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RESEARCH ARTICLE

Mandatory Reviews in Criminal Cases in Malawi: The Recent Understanding and Its Implications

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Abstract

The procedure for mandatory reviews, also known as confirmations, has existed in Malawi since the colonial period. It requires that when a subordinate court convicts a person and imposes a punishment that passes a prescribed threshold, the case record be forwarded to a higher court for review. This article examines the evolution of this procedure in Malawi from the colonial era to how it is being currently understood and applied. It argues that the understanding that courts have recently attached to the procedure does not align with how this procedure has historically developed. Moreover, this understanding diminishes the procedure's effectiveness in its function of protecting convicts' rights. The article suggests ways of improving the procedure to ensure it remains relevant and suitable for the purpose for which it was originally established.

Keywords: convicts' rights; criminal cases; Malawi; mandatory reviews; subordinate courts

Introduction

One important feature of Malawi's criminal justice process is the procedure for mandatory reviews. The procedure requires that when a subordinate court convicts a person and imposes a punishment that exceeds a prescribed threshold, the record of the proceedings be forwarded to a higher court for review and confirmation of both the conviction and sentence. This mechanism, popularly known in Malawi as confirmations, gets triggered irrespective of the existence of the right to appeal and without any action from the convict. The mechanism is an integral part of the right to a fair trial as guaranteed under the Constitution of the Republic of Malawi (the Constitution).[1] In Malawi, the right to a fair trial applies both before and after conviction, and reviews (including mandatory reviews), along with the right to appeal, fall into the post-conviction aspect of this right.[2]

Mandatory reviews have existed in Malawi since the colonial period. But although there is no shortage of literature addressing issues related to Malawi's criminal justice system in general, limited academic attention has been paid to examining the functioning of the mandatory review procedure. In particular, there has been no attempt to systematically analyse its evolution from the colonial era,

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My thanks to the two anonymous reviewers for their comments and suggestions. Any mistakes that remain are entirely my own.

1 Constitution of the Republic of Malawi, sec 42(2)(f)(viii) (the Constitution).
2 DM Chirwa *Human Rights Under the Malawian Constitution* (2011, Juta) at 454.

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through the phase of the one-party state, to the current democratic society in which the Constitution reigns supreme. Moreover, the existing literature has not examined how this evolution affects the protection of fair trial guarantees of convicts in Malawi. This article reviews the mandatory review regime in Malawi, tracing its historical development and evaluating its current status. It discusses recent cases in which prisoners challenged their continued detention due to the High Court's failure to review their convictions and sentences within a reasonable period to show how the regime is currently being applied in Malawi. Through these cases, and by referring to the history of mandatory reviews in Malawi, the article also demonstrates how the regime's original purpose has been watered down. The article argues that, ironically, this weakening of the regime's purpose is happening in an era where Malawi has a Constitution that enshrines comprehensive fair trial protections.

The rest of the article is structured as follows. In the next section, the article discusses the nature, purpose and procedure of mandatory reviews in criminal proceedings. Section three presents the history of the mandatory review regime in Malawi, tracing its development from the colonial period to present-day Malawi. Section four then presents some relatively recent cases in which prisoners challenged their continued detention when the High Court failed to review their convictions and sentences within a reasonable time. Drawing on the emerging courts' understanding and application of the regime as revealed in these cases, section five interrogates the correctness of the courts' interpretation of the regime and its implications. Section six gives possible factors for the courts' recent position in relation to mandatory reviews and proposes solutions for making the regime effective. Section seven concludes the discussion.

Mandatory reviews in criminal cases: nature, purpose and procedure

With the exception of Ethiopia, every African nation has experienced some form of colonial rule in the past.[3] Britain and France were among the major colonial powers, and in the territories under the control of both of these, lower-level courts were typically manned by individuals with limited legal training such as administrators and district commissioners.[4] This arrangement made it necessary that certain sentences that they passed undergo, through the procedure for mandatory reviews, fresh examination by relatively senior, knowledgeable and experienced judicial officers. With respect to the former British colonies, the mandatory review regime existed notwithstanding that it is not a feature of the English common law.[5]

As should be clear from the above, the mandatory review regime developed in Africa in recognition of the limitations of lower-level courts in delivering justice. While at one level these limitations stem from the insufficiency of the knowledge and skills that officers who preside over lower-level courts possess, at another level, they reflect general operational challenges in these courts, such as heavy caseloads, limited resources (including inadequate access to libraries) and the regular lack of legal representation for accused persons appearing before them.[6] Ordinarily, the threshold of the punishment that triggers the operation of the mandatory review regime varies depending on the rank or experience of the magistrate that imposed it. Certain punishments may require review by a higher court if imposed by a lower-ranking or less experienced magistrate, but not if they arise from the proceedings handled by a relatively senior magistrate. In some circumstances, the requirement

3 A Fiseha and Z Ayele "Constitutional adjudication and constitutional governance in the horn: Ethiopia, Somalia, and South Sudan" in CM Fombad, A Fiseha and N Steytler (eds) *Contemporary Governance Challenges in the Horn of Africa* (2023, Routledge) 254 at 260.

4 S Hynd, T Gendry and MB Abboud "Colonial criminal law" in P Caeiro et al (eds) *Elgar Encyclopedia of Crime and Criminal Justice* (2024, Edward Elgar) 326 at 331.

5 C Marumoagae and B Tshehla "Automatic review of magistrates' courts judgments: A noble invention at the risk of impotence?" (2023) 34/3 *Stellenbosch Law Review* 406.

6 *S v Steyn* 2001 (1) SACR 16 (CC), para 18 (*Steyn*).

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for mandatory review may be waived altogether if the case is handled by a magistrate of a certain rank, as is the case in Uganda.[7]

The mandatory review regime serves as an important safeguard for convicts' rights in the criminal justice process. It enables the High Court to supervise the administration of criminal justice in subordinate courts. Such supervision, according to the Supreme Court of Appeal for Malawi (MSCA), helps to protect against abuse of judicial powers by magistrates, and allows the High Court to quickly identify and correct any errors that magistrates make in the handling of criminal cases.[8] This role of the regime is also acknowledged in other African countries. In Uganda, for example, it has been stated that confirmations (which are similar to mandatory reviews) are meant "to ensure compliance with the judicial process by the trial magistrate".[9] Similarly, in South Africa (where a system of automatic reviews by the High Court exists for certain punishments imposed by magistrates), automatic reviews seek to establish whether outcomes in magistrates' courts were obtained in accordance with justice and, if not, to correct them.[10] Through the interventions that higher courts make under the mandatory review procedure, therefore, they are able to reduce incidents of mistakes in criminal proceedings.[11]

It should be noted, however, that the mandatory review procedure is accused-centric, operating only when there is a conviction. It does not come into play in acquittals, meaning that any errors that may have been made during the acquittal process are not remedied through this regime.[12] The regime is particularly beneficial for illiterate and unrepresented litigants, who stand in a disadvantageous position to detect errors in magistrates' decisions. It ensures that even such individuals have their cases re-examined by a more experienced and knowledgeable judicial officer capable of identifying and correcting mistakes made during the trial process. As the High Court of Zimbabwe stated in *S v Kameya*,[13] the regime ensures that "every accused person who is sentenced above the statutory limit automatically enjoys the benefit of an enquiry of his or her conviction and sentence by a senior judicial officer".

In Malawi, the mandatory review regime is especially relevant given the large number of individuals passing through the criminal justice system. With a high volume of convictions originating from magistrates' courts, many of which involve illiterate and unrepresented litigants that are incapable of appropriately understanding the proceedings,[14] and therefore unlikely to comply with the demanding process of filing an appeal, it can be challenging to detect and correct errors in magistrates' decisions. The mandatory review regime makes it easier to trace such cases and rectify the mistakes noted. The regime is also vital in Malawi considering that the majority of magistrates lack formal legal education and, unlike in other jurisdictions such as the UK, normally sit without the advice of trained legal professionals.[15] As of 2023, such magistrates represented over 82 per cent (180 in total) of the available 219 magistrates in Malawi.[16] Many of the functional courts in rural

7 Magistrates Courts Act No 13 of 1970 (Uganda), sec 173(1). Under this provision, orders of a chief magistrate are not subject to mandatory review (or confirmation).

8 *Banda and others v Rep* [2016] MLR 10 at 22–23 (*Banda and others*).

9 *Turyatunga v Uganda* Criminal Appeal no 016 of 2016 [2017] UGHCCD 30.

10 *S v Nkosi* 2008 (1) SACR 87.

11 See, for example, *Steyn*, above at note 6, para 19, where the Constitutional Court of South Africa stated that the automatic review system tries "to minimise the incidence and consequences of mistakes" in the magistrates' courts.

12 See *Rep v Nalumo and another* Confirmation Cause no 489 of 2000 [2000] MWHC 25 in which the High Court stated that ordinarily the court does not overturn acquittals during reviews as it is expected that the state would appeal if it is dissatisfied with an acquittal.

13 HB 116 of 2006 [2006] ZWBHC 116 (*Kameya*).

14 GD Makanje "The protection of vulnerable witnesses during criminal trials in Malawi: Addressing resource challenges" (2020) 20 *African Human Rights Law Journal* 206 at 210.

15 *Rep v Genti* [2000-2001] MLR 383 (*Genti*).

16 Malawi Judiciary *Annual Report 2023* at 72–78, available at: <https://www.judiciary.mw/sites/default/files/2024-05/2023%20Annual%20Report%20Final.pdf> (last accessed 12 August 2025).

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areas are manned by these lay magistrates who sometimes handle matters outside their jurisdiction and pass sentences beyond their legal authority.[17] The reasons for doing so include "necessity, sheer disregard of jurisdictional constraints, and mere incompetence".[18] Such challenges highlight the need for constant oversight, which the mandatory review procedure provides, ensuring that mistakes by magistrates in the administration of criminal justice are quickly spotted and corrected.

Quite apart from acting as a safeguard for convicts' rights in the administration of criminal justice, the mandatory review regime, like any review or appeal process,[19] also plays a secondary function of enabling superior courts to clarify the law and offer guidance to magistrates' courts on how to handle future cases.[20] In Malawi, the High Court has utilized the mandatory review procedure to offer important guidance to subordinate courts on various aspects of the criminal law and criminal procedure.[21] Such guidance promotes consistency and reduces errors in the administration of criminal justice at the lower court level, both of which are vital for furthering fairness in, and respect for, the criminal justice system.

Procedurally, the mandatory review regime in Malawi is purely court driven.[22] This means that no action is required from the convict, the state (through its prosecutorial agencies) or the prison authorities for the process to be set in motion. The regime is automatically triggered when a magistrates' court convicts a person and imposes a punishment that meets the threshold for mandatory review. Therefore, even where the convict elects not to appeal, the mandatory review regime still gets implemented. Following the review, the High Court may confirm the conviction, reverse it and acquit the accused, order a retrial or alter the punishment imposed.[23]

Mandatory reviews in criminal cases in Malawi: the past and the present

The past: mandatory reviews during the colonial period

The mandatory review regime in Malawi (formerly Nyasaland) dates back to 1906 when the Subordinate Courts Ordinance was enacted. This Ordinance created two systems of subordinate courts: the district courts (and sub-district courts), with jurisdiction over Europeans and Asiatics, and the district native courts (and sub-district native courts), which were responsible for matters involving natives.[24] District residents presided over district courts and district native courts, while assistant residents presided over sub-district courts and sub-district native courts.[25] Despite being presided over by individuals who were traditionally administrative officers, these subordinate courts possessed criminal jurisdiction, and until around 1920, they absorbed much of the workload for the administration of justice in the territory.[26] However, certain sentences that they passed required confirmation by the High Court. For district courts, any sentence of imprisonment exceeding six months

17 SA Kalembera "Jurisdictional limits for magistrates are hindering access to justice in Malawi" in *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (2016, SALC) 103 at 106–107.

18 Id at 107.

19 L Campbell, A Ashworth and M Redmayne *The Criminal Process* (5th edn, 2019, Oxford University Press) at 383.

20 Marumoagae and Tshehla "Automatic review of magistrates", above at note 5 at 407.

21 For example, in *Rep v Jefley* Confirmation Case no 141 of 2013, High Court, Principal Registry (unreported), the High Court gave comprehensive guidance on the approach to sentencing offenders in offences of dishonesty such as simple theft, theft by servant and theft by public servant. In *Rep v Mandevu* Confirmation Case no 3 of 2024 [2024] MWHCFin 1, the Financial Crimes Division of the High Court reminded magistrates of the need to send financial crime matters to that division for review.

22 *Rep v Bayani* Criminal Cause no 17 of 1999 [2000] MWHC 26 (*Bayani*).

23 Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), secs 353 and 362.

24 Subordinate Courts Ordinance No 5 of 1906, secs 3, 4, 10 and 11.

25 Ibid. See also LC Bande "A history of Malawi's criminal justice system: From pre-colonial to democratic periods" (2020) 26/2 *Fundamina* 288 at 301.

26 S Hynd "Law, violence and penal reform: State responses to crime and disorder in colonial Malawi, c.1900–1959" (2011) 37/3 *Journal of Southern African Studies* 431 at 434–35.

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or a fine exceeding GBP 20 required the High Court's confirmation.[27] For district native courts, the following sentences required confirmation by the High Court: imprisonment beyond six months, a fine exceeding GBP 5, whipping beyond 12 strokes and flogging above 12 lashes.[28] It is worth noting that the level of a fine requiring confirmation was higher in the district courts than in the district native courts. While the basis for this difference is unclear, it may be a reflection of the racial hierarchies that existed, with a fine of GBP 5 considered to have a greater economic impact on a native than on a European or Asiatic. An imposition of more than two forms of punishment on an offender in a district native court also made that sentence subject to confirmation by the High Court.[29] Another unique feature of the district native courts was that they had the power to review and confirm sentences from sub-district native courts that exceeded one month's imprisonment or combined more than two of the following punishments: imprisonment, fine, whipping and flogging.[30]

In 1929, the criminal procedure regime in Nyasaland underwent fundamental changes. Of particular importance in respect of mandatory reviews was the enactment of the Criminal Procedure Code (CPC), which received assent from the governor of the Nyasaland Protectorate in December 1929 before coming into force in April 1930. The CPC was accompanied by two other statutes that are also of relevance to criminal proceedings: the Penal Code Ordinance of 1929 and the Courts Ordinance of 1929. This new legal framework brought a fresh test for mandatory reviews. The CPC provided that any sentence imposed by any subordinate court exceeding six months, as well as sentences of whipping exceeding 12 strokes or a fine above GBP 50, required the High Court's confirmation before they could be executed.[31] Two things are worth mentioning, especially in comparison to the mandatory review regime under the Subordinate Courts Ordinance. The first is that unlike the Subordinate Courts Ordinance, which did not specify whether sentences had to await confirmation before implementation, the CPC explicitly stated that sentences requiring confirmation could not be enforced until the High Court confirmed them.[32] To further protect the rights of convicts, the law armed subordinate courts with the discretion to release convicts on bail pending confirmation, although a convict could also opt to start serving the sentence while waiting for the High Court's decision on review.[33] The second is that the CPC prescribed one standard for all subordinate courts regarding the punishments that qualified for mandatory review. This was despite that at the time, subordinate courts had been re-classified into three distinct categories, with their presiding officers occupying different ranks: first class (presided over by provincial commissioners and resident magistrates), second class (presided over by district commissioners) and third class (presided over by assistant district commissioners).[34]

In 1949, the single standard for punishments requiring review was abandoned with the threshold for custodial sentences imposed by first class subordinate courts raised to sentences longer than 12 months.[35] The CPC was further revised in 1950 to require the High Court's confirmation not only for imprisonment sentences imposed in default of payment of a fine but also for those imposed in default of payment of costs or compensation.[36] Another amendment was made in 1952 specifically targeting third class subordinate courts. The effect of this revision was to require any imprisonment sentence passed by that court exceeding six months, where such a sentence was a combination of a substantive

27 Subordinate Courts Ordinance No 5, sec 6.
28 Id, sec 12.
29 Ibid.
30 Id, sec 13.
31 Criminal Procedure Code No 23 of 1929, sec 10(1).
32 Ibid.
33 Id, sec 11.
34 Courts Ordinance No 24 of 1929, secs 4 and 5.
35 Criminal Procedure Code (Amendment) Ordinance No 18 of 1949, sec 7.
36 Criminal Procedure Code (Amendment) Ordinance No 12 of 1950, sec 4.

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imprisonment term and imprisonment in default of payment of a fine, costs or compensation, to undergo confirmation by the High Court.[37]

The CPC underwent further changes in 1958, in which the threshold for a custodial sentence imposed by first class subordinate courts requiring the High Court's confirmation was again raised to a term exceeding two years. A more fundamental change in this year, however, was the introduction of the provision that only the excess of the prescribed sentence needed not to be carried out until the High Court confirmed the sentence. According to *R v Makwakwa*,[38] this change had the purpose of enabling "a sentence to be commenced without delay on remand whilst [awaiting] confirmation". The Court further explained the effect of the amendment as follows:[39]

> "Quite clearly, before [the] amendment, a sentence requiring confirmation was suspended till confirmation. After the amendment every sentence is to be legally executed forthwith … up to the excess, although eventually confirmation may be required for the excess. It may seem somewhat anomalous that a sentence, which is not as a whole executable until it is confirmed, nevertheless can be executed in regard to the first instalment without confirmation."

The "up to the excess" in this regard referred to up to two years (for first class subordinate courts), and six months (for subordinate courts of second and third class). The court in *Makwakwa* further explained that the practice in East African territories, as previously in Malawi, was "for the convict to consent to commence sentence forthwith to avoid delay on remand or, if he intends to appeal, to elect to await confirmation".[40] This practice still prevails in some East African countries, notably Uganda, where magistrates' courts have the power to release a convict on bail pending confirmation and convicts are at liberty to postpone the serving of their sentences until confirmation is done.[41]

By the time the CPC was repealed in 1968, the provision governing mandatory review had undergone further changes. One notable change was the adjustment of the thresholds of the punishments that required confirmation by the High Court. For resident magistrates' courts, any imprisonment sentence exceeding two years required confirmation. For first class subordinate courts (other than those presided over by resident magistrates) and second class subordinate courts, imprisonment sentences above one year needed confirmation.[42] The CPC also explicitly provided that upon serving the part of the sentence requiring no confirmation, the convict must be released unless the High Court has confirmed the sentence.[43] Considering that the CPC retained the requirement for a convict to start serving the sentence immediately, it imposed a duty on subordinate courts to endorse on the warrant the part of the sentence that the convict was to serve while awaiting confirmation.[44]

The present: the regime after independence

Malawi gained independence from Britain in 1964, with Kamuzu Banda becoming the country's prime minister and later, in 1966, assuming the presidency after the abolition of the British monarch's role as the head of state. This transition brought with it the winds of change into the criminal justice system in Malawi. In 1966, Banda appointed a commission to enquire into Malawi's criminal justice system, including its "practice, procedure and rules of evidence followed both in the High Court and under local customary law".[45] The Commission's conclusion, "[g]uided by the overriding principle

37 Criminal Procedure Code (Amendment) Ordinance No 31 of 1952, sec 2.
38 (1961-63) 2 ALR Mal 350 at 356 (*Makwakwa*).
39 Ibid.
40 Ibid.
41 Magistrates Courts Act No 13 (Uganda), sec 174.
42 Criminal Procedure Code No 23, sec 12(1) as quoted in *Mtawali v Rep* (1973–74) ALR Mal 89.
43 Id, sec 12(1)(iv).
44 Id, sec 12(3).
45 C Baker "Criminal justice in Malawi" (1967) 11/3 *Journal of African Law* 147 at 147.

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that substantial justice should be done without undue regard to technicalities", was that the CPC be redrafted and simplified.[46] The Commission's report was presented in Parliament and unanimously adopted in April 1967.[47] Subsequently, Parliament enacted the Criminal Procedure and Evidence Code (CPEC), which came into force in 1968, establishing the new legal framework for criminal proceedings in Malawi.

In many respects, the CPEC follows the provisions as enacted under the CPC,[48] and therefore it is of no surprise that it retains the mandatory review procedure. This procedure is specifically covered under section 15 of the CPEC (section 15). Initially, this provision required the High Court to review proceedings whenever a magistrates' court imposes a sentence of corporal punishment, a fine exceeding GBP 50, an imprisonment sentence upon a first offender which is not suspended or any imprisonment sentence exceeding two years (for resident magistrates), one year (for first and second grade magistrates) or six months (for third grade magistrates).[49] It also expressly directed that corporal punishment must not be executed, and no fine must be levied or a custodial sentence in default of its payment be implemented, until the High Court has reviewed the proceedings and confirmed these sentences.[50] The provision further guided authorities responsible for implementing prison sentences to treat a warrant of commitment as though it had been issued in respect of a period of two years, one year or six months for resident magistrates, first or second grade magistrates and third grade magistrates respectively until they receive notification from the High Court that it confirmed the sentence to be carried out as originally imposed.[51] Section 15, therefore, also mandated a magistrates' court, when passing a sentence subject to mandatory review, to indicate on the warrant or order that the sentence requires a review by the High Court and to specify "which part if any of the sentence or order may be treated as valid and effective pending such review".[52]

Over time, the mandatory review regime under the CPEC has undergone several changes. For example, the abolition of corporal punishment in Malawi has resulted in its deletion from section 15. In turn, this has affected the arrangement of the sub-sections under that provision.[53] The currency for fines subject to mandatory review was also changed from the British pound to Malawi Kwacha (MK), and the threshold has, without any clear pattern, increased from MK 100 to MK 1,000[54] and later to MK 1,000,000.[55] Fourth grade magistrates had also, along the way, been included as courts whose sentences required confirmation; however, following the abolishment of this level of magistracy, they have been removed from section 15.[56] Despite these changes, other aspects of the mandatory review regime have largely remained intact since 1968.

Noticeably, while the CPC explicitly provided that a convict must be released without serving the excess portion of the sentence unless the High Court confirms it, there is no express mention of releasing the convict in those circumstances under the CPEC. Also worth noting, especially in terms of language, is that unlike under the CPC where the word "confirmation" was explicitly mentioned in

46 Id at 149.

47 Id at 147.

48 *Report of the Law Commission on Criminal Justice Reform on the Review of the Criminal Procedure and Evidence Code* (2003, Malawi Law Commission) at 8.

49 Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), sec 15(1).

50 Id, secs 15(2) and 15(3).

51 Id, sec 15(4).

52 Id, sec 15(6).

53 The abolition of corporal punishment abolition resulted in the deletion of the original sub-section 2 of section 15 of the Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi). Consequently, what were initially sub-sections 3, 4, 5, 6 and 7 became sub-sections 2, 3, 4, 5 and 6 respectively.

54 See *Report of the Law Commission on Criminal Justice Reform*, above at note 48 at 23.

55 Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), sec 15(1)(a) as amended by the Criminal Procedure and Evidence Code (Amendment) Act No 37 of 2022, sec 4(a).

56 Criminal Procedure and Evidence Code (Amendment) Act No 37 of 2022, sec 4(b).

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the provision governing mandatory reviews, under section 15, that word only appears in the marginal notes, with the term used in the actual provision being "review". In practice, however, the expression "confirmation" still remains dominant within the judiciary in Malawi as exemplified by its common usage in the processing of cases that are referred to the High Court for mandatory review.[57]

When exercising its powers of mandatory review, the High Court has the discretion whether to hear the parties or not, although it cannot make an order prejudicial to an accused without hearing him or her.[58] Given the High Court's discretion, typically, there are two forms of mandatory reviews that the High Court conducts. The first involves a judge conducting a review in the absence of the parties. It is this form of mandatory review that courts in Malawi commonly utilize,[59] and its advantage lies in that it is quicker in the disposal of cases. This form of mandatory review, however, does not preclude a party from appealing to the High Court on the same issues.[60] The second form of mandatory review is where a judge makes a finding or conclusion after hearing the parties in open court. In such cases, an appeal to the High Court on the same issues is not allowed.[61] An aggrieved party's remedy against the outcome of this form of mandatory review lies in appealing to the MSCA. But regardless of the type of review, under the existing legal framework in Malawi, reviews have been accorded constitutional recognition as part of the right to a fair trial.[62] In criminal proceedings, reviews, according to *Rep v Bayani*,[63] complement the right to appeal, which is often impeded by costs and sometimes the level of education and understanding of the litigants.

Building on this background, the next section discusses court decisions in which convicts challenged their continued detention on the basis that their cases (which qualified for mandatory review) were not reviewed within a reasonable time.

The courts' response to applications challenging continued detention without a review

Recently, Malawi has seen a rise in the number of prisoners held for long periods on the basis of unconfirmed sentences. Some convicts have been held for as long as five years without their cases being reviewed.[64] At the time the CPEC was enacted, the country's population size was smaller and courts handled fewer criminal matters.[65] The introduction of the traditional courts in 1969, with broad criminal jurisdiction and operating parallel to the High Court system in which the mandatory review procedure applied, also took away some matters from the magistrates' courts.[66] These factors,

57 For instance, the cases referred to the High Court for mandatory review are assigned "confirmation" cause numbers. See, for example, *Rep v Damson* Confirmation Cause no 408 of 2008 [2008] MWHC 59; *Rep v Mayenda* Confirmation Case no 754 of 2017 [2018] MWHCCrim 13; *Rep v Billiati* Confirmation Case no 509 of 2020 [2021] MWHC 35.

58 Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), secs 362(2) and 363.

59 OD Kamanga "Management of review cases by the judiciary: The impact and implications on overcrowding in Malawi prisons" (LLM dissertation, University of Cape Town, February 2013) at 37.

60 Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), sec 362(4).

61 Id, proviso to sec 362(4).

62 The Constitution, sec 42(2)(f)(viii). See also *Kalonga v The State* Miscellaneous Criminal Application no 33 of 2013, High Court, Principal Registry (unreported) (*Kalonga*).

63 Above at note 22.

64 *The Report of the Inspection of Prisons and Police Cells Conducted By the Malawi Inspectorate of Prisons in February, May, August 2020 And February 2021* (2021, Malawi Inspectorate of Prisons) at 51, available at: <https://www.ohchr.org/sites/default/files/documents/cfi/subm-2023-07/subm-violence-abuse-neglect-cso-reprieve-annex.pdf> (last accessed 2 December 2024).

65 A Chipeta "Reforming litigation procedures as a tool for effective case-flow management - Experiences from Malawi" (paper presented at the Judges' Symposium on Judicial Independence, Accountability and Reform in Lesotho, Maseru, 28–29 July 2010) at 14, available at: <https://www.icj.org/wp-content/uploads/2012/06/Lesotho-reforming-tool-management-Chipeta-event-2010.pdf> (last accessed 18 November 2024).

66 The traditional courts had very wide criminal jurisdiction, including over capital offences. The CPEC was, however, not applicable in these courts. See Bande "A history of Malawi's criminal justice system", above at note 25 at 311–13.

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taken together, made it easier to track the status of convicts and confirm their sentences within a reasonable time. With the abolition of the traditional court system during Malawi's transition to the democratic rule in the early 1990s, the expansion of the existing court system and a growing prison population,[67] it has become increasingly challenging to follow up on the convictions that magistrates' courts enter on a daily basis across the country. In response to the resultant prolonged detentions, some prisoners have judicially challenged their continued detention without a review. Six cases that addressed such applications, and interpreted the mandatory review procedure under section 15, are presented in this section. The first three cases take a different position to the other three.

First, in *Kalanje v Rep*,[68] a first grade magistrate convicted the applicant of forgery and theft by servant, imposing a 14-year imprisonment sentence for each offence. Over a year after the conviction, the High Court had still not reviewed the sentence. Kalanje then applied to the High Court for his release, arguing that the prison authorities were unlawfully detaining him. The High Court acknowledged that a post-trial review is a fundamental human right under Malawi's Constitution. The court, thus, stressed the importance of conducting timely reviews to avoid miscarriages of justice in the criminal justice system. More importantly, however, the court explicitly stated that a prisoner is entitled to release if the mandatory review is not done within the timelines set by section 15(3). It was the High Court's view that it is against the law for prison authorities to continue detaining a prisoner in those circumstances, and in light of this, the court underscored the need for the judiciary to conduct mandatory reviews before the lapse of the periods prescribed in section 15(3). These observations notwithstanding, the court declined, on fair trial grounds, to release the convict; it instead ordered the urgent transfer of his case file to the High Court for confirmation.

In *Kalonga v The State*,[69] the applicant was convicted of robbery by a second grade magistrate and sentenced to eight years' imprisonment. Noting that his case had not been reviewed by the High Court more than a year after he was sentenced, Kalonga applied for his immediate release. He argued that absent a review as provided under section 15, he could only be legally imprisoned for one year. The High Court reaffirmed in its ruling that the mandatory review regime under the CPEC is not a mere formality but a procedure that has the status of a constitutional right. A failure to have a mandatory review done within the prescribed statutory periods is thus not a mere technical flaw but a violation of constitutional rights. It was the court's finding that if a mandatory review is not done within two years, one year or six months depending on the level of the magistracy that handled the case, any continued detention of the convict becomes unlawful and, therefore, subject to challenge. The court further noted that the case exposed a problem that for a while had been overlooked, and explicitly mentioned that Kalonga's application "should serve as a wake-up call to the judiciary to put its house in order in ensuring that review and confirmation of criminal cases is done expeditiously". Ultimately, however, to balance the convict's right to a fair trial with society's interests, the court ordered that the applicant's conviction and sentence be reviewed and confirmed within 30 days, or he would be released unconditionally.

In *Zembere v Rep*,[70] a first grade magistrate convicted the applicant of robbery under three separate cases, imposing sentences ranging from three to ten years. However, the records of his convictions went missing. After spending nearly three years in prison without his convictions and sentences being reviewed by the High Court, he applied for his release, contending that the failure to review his sentences within the prescribed period had rendered his detention unlawful. The High Court held that where sentences subject to mandatory review have not been reviewed within the periods prescribed under section 15, prison authorities are at liberty to release the prisoner without further

67 As of June 2024, Malawi had a prison population of 16,536 against the official prison holding capacity of 7, 000. See World Prison Brief "Malawi" <https://www.prisonstudies.org/country/malawi> (last accessed 9 June 2025).

68 Miscellaneous Criminal Application no 20 of 2013, High Court, Principal Registry (unreported) (*Kalanje*).

69 Above at note 62.

70 Miscellaneous Criminal Application no 19 of 2014, High Court, Principal Registry (unreported) (*Zembere*).

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instructions from the court or risk further detention being unlawful. In this case, however, the court considered that since the case files were missing, the interests of justice weighed against the immediate release of the convict. Worth highlighting though is that the court emphasized that the mandatory review regime under section 15 is sound law and must be adhered to. It further mentioned that given the circumstances of the case, it would have no problems if prison authorities released the convict.

The decisions in *Kalanje, Kalonga* and *Zembere*, collectively, demonstrate that section 15 mandates specific timeframes within which imprisonment sentences must be reviewed. A custodial sentence imposed by a resident magistrate must be reviewed within two years, a sentence from a first or second grade magistrate within one year, and a sentence from a third grade magistrate within six months. All three cases agree that if a review is not done within these periods, a convict's further detention becomes unlawful. Accordingly, prison authorities are at liberty to release the convict without a further order from the court. The convict is also free to challenge any continued detention as it violates his or her constitutional right. The next three cases, however, offer a different interpretation of the mandatory review regime.

In *Khoswe and others v Rep*,[71] the applicant and others were convicted by a magistrates' court of robbery and sentenced to custodial terms ranging from 18 to 21 years. While his co-accused appealed their convictions, the applicant did not, leading to his file remaining unreviewed for several years after the conviction. He argued before the High Court that his continued detention beyond the time limits specified in section 15(3) was illegal. The High Court was unconvinced. It held that detaining a convict beyond the periods specified in that provision does not automatically make the imprisonment unlawful. The court stated that reading through sub-sections three to five of section 15, the High Court is not obliged to review and confirm sentences within the periods mentioned in section 15(3). It can review a sentence even after those periods have lapsed. Additionally, the court held that a magistrate has the power to determine the portion of a sentence that should be considered valid and effective while awaiting review. This portion could be longer or shorter than the time limits set in section 15(3). However, if a magistrate has not specified the valid portion of the sentence, then prison authorities are required to treat the sentence according to the default periods outlined in section 15(3), that is, two years for a resident magistrate, one year for a first or second grade magistrate and six months for a third grade magistrate. The court further clarified, however, that even in such a case, the lapse of the default periods before a review is done does not automatically entitle prison authorities to release the convict. According to the High Court, this is because section 15(3) does not specify that prison authorities must release the convict. Consequently, prison authorities can only release a convict whose sentence is pending review upon an order by the High Court.

An opportunity for the MSCA to examine the issue came in *Banda and others v Rep*.[72] The case involved three convicts who appealed separately to the MSCA following the High Court's refusal to grant their applications, premised on the delayed review of their convictions and sentences from magistrates' courts, for immediate release. The MSCA held that although the mandatory review procedure under the CPEC serves an important purpose of ensuring that abuse and mistakes in the criminal justice system are quickly rectified, it does not take away the sentencing discretion of judges or magistrates and vest it in prison officers. As such, from the reading of the entire section 15, while certain sentences require mandatory review, a presiding magistrate has the discretion to indicate on the warrant of commitment the part of the sentence that the convict must serve while waiting for review. Like in *Khoswe and others*, the MSCA held that such a period could be longer or shorter than the periods prescribed under section 15. Upon the expiration of the indicated period, prison officials can release the convict and that release would be regarded as a release pursuant to an order of the court.[73] The MSCA further stated that where a specific period is not indicated on the warrant, prison

71 Bail Application no 54 of 2013 High Court, Principal Registry (unreported) (*Khoswe and others*).

72 Above at note 8.

73 Id at 21.

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officials should just treat the sentences as two years, one year or six months, depending on the level of the magistrates' court that handled the case, but that that does not entitle them to release the prisoner upon the expiry of those periods. Ultimately, the MSCA reiterated that the High Court has a duty to review cases and, therefore, where it discovers a lapse, it must act quickly "to correct the situation and avoid further injustice being occasioned to the convicts".[74] The MSCA further ordered that all cases whose reviews had been delayed be brought before the High Court without further delay.

Despite the MSCA's directive, delays in conducting mandatory reviews continue to exist in Malawi. *Kadzonga v Officer in Charge of Zomba Prison and another*[75] offers a good example in this regard. In November 2018, Kadzonga was convicted and sentenced by a first grade magistrate for burglary and theft across three separate files, and had, in total, an imprisonment term of 12 years to serve. All his three case files went missing before the High Court could review his convictions and sentences. After spending over two years in prison, he applied for his release, arguing that the prison authorities had no more authority to keep him as his continued incarceration was unlawful. The High Court rejected his application. Referencing the MSCA's decision in *Banda and others*, the High Court held that a failure to review a sentence does not entitle a prisoner to an automatic release. The court reaffirmed that the powers of deciding on the appropriate sentence lie with judges and magistrates and not prison authorities. It then went further to state that "unless … confirmation comes sooner, the convict should complete serving the sentence as ordered by the magistrate".[76]

Evidently, courts have not given a uniform response to the effect of the failure to review criminal cases from magistrates' courts within a reasonable time. Cumulatively, however, all the decisions agree that mandatory reviews play a crucial function in the administration of criminal justice. The decisions also acknowledge that delays in reviewing convictions and sentences could lead to injustice for convicts. The decisions differ on what the section 15 timelines mean, and what impact a failure to comply with them has on the full execution of the sentence. The last three decisions, two of which (*Banda and others* and *Kadzonga*) are the more recent, suggest that the timelines do not speak to the period within which case records from subordinate courts must be reviewed. They also hold that a failure to review a case within those periods does not automatically render the continued detention of the convict unlawful, nor does it authorize prison authorities to release the convict. Further, the decisions suggest that magistrates are under no duty to endorse those periods on the warrant of commitment.

The next section interrogates the correctness of the understanding that the last three decisions have attached to the provision on mandatory review and its implications. Before doing so, it should quickly be noted that in all the cases analysed, the convicts did not ask for their convictions or sentences to be quashed or nullified. This, it is argued, should be of little surprise because the mandatory review procedure passes no definite judgment on the verdict from a magistrates' court until a higher court conducts the review. However, recognizing the potential for errors in the conduct of trials in the lower-level courts, the regime makes the execution of a punishment imposed by a magistrates' court (in its entirety or the excess of a prescribed initial part) contingent on a higher court subjecting the record of proceedings to a fresh analysis and being satisfied about the correctness of the verdict. The failure of a review, therefore, has no impact on the legality of a conviction or punishment but only restricts the latter's implementation. The High Court correctly recognized this point in *Kalonga* when it said: "[t]he detention or imprisonment of a convict in such circumstances [ie on the expiry of the section 15 timeframes] therefore becomes unlawful though, it must be said, the sentence imposed by the lower court may not necessarily be unlawful".[77]

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74 Id at 23.

75 Miscellaneous Criminal Application no 11 of 2023, High Court, Lilongwe District Registry (unreported) (*Kadzonga*).

76 Id, para 3.4.

77 *Kalonga*, above at note 62 at 4.

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The recent understanding of mandatory reviews and its implications

The recent understanding of mandatory reviews as demonstrated in *Banda and others, Khoswe and others* and *Kadzonga* deserves a closer scrutiny. After interrogating the interpretation that these cases have attached to the regime, the section discusses its implications, particularly regarding the protection of convicts' rights.

Questioning the recent understanding of mandatory reviews

The new understanding of the provision on mandatory reviews is indefensible from a historical analysis of the regime in Malawi. The timelines prescribed in the provision governing mandatory reviews have, almost always, been viewed as the maximum period a convict can serve pending the review of his or her case file. In essence, the intention was to prevent situations where a convict serves an excessively long period, or even completes his or her sentence, without the High Court reviewing the conviction and sentence. As highlighted in *Rep v Isaaki*,[78] mandatory reviews are meant to ensure that "convicted prisoners are not confined for too long, if they were not subjected to a fair trial and proportionate punishment". Through this regime, therefore, the law demonstrates its abhorrence of deprivation of a prisoner's liberty for prolonged periods without a reconsideration of a subordinate court's decision by the High Court.[79]

It is also important to recall that the requirement for a convict to serve part of his or her sentence was only a departure from the initial position under the 1929 CPC which, for nearly three decades, did not oblige convicts to begin serving part of their sentences until the High Court confirmed them. A mandatory review procedure, as previously noted, is premised on the understanding that subordinate courts are prone to making mistakes given their limited capacity in terms of knowledge and resources, as well as their dealing with largely unrepresented and illiterate accused persons. The regime is meant to quickly detect and rectify errors and abuses in the administration of criminal justice. Allowing a convict to serve only a limited portion of his or her sentence, therefore, balances society's interest with the rights of the convict by giving the justice system a chance to review the conviction and sentence within a given period or, if this is not done, the convict must be released.

Admittedly, the language of the mandatory review regime changed when the CPEC was adopted in 1968. There is now no explicit statement that the convict must be released after serving part of his or her sentence unless the High Court reviews and confirms it. What, instead, is provided under section 15(3) is for those in charge of implementing the imprisonment sentence to treat the warrant of commitment "as though it had been issued in respect of a period of two years, one year or six months" in respect of a resident magistrate, first or second grade magistrate, or third grade magistrate respectively until the High Court communicates its decision on review. This notwithstanding, it has never been in doubt, until recently, that the section 15 timelines mean that once they lapse, a convict must be released unless there is confirmation from the High Court. In *Kanyenga v Rep*,[80] the High Court held that the practical effect of treating a sentence in a manner provided under section 15(3) is that after the lapse of those periods without a review of a convict's case, prison authorities must release the convict. In fact, the High Court decisions in the late 1990s and early 2000s were clear and consistent in interpreting the prescribed periods (that is, two years for resident magistrates, one year for first and second grade magistrates and six months for third grade magistrates) as the maximum a convict could serve while waiting for the review of his or her conviction and sentence. In *Bayani*, for example, the High Court, after emphasizing that section 15 imposes a duty on both the magistrates' court (to promptly transmit the record to the High Court) and the High Court (to review the sentence as soon as possible), remarked as follows:[81]

78 Confirmation Case no 1410 of 2005, High Court, Principal Registry (unreported) cited in *Kalanje*, above at note 68.

79 Kamanga "Management of review cases by the judiciary", above at note 59 at 37.

80 Miscellaneous Criminal Application no 38 of 2016 [2016] MWHC 632.

81 Similar sentiments were stated in *Rep v Munthali* Confirmation Case no 647 of 1999 [2000] MWHC 22.

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> "To reinforce the policy the Criminal Procedure and Evidence Code provides that if this Court does not exercise the [mandatory review] powers, prison authorities can only keep the prisoner for up to two years, one year, six months and three months for a sentence imposed by a Resident Magistrate, First Grade, Second Grade and Third Grade Magistrate, respectively. Speed, therefore, is important."

Similarly, in *Rep v Moffat*,[82] the High Court explained that since section 15 requires the High Court to review sentences within the prescribed periods, "[p]rison authorities cannot and should not, even if the sentence is higher, keep a prisoner beyond the statutory period" if no review is conducted. The High Court further explained that this understanding is supported by Form XXVI of the Criminal Procedure (Forms) Notice (Warrant of Commitment). It thus advised magistrates issuing warrants of commitment to specify, depending on their grades, to the authorities entrusted with carrying out imprisonment sentences, the periods outlined under section 15. *Bayani* and *Moffat*, therefore, stand for the position that the periods under section 15 are the maximum a convict can serve pending a review, and magistrates have a duty to endorse them on the warrants of commitment. Once those periods lapse without a convict's case being reviewed, the convict is entitled to an automatic release.[83]

Recognizing the potential for a convict's release if a review is not done within the timelines specified in section 15, the High Court has demanded speed in the conduct of mandatory reviews. It has, for instance, on several occasions stressed that when setting down a matter for mandatory review, the registrar must consider the periods prescribed under section 15.[84] Historically, therefore, since the requirement for a convict to serve a portion of his or her sentence while awaiting review or confirmation was introduced in 1958, it has been understood that the periods prescribed under the provision for mandatory reviews represent the maximum duration a convict can serve while waiting for his or her conviction and sentence to be reviewed. From this perspective, the decisions in *Kalanje, Kalonga* and *Zemebere* align with the historical understanding of the provision on mandatory reviews.

The view posited in *Khoswe and others* and *Banda and others* that a magistrates' court has the discretion to indicate on the warrant whatever period he or she wishes to be regarded as valid while the convict's case awaits review raises various problems. To implement this understanding properly and procedurally, it would require that, after sentencing, a magistrates' court must decide the length of the sentence to be endorsed on the warrant of commitment as the valid period before a review. Since this decision would have a direct impact on the interests of the parties – the state and the convict, in terms of how long he or she remains in custody pending a review – it would thus require, at least for purposes of transparency and accountability, that the court hears the parties and records its decision together with the reasons thereof. However, the CPEC does not contain any procedural rules to support such a hearing. The absence of these rules suggests that the CPEC did not envisage that there would be a need for a decision on the specific period to be indicated on the warrant.

An argument could be made that a magistrates' court does not need to hold a hearing for purposes of determining the period for which a convict can be lawfully detained pending the review of his or her case. However, determining the period without hearing the parties would undermine the principles of natural justice, especially the right to be heard. Additionally, it could lead to arbitrariness in decision-making and create room for corrupt practices. Without clear guidelines on how to determine the period, and a lack of transparency in the process, a magistrate could well convict and sentence a person but proceed to indicate an unreasonably short period on the warrant of commitment, with the consequence that the person would be released before the High Court reviews the case. This would particularly be possible in light of the position taken by the MSCA in *Banda and*

82 Confirmation Case no 734 of 1999 [2000] MWHC 17 (*Moffat*).

83 See also *Msomera v Rep* Miscellaneous Criminal Application no 29 of 2017 [2018] MWHC 874 (*Msomera*).

84 *Genti*, above at note 15; *Rep v Ndelemani* Confirmation Case no 149 of 2002 [2000] MWHC 19; *Nalumo and another*, above at note 12; *Bayani*, above at note 22.

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others that after the expiry of the period that a magistrate indicates on the warrant, prison authorities can release a convict.

Implications of the recent understanding

Besides being historically unjustifiable and inconsistent with the purpose of mandatory reviews, the interpretation in *Khoswe and others* and *Banda and others*, which allows a magistrate to set any period (potentially exceeding the prescribed timelines) for a convict to serve while awaiting a review, is detrimental to the rights of convicts. This understanding could allow a magistrate to prescribe the entirety of his or her sentence as the valid period to be served pending the review of the case. While doing so may provide the High Court with more time to review the proceedings, especially where the imposed sentence is lengthy, it also risks perpetuating injustice. Prolonged detention before a review is a potential source of injustice as acknowledged in both *Banda and others* and *Kalanje*. A similar observation has been made in Zimbabwe, where the court held that detention without an automatic review may cause injustice as prisoners wrongly convicted may continue to serve their sentences.[85] The prescription of maximum periods that convicts can serve while waiting for the review of their convictions, as earlier stated, balances society's interests (to ensure justice) against the interests of the convict (to not be subjected to prolonged detention without a mandatory review). The interpretation in *Khoswe and others* and *Banda and others*, while protective of society's interests, overlooks the interests of convicts, who stand in a vulnerable position after conviction and imprisonment.[86] With this interpretation, if a convict's case is not reviewed, including for reasons that are entirely at the fault of the judiciary (such as files going missing or magistrates delaying their forwarding to the High Court), the convict risks serving the entirety of the sentence, even where it exceeds the periods set under section 15. Indeed, this is what the *Kadzonga* decision suggests when it states that a convict must serve the entirety of the sentence unless review comes sooner. Following this understanding, absent a review, the convict would complete the entirety of the sentence even where such a sentence is plainly erroneous, such as where it goes beyond the maximum punishment set by the law.[87]

The danger of this approach causing convicts to serve the entirety of the erroneous sentences is further heightened by two factors. The first is that, as earlier noted, more than 82 per cent of Malawi's magistrates lack professional legal training. Errors in the handling of criminal matters in the magistracy are thus a common occurrence. Taking the sentencing process as an example, in 2004, the Law Commission Report on the Review of the Criminal Justice System found that magistrates frequently make mistakes in imposing fines.[88] About two decades after that observation was made, such errors continue to emerge on a regular basis from the magistracy.[89] The Inspectorate of Prisons in Malawi has also recently noted that although fines above a certain threshold are supposed to be reviewed by the High Court before being enforced, magistrates sometimes enforce them immediately. One strategy that they employ in this regard is placing convicts in prison on remand to pressure their families into paying the fines.[90] Regarding custodial terms, *Kadzonga* noted that magistrates in Malawi often impose "emotional sentences", as reflected in the "too much inappropriate use of imprisonment",

85 *S v Lindo* HH 149-03 (unreported) quoted in *Kameya*, above at note 13.

86 *Msomera*, above at note 83.

87 Reports from the investigations in prison reveal that this is a common occurrence – see *The Report of the Inspection of Prisons and Police Cells*, above at note 64 at 51. One prisoner was sentenced to 9 months' imprisonment for an offence whose maximum punishment is 3 months. Another was sentenced to a custodial term of 3 years for an offence that has a maximum sentence of 2 years – see L Mkandawire "Judicial injustices" (14 March 2020) *The Nation*, available at: <https://mwnation.com/judicial-injustices/> (last accessed 21 June 2024).

88 *Report of the Law Commission on Criminal Justice Reform*, above at note 48 at 23.

89 See, for example, the High Court's observations in *Rep v Mbawu* Confirmation Case no 775 of 2024 [2024] MWHCCrim 8 that magistrates regularly commit procedural errors when imposing fines.

90 *The Report of the Inspection of Prisons and Police Cells*, above at note 64 at 56.

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and this exacerbates prison overcrowding.[91] Some mistakes that magistrates commit reflect a patent disregard for the limits of their powers. In *Rep v Mpokeyi and others*,[92] for instance, the High Court reviewed over 40 criminal case files handled by a single third grade magistrate, quashing convictions, setting aside sentences and ordering retrials in all of them. The review revealed, among other things, that this magistrates' court dealt with cases outside its jurisdiction and imposed sentences beyond its legal powers.

The second factor is that, as *Kalanje* (in which a magistrates' court failed to forward a record to the High Court for over a year), *Zembere* and *Kadzonga* reveal, record keeping and transmission from the magistrates' courts to the High Court are problematic in Malawi. Instances of case files going missing are not uncommon, and in some cases, magistrates are simply reluctant to forward files to the High Court for review.[93] In *Kadzonga*, the High Court observed a troubling pattern at Ntchisi Magistrate Court where after handling certain cases and passing sentences, files would inexplicably go missing thereby frustrating the mandatory review process.

Given these factors, an approach that balances the interests of both the society and the convict (by requiring a convict to serve only a portion of the sentence while awaiting the review of the case) better protects convicts' rights. The irony here is that the previous understanding of the mandatory review regime (ie that if a review is not done within the prescribed periods, a convict must be released) provided greater protection for a convicts' rights than the recent interpretation given in *Banda and others, Khoswe and others* and *Kadzonga*, despite that now reviews are constitutionally protected. The recent approach allows the very magistrate who imposed a sentence that is supposed to undergo a fresh examination for potential errors or abuse of power to also decide how long a convict can be held in custody pending a review. This gives magistrates excessive powers that can easily be abused. For example, a magistrate of 'ill will' could endorse a longer custodial period that must be regarded as valid pending the review of a case and then either make the case file disappear or delay its transmission, thereby prolonging the convict's incarceration. This kind of abuse could especially materialize in cases where convicts are unrepresented. Considering that the High Court has not been consistent on the remedies available to a convict where a case file goes missing,[94] there is also no guarantee that a convict could successfully secure a relief on the basis that the court record is missing.

The approach that the MSCA took in *Banda and others* notably contrasts with the general trend that this court has taken concerning the CPEC in recent years. The MSCA has lately stressed that the CPEC was enacted prior to the adoption of the Constitution, and therefore while it may have been the principal statute for regulating criminal proceedings before 1994, presently, it must be interpreted in light of the constitutional provisions.[95] In this connection, the MSCA has, for instance, discouraged courts from entering alternative verdicts in criminal trials even though the CPEC permits this. The MSCA has justified this on, among other reasons, the need to comply with the constitutional demands for a fair trial.[96] More recently, the MSCA has declared that illegally obtained evidence is inadmissible in Malawi,[97] marking a departure from section 176 of the CPEC which, under certain circumstances, allows the admission of evidence obtained through duress.[98] In declaring the inadmissibility of illegally obtained evidence, the MSCA explicitly stated that the Constitution serves

91 *Kadzonga*, above at note 75, paras 3.10 and 6.4.

92 Criminal Review Case nos 25-66 of 2015, High Court, Lilongwe District Registry (unreported) cited in Kalembera "Jurisdictional limits for magistrates are hindering access to justice in Malawi", above at note 17 at 107.

93 Mkandawire "Judicial injustices", above at note 87.

94 E Gumboh "Justice in limbo: Missing court records in Malawi" (2025) 4/1 *JUSTICES: Journal of Law* 1.

95 *Namata v Rep* Criminal Appeal no 13 of 2015 [2018] MWSC 9.

96 Ibid. Alternative verdicts are allowed under, for example, sec 150 of the Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi).

97 *Misozi Charles Chanthunya v The State* MSCA Criminal Appeal no 1 of 2021 (unreported) (*Chanthunya*).

98 See, for example, *Kara v Rep* [2002–2003] MLR 122 in which the MSCA upheld the view that in terms of sec 176 of the of the Criminal Procedure and Evidence Code (cap 8:01, Laws of Malawi), confessions obtained under duress are admissible – duress only affects the weight of the evidence.

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as the standard by which all laws, including the CPEC, must be measured in Malawi.[99] Considering this seemingly progressive trend, one would have expected that in interpreting section 15, the MSCA would give the provision a meaning that furthers the constitutional guarantees, particularly the right to a fair trial through a post-conviction review. This, unfortunately, is not what happened, as the interpretation adopted in *Banda and others* allows for the possibility of a prolonged incarceration of a convict where a review is delayed. The interpretation also renders the section 15 timeliness of no practical relevance, and leaves a convict with no clear remedy, where a magistrate omits to endorse on the warrant a period that should be regarded as valid pending a review.

Factors that may have influenced the recent understanding of mandatory reviews

Considering the preceding discussion, it is important to further interrogate the reasons that may have influenced the recent approach to mandatory reviews in Malawi. In analysing these factors, it is crucial to recall that the prison population and the court structure have grown since the mandatory review regime was adopted in Malawi. As mentioned earlier, this has made it more challenging to track the status of convicts, leading to a significant rise in the number of prisoners with unconfirmed sentences. For instance, reports suggest that as of 2016, there were about 5,095 cases of prisoners serving sentences that were yet to be reviewed by the High Court.[100] The Prison Inspectorate has also recently found that in some prisons in Malawi, a large number of old cases are still to be reviewed.[101] The increasing number of unconfirmed cases is mainly attributable to the judiciary's inefficiencies given that the mandatory review process is within its control. Laudably, the judiciary has attempted to put in place policy measures to fast-track the carrying out of mandatory reviews. In its performance standards, the judiciary demands that files that require mandatory review be forwarded to the High Court within seven days after their conclusion, and be attended to by judges within seven days after they are brought to their attention.[102] Regrettably, these standards have rarely been complied with. Kamanga is therefore correct to argue that the manner in which the judiciary is handling mandatory reviews in Malawi amounts to a violation of prisoners' rights and a failure to respect the demands of the Constitution.[103]

In light of this context, it is reasonable to argue that the recent approach to mandatory reviews is premised on the recognition of the judiciary's inefficiencies in handling these reviews and an attempt to prevent a large number of prison sentences from being curtailed earlier.[104] Considering the substantial number of unconfirmed cases that exist and the continuing delays in conducting reviews, giving the mandatory review regime its previous understanding would likely result in the release of many prisoners once the section 15 timelines expire. This would make victims feel not adequately assisted by the criminal justice system, especially for offences that directly affect an identifiable victim, such as robberies and sexual offences. The decision in *Banda and others* is probably the clearest in revealing the influence of the protection of victims' interests on the recent approach taken by the courts. In the case, the MSCA explained that the criminal justice system must champion human rights for all, including victims.[105] Besides this factor, one could also surmise that courts are perhaps

99 *Chanthunya*, above at note 97 at 30.

100 Mkandawire "Judicial Injustices", above at note 87.

101 *The Report of the Inspection of Prisons and Police Cells*, above at note 64 at 30.

102 Malawi Judiciary *Performance Standards 2006*, para 6 cited in Kamanga "Management of review cases by the judiciary", above at note 59 at 34–35.

103 Kamanga "Management of review cases by the judiciary", above at note 59 at 58–59.

104 The High Court tried to downplay the relevance of this argument in *Khoswe and others*, above at note 71. However, *Kadzonga*, above at note 75, reveals that this argument influences court decisions. In *Kadzonga*, the High Court, at para 3.2, explicitly stated that allowing convicts with unconfirmed cases to be released on the expiry of the sec 15 timelines "would create a mischief where every convicted offender would be out of prison at expiry of 2 years, should there be non-confirmation of sentence, for whatever reason".

105 *Banda and others*, above at note 8 at 18.

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moved by the desire to protect society's interests generally, and to preserve a positive image to the public. The indiscriminate early release of convicts due to the failure to conduct reviews on time may result in some offenders not being adequately punished, and further security fears in the society, ultimately resulting in the public losing confidence in the justice system. The argument that these extra-legal factors may have played a role in the adoption of this new understanding is strengthened by the sudden shift in judicial views. Some judges who initially acknowledged that prisoners held beyond the prescribed timelines without a review should be released later, without hesitation, retreated from this position as more applications for release, premised on prolonged detention without a review, started reaching courts.[106]

It is fair to state, however, that these factors have influenced not only the courts that have taken the new approach but at times even those that take the view that mandatory reviews must be done within the timelines prescribed under section 15. For instance, in both *Kalanje* and *Kalonga*, the High Court refused to immediately release the convicts despite acknowledging that the delay to review their cases undermined the right to a fair trial. The reason given in *Kalonga* was the need to balance the convict's rights against the interests of the society to ensure adequate punishment for offenders. In *Kalanje*, the court stated that releasing the convict without reviewing his case would not have complied with the right to a fair trial under section 42(2)(f)(iii) of the Constitution. In *Khoswe and others*, the High Court was unconvinced with the reason given in *Kalanje* for continuing to detain the convict:[107]

> "Certainly, one who complains that one has been detained for longer than is required by the review law is complaining violation of the right to a fair trial and, if it be the case, detaining that person further so that the person may be heard has to be justified on different grounds than the right to a fair trial. If the detention be unlawful, it cannot be justified by providing a fair trial."

The contentious nature of the reasons that have generally been given to justify decisions to deny immediately releasing convicts indicates that the possibility of other subtle considerations having a role cannot be disregarded. As Kamwambe J observed, however, to continue detaining a convict on the basis of factors such as institutional lapses is unjust, unfair and a contravention of the Constitution.[108] The judiciary, therefore, needs to accept the advice that the judge gave "to face the truth" and start being open to embracing the consequences that arise out of its shortcomings, including the early release of convicts.[109]

Quite apart from the above factors, the recent approach also seems to have been influenced by the judiciary's fears of leaving prison authorities with too much power. The decisions taking this approach suggest that allowing prison authorities to release convicts on the expiry of the periods prescribed under section 15 would not align with the separation of judicial and executive authority. They insist that section 15 does not take away the sentencing powers of judges and magistrates and vest them in prison authorities.[110] It is argued, however, that if the responsible institutions were to adhere to the mandatory review provisions, allowing prison authorities to release prisoners would neither accord them more powers nor permit them to intrude into the realm reserved for judicial authority. This is because, on a strict compliance with the mandatory review regime, magistrates' courts would endorse on the warrants of commitment the periods provided under section 15. On the expiry of those periods without a review, prison authorities would be releasing prisoners not out

106 For example, *Khoswe and others*, above at note 71, was decided by the same judicial officer who in the early 2000s delivered various decisions acknowledging that after the lapse of the prescribed statutory periods, a convict must be released. These include *Bayani*, above at note 22 and *Moffat*, above at note 82.

107 *Khoswe and others*, above at note 71 at 8.

108 *Msomera*, above at note 83.

109 Id at 2.

110 See, for example, *Banda and others*, above at note 8 at 23.

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of their discretion but in compliance with a court order. In the circumstances where the High Court manages to conduct a review before the expiry of the section 15 timelines, prison authorities would not even have the powers to release prisoners on the basis of a delayed review. Instead, they would comply with the terms of the order by the High Court on review. Clearly, therefore, there is no threat of expansion of prison authorities' powers.

One, however, needs to accept the difficulties of the judiciary efficiently complying with the demands of section 15 in the present set-up of the criminal justice system. With the expanded magistracy, the abolition of the traditional court system and the increase in the number of accused persons passing through the criminal justice system, it is unrealistic to expect the High Court to cope with all the cases being processed by magistrates and to confirm them within the currently prescribed timelines. While mandatory reviews are certainly vital for preventing miscarriages of justice, to address the inefficiencies in the regime's operations, there is a need to conduct systematic reforms aimed at reducing the High Court's workload on reviews. Doing so will enable the High Court to focus its review powers on those matters in which there is a greater risk for miscarriages of justice. Several measures could be utilized to reduce the High Court's workload. The first is through raising the threshold of punishments requiring mandatory review. Sentences imposed by resident magistrates in particular can be raised from two years to, for example, five years. This adjustment could be justified on the basis that resident magistrates, who undergo professional legal training, are less prone to making errors in trials. The second is through exempting cases in which the convict is legally represented from mandatory review, as is the case in South Africa for example. The justification for this is that it can be safely assumed that if an accused is legally represented in a subordinate court, the legal representative will safeguard his or her interests by ensuring that the possibilities of injustice in the trial are minimized and, generally, his or her rights related "to a fair trial are protected".[111] The third measure is through exempting sentences imposed by certain magistrates, based on their experience, from mandatory review. As stated earlier, Uganda follows this approach by not requiring confirmation for orders made by chief magistrates. The fourth is through according resident magistrates powers to review sentences imposed by graded magistrates on certain minor offences. As noted earlier, the approach for a subordinate court to review and confirm certain sentences imposed by another subordinate court has been tried before in Malawi with respect to district native courts and sub-district native courts. Also, in jurisdictions such as Uganda, chief magistrates handle criminal appeals in relation to matters that were before grade II magistrates.[112] These examples demonstrate that some levels of subordinate courts possess sufficient experience and expertise to review cases that were handled by relatively less versed and experienced subordinate courts. The adoption of the last two proposed measures would not undermine the constitutional status of reviews in Malawi as these measures would operate only in relation to mandatory reviews, leaving the option for voluntary reviews initiated either by the convict or the High Court still open.

Besides the above proposed measures, the judiciary also needs to put in place procedures for disciplining magistrates who delay or evade the forwarding of cases for review. The efficient functioning of the mandatory review regime rests in the ability of magistrates' courts promptly forwarding their records to the High Court. As observed in *Bayani*, speed is important in mandatory reviews. The judiciary thus needs to develop and implement strategies for ensuring that magistrates speedily forward cases to the High Court for review. In addition, the judiciary needs to improve its record keeping system, given that incidents of missing court records are now no longer unusual.[113] In the long term, the judiciary would need to migrate from the current paper-based court records keeping system (especially at the subordinate courts level) to a digital or electronic mode. But in the meantime,

111 *The State v Jan Nakedi* High Court Ref no 12 of 2011, North West High Court, Mafikeng.

112 Magistrates Courts Act No 13 (Uganda), sec 203.

113 Gumboh "Justice in limbo", above at note 94 at 2.

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measures need to be put in place to ensure optimum security of the court records and efficiency in their transmission from the magistracy to the High Court.

Conclusion

The mandatory review regime has a long history in Malawi, dating back to the Subordinate Courts Ordinance of 1906. Despite the significant political and legal changes the country has undergone since then, this regime has been preserved, albeit with varying configurations to align with the structure of subordinate courts, and perhaps the societal aspirations, at different times. This article has examined the regime, tracing its developments from 1906 to how it is currently understood and practised. Although the judiciary is entirely in control of the operations of the regime, inefficiencies in the judicial system have recently revealed that many convicts are serving sentences that are yet to be reviewed. When convicts have challenged their continued detention, citing the failure of the courts to review their cases within the timelines set by section 15 of the CPEC, recent decisions have concluded that: (a) the High Court is not bound to review and confirm cases within the timelines specified by section 15, (b) magistrates are not required to endorse those timelines on warrants of commitment as the valid period that a convict can serve pending a review and (c) prison authorities are not permitted to automatically release convicts after the expiry of the timelines. The article has argued that this interpretation of the provision governing the regime is historically indefensible, undermines the purpose of the regime and is less protective of the rights of convicts. The article has further argued that the approach may have been influenced by, among other factors, the significant number of unconfirmed cases. As such, giving the provision its previous understanding (ie that a convict whose sentence has not been reviewed must be released at the expiry of the periods specified in section 15) could result in the release of many prisoners and potentially expose the judiciary to public criticism. Sadly, however, this approach reduces mandatory reviews to a regime that promises much in theory but offers convicts no tangible remedy when their rights are violated. To improve the efficiency of the regime, the article proposes that the judiciary initiates reforms aimed at instilling discipline in magistrates to promptly forward cases for review, reducing incidents of missing court records, and cutting the workload of the High Court so that it focuses its review powers on cases that carry a heightened risk of miscarriages of justice.

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