individual. They then determined that Charles should be a suspect and detained him. Charles was detained for two years in prison without charge.

Thoko is a 35 year old woman from Kauma village in Malawi. She was arrested on 22 November 2007 after being accused of murdering her husband. Thoko has three children, one of which is a toddler and has been with her in prison for over one year. She recounts that her husband was often abusive when he was drunk. One night he came home and beat her so badly that she ran away to her uncle's house. When her uncle learnt what had happened, he gathered a few men and went to confront Thoko's husband. The confrontation led to violence and Thoko's husband was beaten to death by her uncle and the other men. Despite the fact that Thoko said nothing to her uncle and that she did not encourage him to exact revenge on her husband, she was arrested and co-charged with murder with him.

Six individuals of various ages were arrested on 5 October 2005 in Mzuzu, Malawi. They were accused of murdering a man whose body was found in a river near their village. They remained in prison for over three years awaiting charges. They individually recounted that they were put in charge of distributing food at a funeral of an unknown man whose body was found within the village. After distributing the food, the village elders informed them that they had not 'considered them well'; or in other words, they had not given them adequate portions of food at the funeral. They were then reported to the community police volunteers by the village elders as potential suspects for the murder of the unknown man.

These case studies illustrate first-hand experience with the failures of the Malawian criminal justice system. They also demonstrate the heightened importance of the presumption of innocence in Malawi. These case studies show that the individuals involved were detained without charges for long periods of time. They were all arrested by police or community volunteers without adequate evidence to support the accusations of murder, a symptom of the lack of appropriate crime detection by police and prosecutorial oversight over the charging and detention of suspects. According to the presumption of innocence, people should be treated as if they were innocent and not be punished before a determination of guilt has been made against them by a court of law.

All of the above individuals were arrested and detained (or in other words punished)[27] with extremely limited evidence against them. The need to respect the presumption of innocence is particularly important in a country like Malawi, where the police are often ill-equipped to investigate crimes properly before charging and detaining a person and pretrial detention can be aggressive and lengthy.

The next section will discuss the historic and modern interpretations of the presumption of innocence to show how this right has lost importance in the pretrial phase.

III HISTORIC AND MODERN BASIS FOR THE PRESUMPTION OF INNOCENCE

Historically, the presumption of innocence has protected defendants from any inferences of guilt from the time they were charged until trial. However, today many countries have limited the application of the presumption of innocence to trial and have restricted its meaning to an evidentiary burden at trial. The narrowing of the meaning of the presumption of innocence has opened the way for many countries to focus on controlling crime through preventative justice.

A Common law basis for presumption of innocence

Accepted worldwide,[28] the presumption of innocence is a principle that even those unfamiliar with the nuances of criminal procedure have heard: that people are 'innocent until proven guilty'. It is based on the natural law premise that '[i]n the eye of the law every man is honest and innocent, unless it be proved legally to the contrary'.[29] Historically, the presumption of innocence can be traced back to Deuteronomy, Sparta and Athens and through Roman

27 This proposal is consistent with Plan of Action (1) of the Ouagadougou Declaration on Prison Conditions which urges states to involve 'community representatives in the bail process'.

28 For a list of some countries whose constitutions include the presumption of innocence, see MC Bassiouni 'Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 235, 266 note 143.

29 See J Thayer *A preliminary treatise on evidence at the common law* (Boston: Little, Brown & Co, 1898) 552, further arguing (at 553) that the presumption of innocence has also been referred to as the application of the 'rule of sense and convenience, running through all the law' and that the presumption of innocence is a rule that insists that without evidence against an individual, people should be presumed to be honest and blameless.

law and the English common law.[30] Since the Magna Carta, the law has required that 'no man ... shall be ... taken nor imprisoned ... without being brought in answer by due process of law'.[31] Some scholars have noted that the presumption of innocence replaced the ancient rule that the accuser did not have to prove the accusation but that the accusation itself created a presumption of guilt.[32] The presumption generally holds that a person is not 'held guilty of fault unless fault is established and found by the court'.[33]

The presumption of innocence is so fundamental to modern criminal justice systems that it has been contrasted to the 'presumption of guilt' which applied in fascist judicial systems like those of Hitler and Stalin.[34] The modern democratic society has resisted the temptation to punish all those who are likely to commit crimes in lieu of punishments for those who are found to have committed crimes. Because society recognises that the threat of punishment will not deter all criminals, it tolerates some crime being committed. It also bears the risk that some will commit crimes without punishment because of the high standard of proof that must be satisfied for a conviction.[35] In general, the principle is that 'it is far worse to convict an innocent man than to let a guilty man go free'.[36] Hale remarked that five guilty men should be acquitted before one innocent man is convicted.[37] William Blackstone said that the ratio should be 10 to one.[38]

Scholars over the years have recognised that if the presumption of innocence does not impose meaningful limits on pretrial detention, the 'state can

30 *Coffin v United States* 156 US 432, 453 (1895).

31 Confirmation of Magna Carta, 28 Edw 3 c 1 (1354).

32 H Meyer 'Constitutionality of pretrial detention' (1972) 60 *Georgetown Law Journal* 1382, 1447–1448. Actually, in the 11th century, once an individual was indicted, he was put to a test of water or fire. If the accused floated on the water, he was guilty and the trial was over. If he was put to fire, he had to either hold a piece of red-hot iron or walk barefooted and blindfolded across nine red-hot plowshares. If the accused performed under fire without injury, he was innocent, but obviously innocence was rare. See Blackstone, above note 27, 342–344; see also SFC Milsom *Historical foundations of the common law* (London: Butterworths, 1969) 358–359.

33 *Joseph Constantine SS Line Ltd v Imperial Smelting Corp* [1942] AC 154. Indeed, 'the law always presumes in favor of innocence, as that a man's character is good until the contrary appears, or that he is innocent of an offence imputed to him till his guilt be proved.' See T Starkie *Practical treatise on the law of evidence, and digest of proofs in civil and criminal proceedings* 4th edition (Philadelphia: Robert H Small, 1832) 1248.

34 See, eg, *State v Holmes* 338 NW2d 104, 107 (SD 1983) (Henderson J dissenting).

35 Proving an individual to be guilty 'beyond a reasonable doubt' is often conflated with the 'presumption of innocence', but these are two unique concepts.

36 *In re Winship* 397 US 358, 372 (1970).

37 2 M Hale *Pleas of the crown* (London: 1694) 289.

38 See Blackstone, above note 27, 358. Similar references may be found in the work of Fortescue, who wrote: 'I would rather wish twenty evil doers to escape death through pitié than one man to be unjustly condemned.' *De laudibus legum angliae* c 27 (1545).

simply treat the innocent as guilty and avoid the trouble of trial altogether'.[39] The presumption of innocence should 'inform the entire criminal process' and should protect the accused and treat her as innocent until otherwise found guilty at trial.[40] Thus, no assumptions of guilt should be made before and during trial. The only restrictions that can be placed on a defendant must be focussed on preventing flight or interference with witnesses or evidence.[41] No restrictions that are based on the assumption of the defendant's guilt are permitted. Historically, there has been a very strong basis for the application of the presumption of innocence before and throughout trial.

B The presumption of innocence today

The presumption of innocence has traditionally protected the defendant from the time of arrest until conviction, but in recent years, in many countries, the presumption largely applies during trial. A decision on pretrial detention is commonly understood to raise a conflict between two interests: the 'recognition of the hardships' of detention and the desire to apply it in a limited manner, and the worry that defendants will commit offences while on bail.[42] The first interest has led to increases in release on recognizance, bail hostels and legislation requiring that pretrial detention should only be used if it is absolutely necessary.[43] The concern about pretrial crime has led to increased pretrial detention in many countries based on grounds previously never considered in the pretrial release decision, such as the weight of evidence against the defendant or predictions of how 'dangerous' she may be if released.[44]

1 *United States*

In the United States, the import of the presumption of innocence has diminished in criminal procedure.[45] Courts have stated that the presumption of

39 See, eg, M Miller 'Pretrial detention and punishment' (1990) 75 *Minnesota Law Review* 335, 415.

40 One scholar insisted that the presumption of innocence applies at all stages of the criminal process in claiming that the presumption was 'as irresistible as the heavens till overcome [and] ... hovers over the prisoner as a guardian angel throughout the trial'. See Thayer, above note 29, 553.

41 U Raifeartaigh 'Reconciling bail law with the presumption of innocence' (1997) 17 *Oxford Journal of Legal Studies* 1, 4.

42 As above.

43 As above.

44 As above.

45 See H Packer *The limits of the criminal sanction* (Stanford: Stanford University Press, 1968) 160; AP Ordover 'Balancing the presumptions of guilt and innocence: Rules 404(b), 608(b) and

innocence applies at trial—but not before.[46] Many courts have held that the presumption of innocence is synonymous with the prosecution's burden of proof, namely, to prove the defendant's guilt beyond a reasonable doubt.[47] The presumption of innocence is also reflected in evidentiary rules, jury instructions on the burden of proof or defendant's appearance, and treatment at trial.[48] Before changes in the law in the 1980s, US courts were only permitted to determine whether the defendant would appear for trial in determining whether he would receive bail, as bail was presumed for defendants.[49] But now, they are permitted to consider public safety, how 'dangerous' a defendant is, and the weight of evidence against her in determining whether to release her before trial.[50] Indeed, the tone of US courts has changed when it comes to the presumption of innocence and bail. In *US v Salerno*, the US Supreme Court claimed that, though the 'primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants', nothing in the Eighth Amendment or Bail Clause limits the government to only consider risk of flight.[51] Not surprisingly, this lack of respect for the presumption of

609(a)' (1989) 38 *Emory Law Journal* 135, 137.

46 See *Bell v Wolfish* 441 US 520 (1979), holding thus: 'The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it may also serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment or custody or from other matters not introduced as proof at trial ... *But it has no application to the determination of the rights of a pretrial detainee during confinement before his trial* has even begun.' (Emphasis added). See also *US v Salerno* 481 US 739 (1987), refusing to mention the presumption of innocence in regard to bail and pretrial release.

47 See above and the accompanying notes.

48 See J Mitchell 'Bail reform and the constitutionality of pretrial detention' (1969) 55 *Virginia Law Review* 1223, 1231; *US v Fleischman* 339 US 349, 363 (1950). The presumption of innocence is the basis for the following: the duty of the state to disclose exculpatory evidence, see *Brady v Maryland* 373 US 83 (1963); compulsory evidence, see *Taylor v Illinois* 484 US 400 (1988); the right to confront adverse witnesses, see *Coy v Iowa* 487 US 1012 (1988); and the right to effective assistance of counsel, see *Duncan v Louisiana* 391 US 145 (1968).

49 See, eg, *Stack v Boyle* 342 US 1, 4 (1951) ('Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.')

50 The Bail Reform Act of 1984 allows for pretrial detention on expanded grounds, including where a judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any other person or the community. See 18 USC § 3142(e). In addition, the District of Columbia also passed a preventative detention statute, the Court Reform and Criminal Procedure Act of 1970. It was limited to allowing pretrial detention to 60 days and required a finding of 'substantial probability' that the defendant had committed the crime charged. This statute was upheld in *US v Edwards* 455 US 1022 (1982). See also JS Goldkamp 'Danger and detention: A second generation of bail reform' (1985) 76 *Journal of Criminal Law and Criminology* 1, discussing state statutes focusing on preventative detention and the differences between them.

51 481 US 739, 753-54 (1987). Some scholars have noted that the presumption of innocence is violated by preventative detention. See, eg, L Tribe 'An ounce of detention: Preventive justice in the world of John Mitchell' (1970) 56 *Virginia Law Review* 371, 404–405, and P Miller 'Preventive

innocence has led to increased pretrial detention in the US.[52]

2 *England, Ireland, and other common law countries*

In other common law countries such as England[53], Scotland[54], Australia[55] and Canada[56], courts consider the likelihood that the accused will, if released, commit a criminal offence. In Canada, for example, while expressing an interest in protecting the presumption of innocence, courts have nevertheless ignored it by allowing defendants to be detained based on the crime they allegedly committed. For instance, in *R v Pearson*, the Canadian Supreme Court stated that the presumption of innocence applies before trial, including to bail decisions.[57] However, in the same year, it stated that the objective of 'the entire system of criminal justice is to stop criminal behaviour' and that those released on bail (who are accused but not convicted) must be released only 'on condition ... that [they] will not engage in criminal activity pending trial'.[58] Refusing to release defendants on the ground that are likely to commit crimes pending trial assumes the defendants' guilt and violates the presumption of innocence.

In Ireland, the presumption of innocence has been upheld by the courts to apply before trial. The Irish Supreme Court has specifically stated that '[c]ourts owe more than verbal respect' to the presumption of innocence and the fact that each man is innocent until 'duly tried and duly found guilty'.[59] The court also held that the 'presumption of innocence until conviction is a very

detention – a guide to the eradication of individual rights' (1970) 16 *Howard Law Journal* 1, 15–17. Many assume that once defendants are arrested they are most likely guilty and that their punishment can begin. See Ordover, above note 45, 148.

52 In 1990, approximately 35 per cent of defendants were detained before trial. In 2004, this number jumped to approximately 43 per cent. See TH Cohen & BA Reaves *Bureau of Justice Statistics special report, pretrial of felony defendants in state courts* 1990–2004 (2007), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf (accessed 15 April 2010).

53 Under the English Bail Act of 1976, a defendant can be denied bail if the court finds that there are 'substantial grounds for believing' that he will commit an offence while on bail.

54 See also *Smith v M* 1982 JC 67, 1982 SCCR 116, 1982 SLT 421 (discussing the Wheatley guidelines on bail).

55 See also Law Reform Commission of Victoria *Review of the Bail Act 1977: Discussion Paper No 25* (1991); Law Reform Commission of Queensland *To bail or not to bail: A review of Queensland's bail law: Discussion Paper No 35* (1991).

56 Section 515(10) of the Canadian Criminal Code (introduced by Bail Reform Act 1972 and amended by the Criminal Law Amendment Act 1975) allows for pretrial detention if it is necessary 'in the public interest or for the protection or safety of the public having regard to all of the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offense.'

57 77 CCC (3rd) 124 (1993).

58 *R v Morales* 77 CCC (3rd) 91 (1993).

59 *People (Attorney General) v Callaghan* [1966] IR 501, 508–509.

real thing and is not simply a procedural rule taking effect only at the trial'.[60] Irish courts refused to consider the likelihood of a defendant committing further offenses as a ground for denying bail in 1966 and 1989. However, in 1996, the Sixteenth Amendment to the Irish Constitution was passed by referendum allowing such detention.[61] Thus, bail can be denied in Ireland if the defendant is adjudged to be likely to commit other crimes.

Under English law, protecting the innocent from wrongful conviction has always been a priority over bringing the guilty to justice.[62] The English Court of Appeal held that 'although the avoidance of the conviction of the innocent must unquestionably be the primary consideration, the public interest would not be served by a multiplicity of rules which merely impede effective law enforcement'.[63] The presumption of innocence generally applies at trial only. English courts, like US courts, have reduced the presumption of innocence to a standard of proof.[64] Due in part to the fact that fewer individuals are afforded pretrial protections of the presumption of innocence, pretrial detention rates in England are increasing,[65] contributing to overcrowding in prisons.[66]

3 *European countries*

European countries uphold the presumption of innocence, but whether the presumption applies before trial remains a controversial matter. Article 6(2) of European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[67] states that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. In *Barberá, Messegué and Jabardo v Spain*, the European Court of

60 As above, 513.

61 This amendment provided that a 'provision may be made by law for the refusal of bail by a court to a person charged with a serious offense where it is reasonably considered necessary to prevent the commission of a serious offence by that person.'

62 A Sanders & R Young *Criminal justice* (London: Butterworths, 2000) 10. In *R v Hobson* 1 Lew CC 261 (1823), Holroyd J declared that 'it is a maxim of English law that 10 guilty men should escape rather than one innocent man should suffer.' At which particular page was this said?

63 *R v Ward* 96 Cr App Rep 1, 52 (1993).

64 Sanders & Young, above note 62, 10–11.

65 For instance in 1992, 10 per cent of defendants were detained before trial while by 1998, the number had risen to 15 per cent. In addition, pretrial detainees comprise a fifth of the prison population. Sanders & Young, above note 42, 10–11, 511 (citing Home Office (1993) 183).

66 See Sanders & Young, as above, 512.

67 ETS 5, 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

Human Rights (ECHR) stated that the presumption of innocence 'requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged'.[68] Both the courts and other state organs are bound by the presumption of innocence. In *Allenet de Ribemont v France*, a defendant in police custody was accused by a police officer of murder at a public press conference.[69] The ECHR held that article 6(2) of the European Convention applied not only to courts but to other public authorities as well from the time a defendant was 'charged with a criminal offence'.[70] It concluded that the police officer's 'declaration of guilt' was made 'without any qualification or reservation and encouraged the public to believe that the applicant was guilty before the facts had been assessed by a competent court' and this was deemed to be a 'violation of the principle of the presumption of innocence'.[71] However, article 5(1)(c) of the European Convention allows pretrial detention, only when 'it is reasonably necessary to prevent his committing an offence or fleeing after having done so'.[72] While the ECHR has upheld the presumption of innocence before trial, the fact that it allows detention to prevent defendants from committing further crimes allows judges to make inferences or predictions of guilt on individuals, thereby opening the way for preventative detention.

It can therefore be seen that in many common law countries the presumption of innocence has been relegated to a burden of proof only applicable at trial. The next section will discuss how Malawian courts in recent years have applied the presumption of innocence.

IV MALAWIAN LAW ON THE PRESUMPTION OF INNOCENCE AND PRETRIAL DETENTION

Malawian law exhibits an extremely robust protection of the

68 *Barberá, Messegué and Jabardo v Spain* A146 (1988) para 77. Article 6 (2) does not explicitly prohibit presumptions of law or fact, but any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within 'reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.' *Salabiaku v France* 13 EHRR 379 (1988), para 28.

69 *Allenet de Ribemont v France* 15175/89 [1995], ECHR 5 (1995).

70 As above.

71 Indeed, the court determined that the violation of the presumption of innocence was not 'cured' even though the defendant was later released by a judge for lack of evidence. See N Mole & C Harby *The right to a fair trial: A guide to the implementation of article 6 of the European Convention on Human Rights—Human rights handbook 3* (Council of Europe, 2006).

72 In addition, art 5(3) states that '[e]veryone arrested or detained ... shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

presumption of innocence. Courts in Malawi have stated that an 'innocent citizen is born with his freedom and meant to stay with it'.[73] The Constitution holds that '[t]he dignity of all persons shall be inviolable',[74] and that 'every person shall have the right to freedom and security of person, which shall include the right not to be ... detained without trial'.[75] The burden of demonstrating the legality of a defendant's detention rests on the prosecution as the Constitution specifically grants every detained person the right 'to be released if such detention is unlawful'.[76] The Malawian Penal Code also upholds the right of a defendant to bail and states that bail shall not be excessive.[77]

The Malawian Constitution explicitly recognises the right to be 'presumed innocent and to remain silent during trial during plea proceedings or trial and not to testify during trial'.[78] Malawian courts have specifically and unequivocally proclaimed that the presumption of innocence applies before trial.[79] It has been noted that an 'accused is presumed by law to be innocent until his or her guilt has been proved in court and bail should ordinarily not be withheld from him as a form of punishment'.[80]

Under the Malawian Constitution, the accused has the right to challenge the legality of her detention, to have access to legal counsel, to be informed of charges by a court within 48 hours, and to be released with or without bail.[81]

Many Malawian courts have applied the presumption of innocence throughout trial to protect the defendant from any inferences of guilt. For example, in *Amon Zgambo v Republic,* it was specifically noted that bail

73 *Daniel Tanganyika v Republic* Misc Criminal Appeal No 1251 of 1994 (unreported) per Nyirenda J, as he then was.

74 Section 19(1).

75 Section 19(6).

76 Section 42(1)(f).

77 Section 118 states: 'The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.'

78 See sec 42(2)(f)(iii).

79 See, eg, *Daniel Tanganyika v Republic,* above note 73; *Amon Zgambo v Republic* MSCA Criminal Appeal No 11 of 1998 (unreported). See also, *Aubrey Mbewe and Simoni Pondani v Republic* Misc Criminal Application No 11 of 1995 (unreported), where Mtambo J granted bail stating that: 'I would myself see no reason for not giving him bail as it should always be remembered that an accused person is presumed innocent until pronounced guilty by a court of law, and therefore, that he should not be denied his liberty ahead of conviction.'

80 See *Amon Zgambo v Republic,* as above.

81 Section 42(2)(b) of the Malawian Constitution. In *Felix Chima v Republic* Misc Application 18 of 2008 (unreported), Chikopa J said: 'If it is the wish of the arresting agency to keep the detainee beyond 48 hours they are at liberty as they come to court within the said 48 hours to ask the court to allow them so to do. They cannot however keep, by their own authority, any person beyond 48 hours. That would result in the detainee being in unlawful detention. However, in practice, these rights are seldom complied with.'

requirements exist 'merely to secure the attendance of the accused at his trial and that the test is whether it is probable that the accused will appear to take his or her trial'.[82] In *Roy Mangame v Republic*,[83] the Malawi Supreme Court of Appeal (MSCA) held that a court must give consideration to the following questions when considering bail:

- Is the applicant's incarceration unlawful?[84] Or alternatively,
- Will the applicant break bail or abscond?
- Will the applicant interfere with the course of justice?
- Are there any other factors that reinforce the applicant's right to bail, including how prejudicial it might be for the accused to be kept in custody by being denied bail?[85]

It is important to note that before even considering whether bail should be granted and whether there should be any conditions placed on it, the MSCA indicated that a court must consider whether the incarceration is lawful. Thus, if the charges have no basis, the court will not grant an individual bail but simply dismiss those charges. As Chikopa J said in *Felix Chima v Republic*, to release a person on bail with or without conditions when the detention is unlawful would effectively 'legalise the illegal'.[86] The fact that this is the initial inquiry in considering bail demonstrates that Malawian courts give priority to releasing those who are improperly detained without adequate evidence and thus respect the presumption of innocence.

Second, and most importantly, when it comes to the presumption of innocence, none of the above questions allow the court to presume guilt against the defendant or consider the crime that the defendant is charged with in determining whether the defendant should be released. Nor do they use bail as a form of punishment.[87] They consider appropriately whether the defendant will flee or interfere

82 Above note 79.

83 MSCA Criminal Appeal No 27 of 2005 (unreported).

84 Bail must be granted if the state cannot show there is a case to answer. See *Rose Bandawe Nkwangwanya v Republic* Misc Criminal Case No 37 of 2005 (unreported).

85 These considerations include: the duration of incarceration if any; duration of possible detention before his trial is completed; the cause of any delay in the completion of his trial, including whether the accused is partially or wholly to be blamed for such a delay; the extent to which the accused needs to continue working in order to meet his financial obligations; the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence if he remains in custody; and the health of the accused. See *Yiannakis v Republic* Criminal Appeal No 37 of 1994, [1995] 2 MLR 505.

86 *Felix Chima v Republic* Misc Application 18 of 2008 (unreported).

87 See *Amon Zgambo v Republic,* above note 79.

with the court case at hand in determining whether bail should be granted, because the purpose of bail historically has only been to secure the defendant's presence at trial rather than to detain supposedly dangerous individuals to protect the public. Indeed, to convince the court that the defendant will 'interfere with the course of justice', the state must demonstrate why they suspect that the accused is likely to interfere and that he will succeed in doing so. The fact that the police have not completed investigations is insufficient,[88] and so is mere proof that the accused knows the witnesses.[89]

However, there are a number of cases in which some courts in Malawi have held that the severity of the offence the defendant is charged with should be considered in determining whether to grant bail.[90] Recently though, the MSCA in *Mvahe v Republic* ended a decade-long confusion over this issue and determined that, according to the Constitution, bail is presumed in all criminal offences—including murder—and the state bears the burden of proving that the interests of justice require a person to be detained before trial.[91] Previously, in *McWilliam Lunguzi v Republic*,[92] bail was rarely allowed in murder cases unless the applicant proved exceptional circumstances that would justify release. In the same year, the same MSCA in *John Tembo and others v DPP* [93] contradicted that ruling, holding instead that courts should grant bail even to murder suspects unless the state proves that the interests of justice will clearly be prejudiced thereby. Later cases either followed the *Lunguzi* approach or the *Tembo* approach.[94] Importantly, the court in *Mvahe* noted that it was and is rare in common law countries and in most Commonwealth countries for a person accused of murder to be released, but emphasised that the common law does not provide for the right to be released with or without bail as the Malawian Constitution does. Indeed, the court recognised the strength of the Malawi Constitution in protecting the right to bail in all cases and decided to approve the *Tembo* approach.

However, clause 5(b) of Part 1 of the Schedule to the Bail Act departs from this line of case law and states that bail may be refused where there is 'the

88 See *Frizar Kum'bweza v Republic* Misc Criminal Application No 69 of 2005 (unreported).

89 *Yiannakis v Republic,* above note 85.

90 See, eg, *Daniel Tanganyika v Republic,* above note 73.

91 *Mvahe v Republic,* MSCA Criminal Appeal No 25 of 2005) (unreported).

92 MSCA Criminal Appeal Number 1 of 1995, [1991] 1 MLR 632.

93 MSCA Criminal Appeal Number 16 of 1995 (unreported).

94 Notably, the cases of *Amon Zgambo v Republic,* above note 79, and *Brave Nyirenda v Republic* MSCA Criminal Appeal No 15 of 2001 (unreported) followed the *Lunguzi* approach. On the other hand, the cases of *Dickson Zulu & 4 others v Republic* Misc Criminal Application No 136 of 2001 (unreported) and *Ingeresi Mimu v Republic* Misc Criminal Application No 50 of 2005 (unreported) followed the *Tembo* approach.

likelihood' of the accused committing an offence while on bail. The Bail (Guidelines) Act also allows courts to consider the nature of the offence, the strength of the case against the accused, and the nature and severity of punishment likely to be imposed[95]—all factors that historically have not played a role in determining whether to release a person with or without bail.

Some Malawian courts have used or espoused the principles laid down in the Bail (Guidelines) Act to limit (unconstitutionally, it can be argued) the presumption of innocence. For example, some courts have considered previous charges or the severity of the offence accused in determining whether the defendant should receive bail. In *Willy Sambo & Edward Anafi v Republic*,[96] for instance, the two appellants were charged with theft of six tonnes of Malawi Telecommunications Ltd (MTL) cables found in a truck *en route* to South Africa. The appellants focused heavily on the presumption of innocence and their bail right claiming that they should not have been denied bail.[97] In analysing this issue, Kamwambe J noted that while those who are not yet convicted must enjoy the presumption of innocence,[98] 'certain factors may militate against [their continued enjoyment of] liberty'.[99] He noted that both appellants were 'already answering a charge each of a similar nature, to wit, theft of MTL cables'.[100] Given that the appellants had two similar charges against them, he concluded that they were 'likely to commit other or similar offences'.[101] The court's analysis focussed on the exact meaning of 'likelihood to commit offences' as a factor in determining bail. Though the appellants disputed whether the phrase meant 'more than just a mere possibility or probability' or 'tendency or real possibility',[102] they did not argue that bail applications should not consider the defendant's likelihood to commit crimes while on bail.[103] The court went further to hold that the standard of proof to be used in bail hearings 'is not expected to be as rigorous as in criminal proceedings' and found that the defendants were likely to commit further offences and denied bail.[104]

95 See Parts I and II of the Schedule to the Bail Act.

96 Above note 22.

97 As above.

98 As above, 2.

99 As above.

100 As above, 3.

101 As above.

102 See *Livingstone Thomas v Associated Newspapers Ltd* (1969) 90 WN (Ptl) (NSW) 223, holding thus: 'The word "likely" can scarcely mean "more likely than not" ... [it] means likely in the sense of a tendency or real possibility. It does not mean more likely than not; "probably" or very likely.' Quoted in *Willy Sambo & Edward Anafi v Republic,* above note 22, 3.

103 *Willy Sambo & Edward Anafi v Republic,* above note 22, 3.

104 As above, 4.

This sampling of recent cases demonstrates that some Malawian courts, like others in common law countries, have been influenced by the desire to prevent crime and have sometimes undermined the presumption of innocence by considering factors besides flight risk in determining bail. However, the Constitution is clear that the presumption of innocence applies both before and during trial and the MSCA has bolstered the Constitution by holding that the right to be leased from detention with or without bail applies to all defendants, even those accused of murder and other serious criminal offences.

The next section will discuss what a robust protection of the presumption of innocence could look like in Malawi and why predictions of guilt contradict modern notions of democracy.

V JUSTIFYING THE APPLICATION OF THE PRESUMPTION OF INNOCENCE BEFORE TRIAL IN MALAWI

As discussed above, many common law countries now allow courts to detain individuals for fear that they will commit a crime if released, based on the mere fact that they have been charged with a crime. There has been a trend worldwide towards an acceptance of 'preventative justice', a term used in this article to signify a criminal justice model which places premium on crime prevention through, among other things, detaining individuals deemed likely to commit crimes. This section shows why denying bail to individuals on crime prevention grounds is inimical to human rights and why Malawi in particular should desist from this practice.

A Preventative justice

'Preventative justice' has historically been prohibited as a way of preventing crime in common law legal systems. It violates individual liberty in that it deprives an individual of freedom based on a prediction that she will commit an offence if allowed to be free.[105] The goal of preventative justice is the protection of the public from crime. While this is a noble goal, countless studies have shown that it is impossible to predict which individuals released before trial will commit crimes.[106] And indeed, even individuals charged with more serious

105 *People (Attorney General) v Callaghan*, above note 59, 513.

106 See, eg, AR Angel & others 'Preventative detention: An empirical analysis' (1971) 6 *Harvard Civil Rights & Civil Liberties Law Review* 303; M Toborg & J Bellassai 'Attempts to predict pretrial violence: Research findings and legislative responses' in FN Dutile & CH Foust (eds) *Predictions of crime violence* (Springfield, Illinois: Charles C Thomas Publishing Co, 1987) 101, 116–117; P Jackson 'The impact of pretrial preventive detention' (1987) 12 *Justice System Journal* 305; J

crimes, like murder or rape, are no more likely than others to commit crimes.[107] In modern legal systems, the acceptable method of preventing crime is the threat of conviction and punishment,[108] rather than deprivation of liberty. Furthermore, detaining someone before trial for an 'intention to commit a crime' when released does not accord with modern common law principles, which require intent coupled with overt acts of preparation or agreement to commit an offence.[109] Historically, it has been an essential prerequisite for punishment that a person must have first *committed* the criminal acts, not just have intended to do so. This is why in general *actus reus* and *mens rea* have always been required in order to have a complete crime. Considering whether the defendant will commit crimes while on bail presumes the defendant's guilt of crimes that have not yet been committed.[110]

Another problem with preventative justice and predictions of future conduct is that the emphasis is not on what a person has actually done but on who the person 'is'. As Tribe has aptly argued: 'Because imprisonment on grounds of dangerousness is predicated on a finding about the sort of person the defendant is rather than a finding about the sort of thing he has *done*, it has all the vices inherent in a law that makes the crime fit the criminal'.[111] Thus, laws based on future predictions of action do not warn an individual of what they can and cannot do to avoid punishment.

Another fundamental problem with preventative detention is that its justification is circular. Tribe has argued that once government has instituted a system that refuses bail on grounds of crime prevention, 'the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated'.[112] The misconduct of the persons released thus reinforces the argument that those persons should not have been released. However, the errors of the system cannot be seen when those who could have been released without a problem are detained because no detained individuals will commit offences, which only proves that the detention was warranted in

Monahan *The clinical prediction of violent behavior* (Beverly Hills, CA: Sage Publications, 1981) 47–49.

107 J Locke & others *Compilation and use of criminal court data in relation to pre-trial release of defendants* (1970) 8–10, 167–170; JS Goldkamp 'Danger and detention: A second generation of bail reform' (1985) *Journal of Criminal Law and Criminology* 76.

108 *People (Attorney General) v Callaghan,* above note 59, 513.

109 *Ryan v Director of Public Prosecutions* [1989] IR 399.

110 In *US v Melendez-Carrion* 790 F.2d 984, 1000 (2d Cir 1986), it was held: '[I]t cannot seriously be maintained that under [the American] Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.'

111 Tribe, above note 51, 392.

112 As above, 375.

the first place.[113] Effectively, this system operates by imposing imprisonment first rather than by preventing crime through the threat of potential imprisonment.[114]

The presumption of innocence bans 'punitive deprivations of liberty' without court sanction after a full trial.[115] Thus, any limitations on the right to liberty that are punitive in character should be banned as opposed to those that simply regulate liberty for legitimate reasons.[116] Imprisonment before conviction is punitive. Refusing to release a person on bail on grounds of crime prevention must thus not be permitted.[117]

B Negative consequences of preventative justice

Preventative justice does not only harm the principle of liberty; it also has very real consequences for the detained, particularly those in Malawi who are often innocent. A defendant's chances to succeed at trial are diminished if he is detained before trial.[118] Although bail is in some instances denied due to a legitimate fear that the defendant will be hurt or killed before trial,[119] in most cases where there is no risk of flight the defendant does not deserve to be detained. And sometimes when the court fears for a defendant's safety if released, the defendant may not be safe in detention either. For instance, consider the recent case of the same-sex couple, Steven Monjeza and Tiwonge Chimbalanga, charged with breaking Malawi's law against gross indecency. The court denied them bail, ostensibly to protect their safety. However, the two men claimed that they were beaten in prison and not safe there either.[120] In addition, a defendant detained before trial is less able to prepare a defence and to find

113 As above.

114 As above.

115 Raifeartaigh, above note 41, 5.

116 As above, 6.

117 See *People (Attorney General) v Callaghan,* above note 59, 516–517.

118 *McGinnis v Royster* 410 US 263, 281–283 (1973) (Douglas J, dissenting); Vera Institute of Justice *Programs in criminal justice reform; Ten-year report 1961-1971* (1972) 31; J Roth & P Wice *Pretrial release and misconduct in the District of Columbia* (Washington DC: Institute for Law and Social Research, 1980) IV-23—IV-26; S Nagel 'Policy evaluation and criminal justice (1983) 50 *Brooklyn Law Review* 53, 67.

119 *Coffin v US* 156 US 432, 454 (1895); see also Meyer, 32, 1447–1448.

120 See J Clayton & M Banda 'Malawian gay couple Steve Monjeza and Tiwonge Chimbalanga face jail' *Times Online* 22 March 2010; M Banda 'Malawi gays Steven Monjeza and Tiwonge Chimbalanga told to call witnesses' *Times Online* 23 March 2010. On 18 May 2010, the two accused were convicted and subsequently sentenced to the maximum sentence of 14 years imprisonment. See *Steven Monjeza Soko v Tionge Chimbalanga Kachepa* Criminal Case No 359 of 2009 (unreported).

witnesses or consult a lawyer.[121] Pretrial detention is often in the same facility as, or worse than, that where convicted persons are imprisoned. Indeed, it has been noted that the demeanour at trial of those detained for long periods is affected significantly.[122] The defendant is also unable to track down witnesses and gather evidence that would easily be accessible if he were free.[123] In addition, her abilities to communicate with defence counsel are even more limited, not to mention that being detained may also result in loss of employment and separation from family and thus wipe out the defendant's capacity and resources to defend herself at trial.[124]

In Malawi, the situation is even worse. When an indigent defendant is detained, his only opportunity to speak to counsel is most often at the courthouse directly before trial—which does not afford him time to obtain witnesses to support his case. Malawi has only a few hundred lawyers for a population of 13 million; so not surprisingly, there is a dearth of attorneys who are willing to represent indigent criminal defendants.[125] With limited resources, most detainees have little to no ability to contact witnesses or obtain any assistance from family or friends in preparing their defence. As discussed above, the facilities they are detained in are often unsanitary, lack food, and do not provide them with adequate room to sleep, further adversely affecting their demeanour at trial. Needless to say, when a defendant in Malawi is detained, it is often for a very long period of time due to a severe backlog of homicide cases,[126] and lack of sufficient human and financial resources in the judiciary, police, prosecution agencies and the Department of Legal Aid, among other reasons.

VI CONCLUSIONS AND RECOMMENDATIONS

In 1994, 30 years after gaining its independence from Great Britain, Malawi adopted a democratic Constitution which entrenched extensive fair trial

121 D Freed & P Wald *Bail in the United States* (Washington DC: UN Government Printing Office, 1964) 45–46.

122 WR LaFave & JH Israel *Criminal procedure* (2 ed) (St Paul, Minnesota: West Pub Co, 1992) 604.

123 Miller, above note 39, 369.

124 As above.

125 Open Society Justice Initiative 'Groundbreaking project provides poor criminal defendants in Malawi with legal assistance: Community-based paralegals are a cost-effective means of dealing with the demand for legal services in Malawi' Press Release, 10 December 2009, available at http://www.soros.org/initiatives/justice/focus/criminal_justice/news/malawi_121009 (accessed 15 April 2010).

126 See DFID 2008 Annual report, above note 8, at Annex E 12.1 (There was a backlog of 1 657 homicide cases as of June 2007).

rights, including an explicit protection of the presumption of innocence. However, the existing legal system has faced difficulties in implementing these protections. In particular, individuals charged with crimes are often denied the basic criminal rights established in their Constitution. Many are detained without a timely trial or access to attorneys or a competent court. Poor prison conditions and long periods of detention are typical. This is particularly troubling because, due to inadequately trained police and a low evidentiary bar for arrests, many of the people detained are actually innocent. Given that police often imprison higher numbers of individuals as suspects for long periods of time, and have limited ability to detect crime, the potential for innocent people being detained is high. This unique situation indicates that the presumption of innocence should gain even more importance, particularly where it is explicitly protected in a written constitution and upheld by the highest court of the land. Given the acute need for protecting the innocent, the promise of the presumption of innocence in the Malawi Constitution should be enforced to its fullest extent, starting from accusation to arrest and continuing to conviction.

As was emphasised by the MSCA in *Mvahe*, bail should be presumed in all cases including in serious criminal offences. Bail procedures should therefore be streamlined to allow for homicide defendants and others accused of serious crimes to apply for bail like other criminal defendants. As has been shown in this article, the Malawi Constitution protects the dignity of all individuals and the right of all defendants to be released before trial. However, bail is often not granted to murder suspects and defendants due to procedural requirements that require homicide defendants to apply for bail to the High Court. This contributes to the large backlog of homicide cases, and the problem of homicide detainees remaining in prison for a year or more with or without charges. But given the lengthy detention periods and the strong protection of the presumption of innocence in the Constitution, one potential solution would be for homicide detainees to undergo the same process as those charged with other crimes. Although there may be some opposition to making it easier to release individuals accused of murder, studies demonstrate that murder detainees are no more likely to commit crimes while released than those charged with lesser crimes.[127] Defendants charged with murder could potentially obtain bail from a senior magistrates court, rather than wait long periods for the attention of the High Court in order to receive bail. Streamlining bail for all homicide cases, except those where there is a flight risk, could

127 See above notes 106 and 107, and accompanying text. Though many of these studies are from the West and not African countries, perhaps this can be further explored in a less developed setting like Malawi.

substantially reduce the number of prisoners who are detained for long periods of time in Malawi, thereby better protecting the rights of defendants to be presumed innocent.

In general, the factors that need to be taken into account when granting bail should be harmonised with the dicta of the MSCA given in the various important decisions discussed in this article, to ensure that preventative detention is avoided and the presumption of innocence is upheld before trial. Furthermore, involving communities in bail procedures could ease problems detained people face in finding sureties who can pledge their appearance at their trial.[128]

128 This proposal is consistent with Plan of Action (1) of the Ouagadougou Declaration on Prison Conditions which urges states to involve 'community representatives in the bail process.'