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Malawi: The first judicial review case on abortion: *CM (Minor)*

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Abstract

Despite adopting progressive laws, including a national constitution that recognises the rights of the child and the rights of women, and legislation on gender equality that upholds the right of everyone to sexual and reproductive health and rights, women and girls in Malawi face limitations in fully realising their reproductive health and rights, notably in terms of accessing safe abortion services. While ongoing advocacy efforts aim to reform the abortion law through political channels, a significant event occurred when 15 year-old girl sought the intervention of the High Court. She challenged the decision of a public hospital director who denied her access to legal abortion due to a pregnancy resulting from sexual violence. In this chapter the authors explore the potential of public interest litigation to contribute toward enforcing Malawi's legal obligations to provide eligible girls and women legal abortion, grounded in principles of justice. The chapter concludes that despite the outcome of the first initial abortion case in Malawi, the judiciary holds promise as a driving force for the realisation of legal rights to abortion.

1 Introduction

Malawi, formerly Nyasaland, was a British protectorate from 14 May 1891 to 6 July 1964, when it attained independence. One of the persisting influences of British legal imperialism and colonialism is the institutionalisation of the criminalisation of abortion. Abortion has been an offence under Malawian law since 1902 when Malawi's first written Constitution, the British Central Africa Order-in-Council of 1902, extended the application of English statutes of general application

to the protectorate. This included the Offences Against the Person Act of 1861 (OAPA).[1] However, abortion-specific provisions were codified in Malawi's Penal Code adopted in 1930.[2] The provisions in Malawi's Penal Code criminalising abortion are direct replicas of sections 58 and 59 of the OAPA.[3]

There is near-universal consensus that the criminalisation of access to safe termination of pregnancy has had an enduring devastating impact on girls and women in Malawi, especially those from socio-economically disadvantaged backgrounds.[4] The Penal Code only permits the termination of a pregnancy if it is necessary 'for the preservation of the mother's life'.[5] The overly restrictive anti-abortion provisions in the Penal Code scare away qualified medical personnel from providing safe termination of pregnancies, resulting in desperate women and girls having recourse to unsafe abortion practices.[6] Advocacy efforts to reform the law on abortion in Malawi have been ongoing for over ten years. Delays in legislative reforms, however, prompted activists to attempt using strategic litigation to speed up reforms, particularly on clarifying the law. *The State (on the Application by HM (Guardian) on behalf of CM (Minor)) v The Hospital Director of Queen Elizabeth Central Hospital & The Minister of Health* (*CM (Minor)*)[7] is the case in point.

This chapter explores the potential for public interest litigation to determine the question of access to safe abortion according to Malawi's obligations under national, regional and international law. In *CM (Minor)* the strategic aim was to get the High Court's authoritative

1 For a detailed reading on the impact of the OAPA on abortion laws in former British colonies and protectorates, see B Dickens & R Cook 'Development of commonwealth abortion laws' (1979) 28 *International and Comparative Law Quarterly* 424.

2 HF Morris 'A history of the adoption of codes of criminal law and procedure in British colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 22.

3 R Dutch 'The globalisation of punitive abortion laws: The colonial legacy of the Offences Against the Person Act 1861' (2020) *Disrupted* 74.

4 BA Levandowski and others 'The incidence of induced abortion in Malawi' (2013) 39 *International Perspectives on Sexual and Reproductive Health* 88; CB Polis and others 'Incidence of induced abortion in Malawi, 2015' (2017)12 *PLOS ONE* e0173639.

5 Sec 243 Laws of Malawi, Ch 7:01 Penal Code.

6 E Jackson and others 'A strategic assessment of unsafe abortion in Malawi' (2011) 19 *Reproductive Health Matters* 136.

7 Judicial Review Cause 3 of 2021 (HC) (ZDR) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2020/6 (accessed 7 January 2022).

interpretation of abortion law as it applies to a pregnant child and survivor of sexual violence. This chapter analyses the court ruling in *CM (Minor)* and discusses the use of judicial review mechanisms to restate the motivation for pursuing public interest litigation to facilitate law and policy reforms or, at the very least, reforms in hospital practices on access to safe abortion for pregnant minors.

2 Background to abortion law reform

In 1995 Malawi adopted a liberal democratic Constitution (Constitution) that recognises human rights, including those of women and children.[8] Malawi has also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Amongst Women (CEDAW); the Convention on the Rights of the Child (CRC); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); and the African Charter on the Rights and Welfare of the Child (African Children's Charter). Despite adopting progressive national laws and being bound by international legal instruments, Malawi retains abortion provisions that contradict and undermine women's and children's rights, especially their rights to life and health. In its most recent Concluding Observations on Malawi adopted in 2017, the Committee on the Rights of the Child (CRC Committee) expressed concern about the 'criminalisation of abortion, except when the life of the pregnant girl is at risk, leading to girls resorting to risky abortions'.[9] The CRC Committee recommended the decriminalisation of abortion in all circumstances, the removal of barriers to access to safe abortion such as the requirement to report rape or defilement before the service can be provided, and ensuring that girls have access to safe abortion and post-abortion care.[10] Further, the Committee reminded Malawi that the views of the child should always be heard and be given due consideration in abortion decisions.

8 A Mutharika 'The 1995 Democratic Constitution of Malawi' (1996) 40 *Journal of African Law* 205; secs 23 & 24 Constitution of the Republic of Malawi.

9 Committee on the Rights of the Child, Concluding Observations on the combined 3rd third to 5th periodic reports of Malawi, 6 March 2017, UN Doc CRC/C/MWI/CO/3-5 (2017) para 34.

10 Committee on the Rights of the Child (n 9) para 35.

In 2010 a grouping called the Coalition for the Prevention of Unsafe Abortion (COPUA) was formed in Malawi by the first author with support from Ipas, an international non-governmental organisation (INGO). Its primary goal is to champion abortion law reforms.[11] For more than a decade now, COPUA has engaged Parliament through meetings and workshops to lobby for the tabling and consideration of the Termination of Pregnancy Bill (ToP Bill) by the legislature. The ToP Bill was recommended by the Law Commission following the review in 2015 of the abortion law.[12] The Commission recommended a stand-alone law on termination of pregnancy, in contradistinction from the current position where the law on abortion is contained in the Penal Code. The most important reform being proposed by the ToP Bill is the expanded grounds for terminating a pregnancy. It proposes four grounds: risk to the life of the pregnant woman; the risk to the health of the pregnant woman; severe malformation of the foetus; and where the pregnancy resulted from a sexual crime.

Observing that the government is taking a long time to bring the ToP Bill before Parliament, the Chairperson of the Parliamentary Committee on Health, Dr Matthews Ngwale, made the first attempt to bring the ToP Bill to Parliament through the route of a private member's Bill. However, the move was thwarted by other members of parliament who did not want the ToP Bill.[13] Nevertheless, this was an important milestone in the history of Malawi, as it was the very first attempt to bring the subject matter of abortion before Parliament. The unprecedented rejection to table the ToP Bill also reveals how difficult the road to law reform is likely to be. Meanwhile, Women and Law in Southern Africa Educational Trust – Malawi (WLSA-Malawi), a Malawian women's rights organisation, and KK Attorneys, a Malawian legal and consulting firm, supported by the Centre for Reproductive Rights (CRR), facilitated the filing of the

11 J Daire and others 'Political priority for abortion law reform in Malawi: Transnational and national influences' (2018) 20 *Health and Human Rights* 229.

12 Law Commission 'Constitution of Malawi: Report of the Law Commission on the review of the abortion law' *Gazette Extraordinary* LC/01/56, 15 March 2016, https://www.lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Law%20on%20Abortion.pdf (accessed 23 December 2021).

13 L Masina 'Malawi Parliament rejects debate on liberalising abortion law' *VOA* 12 March 2021, https://www.voanews.com/a/africa_malawi-parliament-rejects-debate-liberalizing-abortion-law/6203213.html (accessed 28 March 2021).

CM (Minor) case. In this case, a girl of 15 years sought a review of the refusal of a public health facility to provide her the safe termination of a pregnancy that arose from a sexual assault, despite the obvious attendant risks to her life and health. The minor had applied for judicial review of that refusal. The case was determined on 15 June 2021. This is a landmark case because it is the first ever non-criminal matter on abortion to come before the High Court of Malawi.

WLSA-Malawi and KK Attorneys supported CM because her case raised a matter of public interest, that is, the question of whether a child who was pregnant because of sexual violation is eligible to access safe termination of pregnancy under the current law. This case was strategically litigated because it 'consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)'.[14] *CM (Minor)* was litigated to have the Court interpret the abortion law to determine its scope and application to pregnant minors who have been sexually violated.

When approaching the High Court, the applicant in *CM (Minor)* sought to benefit from the Court's constitutional mandate. First, the judiciary has the constitutional mandate to interpret laws[15] and, therefore, is the only state organ that can authoritatively state the parameters of lawful abortion. Second, and most importantly, through its powers of judicial and constitutional review, it can review any act of a governmental body/authority or any law for consistency with the Constitution and declare it invalid if found constitutionally wanting.[16] The Constitution also recognises the right to access justice and legal remedies, including the right to access any court of law or tribunal for the final settlement of legal disputes. Further, every person has the right to an effective remedy under the rights and freedoms granted to the person by the Constitution or any other law.[17] Therefore, CM had the right to seek the Court's intervention on a question that affected her legal rights and required interpretation of the law.

There is a growing body of regional and international comparative jurisprudence on access to abortion, for instance, the recent decisions

14 Public interest litigation defined in Open Society Foundation *Strategic litigation impacts: Insights from global experience* (2018) 25.
15 Sec 11 Constitution.
16 Sec 108(2) Constitution.
17 Sec 41 Constitution.

in the Constitutional Court of Ecuador to decriminalise access to safe abortion for rape survivors,[18] and the decriminalisation of abortion up to 14 weeks by the Constitutional Court of Mexico.[19] However, the authors chose to highlight the Kenyan case of *Federation of Women Lawyers v Attorney General* (*FIDA*),[20] which was strategically litigated to enable girls and women in Kenya to access safe abortion to the full extent of the law. The *FIDA* case is instructive because despite Kenya having a relatively progressive legal framework, girls and women who are otherwise legally eligible failed to access abortion services because of the action or inaction of the government to provide access to safe abortion following the law, and to provide the information about available services to eligible girls and women.[21]

The authors consider public interest litigation as one important component of advocacy for safe abortion and this involves conscientising the masses, politicians, and policy decision makers, including the judiciary itself.[22] To be successful, public interest litigation should pay attention to the careful crafting of strategy around the issue to litigate and includes an appreciation of the legal, social and political environment.[23]

18 The decision in Spanish is *Corte Constitucional, Acción Pública de Inconstitucionalidad,* Expediente 34-19-IN/21 (Decision of 28 April 2021). See the newspaper report in English: M Pantano 'Ecuador's Constitutional Court decriminalises abortion in cases of rape' *Global Risk Insights* 25 June 2021, https://globalriskinsights.com/2021/06/ecuadors-constitutional-court-decriminalizes-abortion-in-cases-of-rape/ (accessed 31 October 2021).

19 L Diaz & L Gottesdiener 'Mexico's top court decriminalises abortion in "watershed moment"' *Reuters* 8 September 2021, https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/ (accessed 12 October 2021).

20 Petition 266 of 2015 (High Court of Kenya).

21 A Blystad and others 'The access paradox: Abortion law, policy and practice in Ethiopia, Tanzania and Zambia' (2019) 18 *International Journal for Equity in Health* 126.

22 M Roa & B Klugman 'Considering strategic litigation as an advocacy tool: A case study of the defence of reproductive rights in Colombia' (2014) 22 *Reproductive Health Matters* 32-34.

23 T Gonese-Manjonjo & E Durojaye 'Lessons for litigating sexual and reproductive health and rights in Southern Africa' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 189.

3 Litigating abortion: A feminist and reproductive justice perspective

3.1 Women

The status of abortion regulation in Malawi, and the challenges women face to claim the right to access safe abortion, including the attempt to strategically litigate on abortion, has a specific context. Historically, colonialism played an important role in entrenching a patriarchal *status quo*, the effects of which are still palpable in the post-colonial state.[24] European colonisation of Africa involved the transfer of laws from the coloniser to the colonised that aimed at transforming the culture of the colonised people, their social and political organisation, including sexual and reproductive lives.[25] Such 'legal colonisation' has had far-reaching yet subtle ramifications in the post-colonial societies, and more so in the area of abortion.

The criminalisation of abortion introduced during colonialism has since shaped institutional policies and practices, and people's perceptions and behaviour. Since colonialism, therefore, African societies have organised their reproductive lives around the fact that abortion is a criminal offence. Likewise, healthcare systems operate against the background of such criminalisation. This has had severe consequences on the health and lives of women, manifest in the high incidences of unsafe abortions in Africa.[26] The harshness of the law and the suffering of women have largely remained unrecognised despite African countries adopting progressive laws and constitutions. Not only are women denied access to safe abortion, but the social and political climate discourages and excludes women from pursuing political and legal mechanisms to redress the situation.[27] The challenge women face about access to safe

24 M Chanock 'Neither customary nor legal: African customary law in the era of family law reform' (1989) 3 *International Journal of Law, Policy and the Family* 76; SE Merry 'Law and colonialism' (1991) 25 *Law and Society Review* 890.

25 O Phillips '(Dis)continuities of custom in Zimbabwe and South Africa: The implications for gendered and sexual rights' (2004) 7 *Health and Human Rights* 87.

26 A Bankole and others 'From unsafe to safe abortion in sub-Saharan Africa: Slow but steady progress' Guttmacher report (2020).

27 Masina (n 13).

abortion, therefore, is systemic injustice that permeates social, political and legal institutions. To address this injustice requires not only law reform, but social transformation, including raising the consciousness of women and supporting their access to mechanisms for claiming their rights to access safe abortion. It is for this reason that a feminist approach to strategic litigation inspires this chapter because it 'aims to change historically gendered exclusion and silencing that manifest as a failure to understand, frame and claim entitlements under the law in a manner that is meaningful for women'.[28]

The Constitution entrenches the right to life,[29] the inviolability of the dignity of all persons,[30] as well women's rights to full and equal protection of the law, and their rights to non-discrimination.[31] At the statutory level, the Gender Equality Act (GEA) recognises sexual and reproductive rights, which include access to sexual and reproductive healthcare services.[32] The Penal Code, Malawi's principal penal statute, while criminalising unlawful abortion,[33] allows the termination of a pregnancy if it is performed to save the pregnant mother's life.[34] Yet, access to safe abortion continues to be limited by a combination of patriarchal colonial-era regulations that pre-date both the Constitution and the GEA, and the restrictive interpretation of the abortion law by government agencies, including the Ministry of Health (MoH).

3.2 Girls below the age of 18 years (minors)

Children, defined in the Constitution as a person below the age of 18,[35] have a special status and protection under national and international law. The Constitution provides that all children have equal protection under the law, and that 'the best interests and welfare of children shall be a

28 ISLA *Sourcing gender and sexuality cases* (nd) Johannesburg: ISLA, https://www.the-isla.org/wp-content/uploads/2021/07/ISLA-Insights-Issue-1_-Sourcing-Gender-and-Sexuality-Cases_Ebook_PKSC_15-July-2021.pdf (accessed 9 September 2021).
29 Sec 16 Constitution.
30 Sec 19(1) Constitution.
31 Sec 24 Constitution.
32 Sec 19 Laws of Malawi, Ch 25:06 Gender Equality Act.
33 Secs 149-151 Penal Code (n 5).
34 Sec 243 Penal Code.
35 Sec 23(6) Constitution.

primary consideration in all decisions affecting them'.[36] The Constitution also provides that

> Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to –
> (a) be hazardous;
> (b) interfere with their education; or
> (c) be harmful to their health or to their physical, mental or spiritual or social development.

Malawi also has, without reservations, ratified CRC and the African Children's Charter. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), as well as the CRC Committee, have consistently interpreted child rights through the lens of the four core principles of the rights of the child: the best interests of the child; the right to participation; non-discrimination; and the right to life, survival, and development.[37] The first principle requires that in all actions and decisions concerning children, for instance, the question of their access to termination of pregnancy, their best interests should be paramount. Children's views should also be considered. For instance, their views on whether they want to keep a pregnancy, particularly arising from a sexual violation, should not be dismissed with a slight of the hand.[38] Forcing a child to carry to term an unwanted pregnancy, resulting from rape or defilement, gravely impacts her life, survival and development, and violates a host of rights including freedom from torture or cruel, inhuman, or degrading treatment or punishment.[39]

The girl below the age of 18 is doubly protected under the laws of Malawi. Yet, when it comes to access to abortion, this entrenched protection crumbles. Girls are forced to carry unwanted pregnancies to

36 Sec 23(1) Constitution.
37 See, eg, African Children's Committee General Comment on art 22 of the African Charter on the Rights and Welfare of the Child: 'Children in situations of conflict' (2020).
38 UN Committee on the Rights of the Child (CRC Committee) General Comment 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, UN Doc CRC/C/GC/20 (2016) para 60.
39 Human Rights Committee, CCPR General Comment 28: Article 3 (The equality of rights between men and women), 29 March 2000, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) para 11; X Casas 'They are girls, not mothers: The violence of forcing motherhood on young girls in Latin America' (2019) 21 *Health and Human Rights Journal* 158-159.

term regardless of the risk to health and life.[40] The institutionalisation of a colonial and patriarchal abortion law seems so calcified that it cannot be broken even by Malawi's progressive laws that guarantee the protection of the rights of girls. However, the courts in Malawi have not yet been thoroughly engaged to begin dismantling the oppressive derivatives of the OAPA. *CM (Minor)* could mark a novel path in the advocacy for law, policy and practice reforms on abortion in Malawi.

4 Background to CM (Minor)

4.1 Interpreting the abortion law for survivors of sexual violence

In 2016 the first author attended a regional technical meeting convened by Population Council, the World Health Organisation (WHO) and the International Consortium for Emergency Contraception (ICEC) held in Zambia (Zambia meeting). The Zambia meeting aimed to facilitate participating countries to meet their obligations under the African Women's Protocol to realise the reproductive rights of girls and women in Africa. The focus of the Zambia meeting was on the prevention and management of pregnancy resulting from sexual violation and intimate partner violence.[41] It is at the meeting that the first author became enthused to explore the idea of getting the law on abortion clarified, particularly for rape survivors. The need for clarification stems from the fact that sections 149, 150 and 151 of the Penal Code prohibit unlawful abortion without expressly clarifying what constitutes lawful abortion.[42]

40 'Girl, 11, gives birth after being raped by stepfather in Malawi' *Malawi24* 4 December 2021, https://malawi24.com/2021/12/04/girl-11-gives-birth-after-being-raped-by-stepfather-in-malawi/ (accessed 23 December 2021).

41 J Thompson and others 'Harmonising national abortion and pregnancy prevention laws and policies for sexual violence survivors with the Maputo Protocol. Regional technical report' (2017), https://www.popcouncil.org/uploads/pdfs/2017RH_MaputoProtocol.pdf (accessed 30 April 2021).

42 Sec 149 of the Penal Code provides: 'Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.' Sec 150 provides: 'Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for seven

Of course, it is widely accepted that section 243 of the Code provides an exception to the restrictions in sections 149, 150 and 151 if the abortion is performed to save the life of the pregnant woman.[43] However, the question of whether survivors of sexual violence are entitled to termination by that fact alone has never been addressed in Malawi.[44]

Section 19(1) of the GEA provides for the right to access sexual and reproductive health services and would have been interpreted to include access to abortion services had it not been that section 19(2) of the GEA imports the Penal Code restrictions.[45] However, the Penal Code provisions are not explicit about the extent to which abortion is lawful, and the GEA does not address this question either. This means that despite being a progressive law, the GEA does not solve the problem of whether a pregnant survivor of rape is eligible for an abortion performed to preserve life.

The MoH in 2020 issued Standards and Guidelines for Post-Abortion Care (PAC S&Gs)[46] that interpret the abortion law for the guidance of healthcare providers. The PAC S&Gs recognise that the Constitution and relevant laws permit abortion in certain circumstances. They acknowledge that 'the current Penal Code permits abortion to preserve the life of the woman. Therefore, in Malawi, abortion is legal when provided within the context of the law.'[47] The PAC S&Gs provide specific guidance to healthcare providers and describe the circumstances

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years.' Sec 151 provides: 'Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, shall be guilty of a felony and shall be liable to imprisonment for three years.'

43 Sec 243 of the Penal Code provides: 'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.'

44 The position in English law was clarified in 1937 in the case of *R v Bourne* [1938] 3 ALL ER 615, [1939] 1 KB 687, Crown Court of England and Wales, where a judge interpreted the OAPA including the meaning of the expression 'for the preservation of the mother's life'. See also Ipas Africa Alliance *Human rights and African abortion laws: A handbook for judges* (2014) sec 3.4.

45 Sec 19(2) of the Gender Equality Act (n 32) states that '[s]ubject to any other written law, every person has the right to choose whether or not to have a child'.

46 Ministry of Health *Standards and guidelines for post-abortion care* (2020). An electronic copy of the guidelines is available at https://drive.google.com/file/d/1hWvJ_4U7_G1NCwj5xaL3Jql-U-9_GyQ6/view (accessed 31 October 2021).

47 Ministry of Health (n 46) 10.

in which a healthcare provider could terminate a pregnancy to save the woman's life. It lists several medical conditions and concludes by describing '[o]ther conditions' in the following manner:[48]

> There are many other health conditions that place a pregnant woman's life at risk. It is not possible to list all the conditions. Examples of these types of conditions could be tropical hepatosplenomegaly syndrome, HELLP syndrome, psychiatric disorders or severe depression with suicidal tendencies or other health conditions that are known to place the life of the woman in danger.

The PAC S&Gs interpret section (19)(2) of the GEA to mean that '[s]ection (19)(*sic*)2 of the Gender Equality Act limits abortion within the context of the Penal Code'.[49] However, this still begs the question about what is understood to be the full extent of lawful abortion in Malawi. It is this legal uncertainty, especially regarding survivors of sexual crimes, that the applicant in *CM (Minor)* sought to have the courts resolve by instituting a judicial review. A judicial review procedure involves a higher court reviewing the decision of public officials, among others, for compliance with the law. The applicant challenged the decision of the Director of Queen Elizabeth Central Hospital (QECH) refusing the termination of CM's pregnancy. To determine the legality of that refusal, the Court would have had to interpret the relevant provisions of the abortion law.

4.2 Hospital practice regarding survivors of sexual violence in Malawi

The One Stop Centre (OSC) is an institution of the MoH based within public hospitals. It provides comprehensive services to children, women and men who are survivors of physical and sexual violence.[50] An evaluation of the OSC has revealed that three-quarters of the families are satisfied with the services provided at the OSC.[51] Interestingly, a search for literature reveals nothing about the experience of those survivors of sexual violence who want to terminate unwanted pregnancies

48 Ministry of Health (n 46) 11.
49 Ministry of Health (n 46) 10.
50 Ministry of Health *National guidelines for provision of services for physical and sexual violence* (2014).
51 Y Mulambia and others 'Are one-stop centres an appropriate model to deliver services to sexually abused children in urban Malawi?' (2018) 18 *BMC Pediatrics* 145.

conceived because of rape or sexual assault. However, the authors of this chapter learned from a conference that as a matter of practice, all clients presenting themselves at the OSC who request termination of their pregnancies are told that it is not available because it is illegal.[52] The lack of a policy on access to safe abortion for sexual violence survivors, the dearth of literature or documentation on their experience, and the invisibility of the fate of women and girls who are turned away from safe abortion services, are the effect of the enduring legacy of colonialism and patriarchy. This is the context in which *CM (Minor)* was litigated.

5 The *CM (Minor)* judicial review case and analysis

The applicant in *CM (Minor)* applied for the Court's permission to review the decision by the first defendant denying CM access to termination of a pregnancy that arose from a defilement. The Court declined leave for reasons explored below. Despite the judicial outcome, *CM (Minor)* has opened a novel chapter on the possibility of using courts to determine questions about the legality of abortion practices, policy and laws in Malawi that impact the rights of women and children.

Judicial review is a powerful mechanism through which courts exercise their supervisory role over decision-making processes and substantive decisions of public bodies. Malawi has recently seen a significant increase in litigation using judicial review. In the past five years alone, courts have been petitioned to review, among others, the President's failure to fire a minister implicated in corruption;[53] the commencement of a major water supply project without the legally mandated environmental impact assessment;[54] the government's decision to impose a lock-down

52 Women and Law in Southern Africa Educational Trust – Malawi 2017 *Advancing sexual and reproductive rights of women and girls in Malawi: The role of the courts* Capital Hotel, Lilongwe, Malawi, 12 December 2017.

53 *Chaponda v The State; Ex Parte Kajoloweka* Miscellaneous Civil Appeal 5 of 2017 (Malawi Supreme Court of Appeal) (unreported), https://malawilii.org/mw/judgment/supreme-court-appeal/2019/1 (accessed 30 September 2021).

54 *The State v Lilongwe Water Boards; Ex Parte Malawi Law Society* Judicial Review Cause 16 of 2017 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2017/135 (accessed 30 September 2021). The judge considered the main issue to be an application for leave to apply for judicial review. The second issue was whether the applicant and the Malawi Law Society (MLS), an interested party, had *locus standi* in the matter considering sec 26(1)(d) of the Legal Education and Legal Practitioners' Act (LELPA).

to curb the spread of the coronavirus;[55] and the President's decision to send the chief justice on leave pending retirement.[56] *CM (Minor)* was litigated when judicial review became a popular mechanism for enforcing governmental accountability.

5.1 Judicial review mechanisms under Malawian law

Historically, within the Anglo-American legal tradition, there are two broad types of judicial review. The first is judicial review of legislation to ascertain its constitutional validity.[57] It is currently a well-established practice in most constitutional democracies,[58] for instance, the United States, Canada, India, France, Hong Kong, Japan, South Africa, Kenya, Germany, The Netherlands and Hungary.[59] It was also incorporated into the 1994 Constitution of Malawi.[60] It is commonly referred to as 'constitutional judicial review', an expression that has found its way into the country's judicial parlance.[61]

55 See *The State v The President of Malawi; Ex Parte Mponda* Judicial Review 13 of 2020 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2020/6 (accessed 30 September 2021).

56 *The State v The President of the Republic of Malawi; Ex Parte Human Rights Defenders Coalition* Judicial Review Cause 22 of 2020 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2020/26 (accessed 31 October 2021).

57 JJ Coughlin 'The history of the judicial review of administrative power and the future of regulatory governance' (2001-2002) 38 *Idaho Law Review* 89.

58 M Tushnet 'Judicial review of legislation' in M Tushnet & P Cane (eds) *The Oxford handbook of legal studies* (2005) 164.

59 D van der Schyff *Judicial review of legislation: A comparative study of the United Kingdom, The Netherlands and South Africa* (2010); VF Comella 'The European model of constitutional review of legislation: Toward decentralisation?' (2004) 2 *International Journal of Constitutional Law* 461; AHY Chen 'The global expansion of constitutional judicial review: Some historical and comparative perspectives' (2013) University of Hong Kong Faculty of Law Research Paper 2013/001.

60 MJ Nkhata 'The High Court of Malawi as a constitutional court: Constitutional adjudication the Malawian way' (2020) 24 *Law, Democracy and Development* 442; DM Chirwa 'Liberating Malawi's administrative justice jurisprudence from its common law shackles' (2011) 55 *Journal of African Law* 105.

61 *The State v Council of the University of Malawi; Ex Parte University of Malawi Workers Trade Union (Judicial Review)* Miscellaneous Civil Cause 1 of 2015 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2015/494 (accessed 3 October 2021); *The State v The President of Malawi; Ex Parte Mponda* Judicial Review 13 of 2020 (HC) (ZDR) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2020/6 (accessed 4 October 2021).

The second type of judicial review involves the review of administrative actions of public bodies and officials for conformity with principles of legality, procedural fairness and reasonableness. It has its origins in England.[62] Essentially, it is a legal procedure whereby decisions of 'public' bodies and officials are reviewed by courts to determine whether they are within the scope of enabling laws and conform with fundamental principles of administrative law.

In Malawi, judicial review has a constitutional basis under sections 4, 12(1)(f) and 108(2) of the Constitution. Section 4 binds 'all executive, legislative and judicial organs of the state at all levels of government' to the Constitution. On its part, section 12(1)(f) states that all institutions and persons shall observe and uphold the Constitution and the rule of law, and no institution or person shall stand above the law. Lastly, section 108(2) confers on the High Court 'original jurisdiction to review any law, and any action or decision of the government, for conformity with [the] Constitution'. The three provisions confer on the High Court 'the power to review all decisions or actions of government for conformity with the constitution [and] that this review power is not limited to administrative action but extends to include executive decisions'.[63]

The ambit for constitutional review is broader than judicial review, which is limited to administrative action. It includes the review of laws and the exercise of constitutional powers. As explained by the Supreme Court in *Reserve Bank of Malawi v Finance Bank of Malawi (In Voluntary Liquidation*), a constitutional review involves the court in reviewing the constitutionality of laws, actions and decisions of government.[64]

While having a common law pedigree, judicial review of administrative action now has a constitutional basis in section 43 of the Constitution. This section enacts the right to 'administrative justice' by granting to every person the right to

62 PH Russell 'The diffusion of judicial review: The Commonwealth, the United States, and the Canadian case' (1990) 19 *Policy Studies Journal* 116.

63 *Chaponda v The State; Ex Parte Kajoloweka* Miscellaneous Civil Appeal 5 of 2017 (Malawi Supreme Court of Appeal) (unreported), https://malawilii.org/mw/judgment/supreme-court-appeal/2019/1 (accessed 30 September 2021).

64 Constitutional Cause 5 of 2013 (Malawi Supreme Court of Appeal) (unreported); sec 5 of the Constitution provides that '[a]ny act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid'.

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
(b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected.

Academics and courts concur that section 43 provides a constitutional foundation for judicial review of administrative actions under Malawian law.[65]

In terms of rules of procedure, Order 19, Rule 20 of the High Court (Civil Procedure) Rules, 2017 provides a statutory basis for judicial review application at the High Court. The Order also reveals the parameters of judicial review under Malawian law. The Order states:

> Judicial review shall cover the review of –
> (a) a law, an action or a decision of the government or a public officer for conformity with the Constitution; or
> (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine –
> (i) its lawfulness;
> (ii) its procedural fairness;
> (iii) its justification of the reasons provided, if any; or
> (iv) bad faith, if any,
> where a right, freedom, interests, or legitimate expectation of the applicant is affected or threatened.

5.2 Constraints of judicial review of administrative action

It should be noted that judicial review is of limited application. Both at common law and under section 43 of the Constitution, only 'administrative actions' are reviewable. This was a common law requirement, which has been codified in section 43 of the Constitution.[66] Justice Ntaba has explained that '[a]dministrative action entails a decision taken or a failure to take a decision while exercising a public function. Such decisions are ostensibly taken under empowering provisions in law for the fulfilling of the function of state administration ... In determining

65 See Kapindu J's explanation in *The State v Council of the University of Malawi; Ex Parte University of Malawi Workers Trade Union* Misc Civil Cause 1 of 2015.
66 *The State v Speaker of the National Assembly; Ex Parte Nangwale* Miscellaneous Civil Cause 1 of 2005 (Malawi Supreme Court of Appeal) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2005/80 (accessed 28 September 2021).

the nature of the function, guidance may be sought from the source of the function.'[67] This is a key aspect of judicial review, such that a judge attending to an application for leave for judicial review is required to examine whether or not this requirement is satisfied.

In *CM (Minor)* the Court declined to grant leave for judicial review because it found that health officials at QECH had not come to any decision. The first defendant had examined CM and recorded details about her pregnancy. However, the first defendant claimed that the applicant made no request for termination of her pregnancy. According to the Court, the failure by CM to prove that she had requested a termination of pregnancy, which was then denied by the first defendant meant that, technically, there was no 'administrative action' for the Court to review.

However, the authors disagree with the Court's reasoning for making it incumbent upon CM to make the request. The Court's view could be interpreted to mean that even though the first defendant, in his professional capacity, would have known that CM's teenage pregnancy posed a risk to her life, he need not do anything about it, and his inaction would not be amenable to review. Indeed, historically, the judicial review did not apply to administrative inaction.[68] The reasoning was that an administrative body vested with discretionary powers has complete freedom of agencies to act or not to act. However, there is growing consensus that administrative inaction just as action can harm individuals.[69] This is particularly the case, in the instance of CM, where the inaction of the health provider to alert her about the risk she faced because of her pregnancy had serious implications on her right to life, survival and development.

67 *The State v Judicial Service Commission; Ex Parte Chakuma and 16 Others* Judicial Review Cause 22 of 2018 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2019/34 (accessed 22 September 2021).

68 For a detailed reading on judicial review of administrative inaction, see PHA Lehner 'Judicial review of administrative inaction' (1983) 83 *Columbia Law Review* 627.

69 N Kawagishi 'Deference to the administration of judicial review in Japan' in G Zhu (ed) *Deference to the administration in judicial review: Comparative perspectives* (2019) 319; AE Rowley 'Administrative inaction and judicial review: The rebuttable presumption of unreviewability' (1986) 51 *Missouri Law Review* 1039.

Although the wording of section 43 of the Constitution, by using the expression 'administrative action', creates a strong presumption against reviewability of administrative inaction, a court discharging its supervisory role over administrative action, whether under section 43 of the Constitution or any other law, should consider section 11 of the Constitution. Section 11(1) of the Constitution enjoins courts to develop and employ 'appropriate principles' for the interpretation of the Constitution, and that those principles must 'reflect the unique character and supreme status' of the Constitution. Section 11(2) demands that a court interpreting the provisions of the Constitution must (a) promote the values that underlie an open and democratic society; (b) take full account of the Fundamental Principles (chapter II) and the Bill of Rights (chapter IV); and (c) where applicable, have regard to current norms of public international law and comparable foreign case law.[70] Further, courts have expressed the view that the Constitution should not be construed in a narrow and legalistic manner, but broadly and purposively.[71] Applying all these principles, it is a plausible conclusion that a court would not only review the action but also the inaction. Public officials who fail to act, contrary to the law, cannot preclude judicial review by casting their decisions in the form of inaction rather than action. In other words, the failure to act, in essence, is an administrative act that is reviewable. Further, Order 19, Rule 20(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 expressly states that a judicial review shall cover the review of a decision, action or failure to act concerning the exercise of a public function.

Epidemiological evidence shows that teenage pregnancy poses a significantly high risk to the life and survival of the pregnant child.[72] Defilement also has negative psychological, social, educational and physical impacts on the child.[73] The combination of being a child and

70 See Banda CJ's judgment in *Chakuamba v The Attorney General* Malawi Supreme Court of Appeal Appeal 20 of 2000 (Malawi Supreme Court of Appeal) (unreported), https://malawilii.org/mw/judgment/supreme-court-appeal/2000/5 (accessed 5 October 2021).

71 *Chakuamba* (n 70).

72 World Health Organisation 'Adolescent pregnancy' (2020), https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy (accessed 18 October 2021).

73 T Mutavi and others 'Psychosocial outcomes among children following defilement and the caregivers' responses to the children's trauma: A qualitative study from Nairobi suburbs, Kenya' (2016) 5 *African Journal of Traumatic Stress* 38.

being pregnant from sexual violation compounds these risks. It would not be expected that the child should make a self-risk assessment to then request the termination of her pregnancy. A competent health provider is expected to provide her with the necessary advice and information and the options to avert the risks to her life or health. The authors argue that the court in *CM (Minor)* should have reviewed the failure to act by the health provider who, having examined CM, failed to disclose the risks she faced because of her pregnancy and as a survivor of sexual violence.

5.3 Leave for judicial review

One of the procedural hurdles a person seeking judicial review must surpass is the requirement to obtain the court's leave (or permission) to apply for judicial review. The requirement for leave has its origins in common law, where judicial review is a discretionary remedy.[74] Applications for leave for judicial review often fail at this stage as was the case in *CM (Minor)*. While the authors appreciate the importance of this procedural requirement, they argue that in this particular instance, the Court could have given the applicant the benefit of the doubt on an issue that had serious implications for her life and health.

5.4 No leave where there are alternative remedies

In *CM (Minor)* the Court commented that even if the applicant had shown that an administrative action had been made, leave for judicial review would still have been denied because she had already pursued available alternative criminal and civil remedies against her abuser. These included lodging a criminal complaint with the police for sexual assault and suing the perpetrator for child maintenance. When making this statement, the Court relied on an established principle of law that the granting of leave for judicial review is at the discretion of the court.[75] One implication is that courts do not grant leave for judicial review if the

74 See *The State v George Chaponda and The State President of Malawi; Ex Parte Mr Charles Kajoloweka* MSCA Civil Appeal 5 of 2017.

75 Kapindu J in *The State v The Chief Resident Magistrate (Lilongwe); Ex Parte Jumbe* Judicial Reviews Cause 18 of 2015 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2015/488 (accessed 26 September 2021).

applicant has alternative remedies.[76] While it is indisputable that judicial review is a remedy of last resort, the Court's application of that principle in *CM (Minor)* was misplaced. The alternative remedies must be part of a formal appeal process. In *CM (Minor)*, if medical personnel at QECH had decided not to terminate the applicant's pregnancy, there currently are no appeal processes, whether legally or administratively, available to the applicant.

Further, the criminal proceedings against the applicant's defiler are instituted and prosecuted by the state, and not the applicant. She is merely a 'complainant' in those proceedings, and she has no control over them. As such, these proceedings could not be characterised as an alternative remedy to judicial review proceedings. The lawful termination of pregnancy where the life of the mother is in danger cannot be substituted with the criminal proceedings against sexual predators. The authors, therefore, disagree with the Court's suggestion that victims of sexual violence must not report their ordeals to the police as a precondition to access safe abortion services. Likewise, the fact that a woman is attempting to hold the person responsible for her pregnancy to own up cannot be treated as an alternative to lawful termination of pregnancy that threatens her life or health. Although the statements of the Court were made *obiter,* they represent a misleading interpretation and application of the law to cases of termination of pregnancy.

5.6 Review limited to the decision-making process, not merits or demerits

Another limitation of judicial review is that it is not concerned with the merits or demerits of the administrative action under review, but rather the decision-making process.[77] The goal of the judicial review is to ensure that, when deciding, the public officer acted lawfully, was procedurally

76 As explained by Kapindu J in *The State v The Chief Resident Magistrate (Lilongwe),* 'it is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been used'. See also *The State v The Commissioner General of the Malawi Revenue Authority; Ex Parte Airtel Malawi Limited* Judicial Review Cause 33 of 2015 (High Court of Malawi) (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2016/556 (accessed 19 September 2021).

77 *The State v Speaker of the National Assembly; Ex Parte Nangwale* Miscellaneous Civil Cause 1 of 2005 (Malawi Supreme Court of Appeal) (unreported), https://

fair, acted reasonably and was not tainted by bad faith. The limitation of judicial review is also explained by contrasting judicial review from an appeal. 'Judicial review, as the words imply, is not an appeal from a decision, but a review of how the decision was made.'[78] More recently, the UK Supreme Court explained this distinction in *Michalak v General Medical Council*.[79] In an appeal, the court may assess the merits of the decision, but in a judicial review, the court assesses the legality or procedure by which a decision is reached.[80]

This common law principle has been preserved by Order 19, Rule 20 of the High Court (Civil Procedure) Rules, 2017, which states that a judicial review aims to determine lawfulness, procedural fairness, justification of the reasons provided, or bad faith. This means that a successful outcome in *CM (Minor)* would not have meant that the Court would itself have ordered a termination. The matter would have been referred to qualified medical personnel for a fresh decision, and there is a possibility that the healthcare provider could still have decided against termination. However, the value of a judicial review is that it ensures that decision makers comply with the law. It also sets the standards for good administration.[81]

6 A comparable constitutional review case: The Kenyan *FIDA* case

The *FIDA* case provides important lessons for Malawi regarding the use of judicial and constitutional review as a tool for public interest litigation to promote women's access to safe abortion services. Kenya and Malawi share similarities in their laws on judicial and constitutional reviews and on social and institutional practices on abortion. The brief factual background to the case is that JMM, a 14 year-old schoolgirl, was defiled by an older man and fell pregnant. JMM did not receive post-rape care information as a rape survivor. Fearing the social and cultural

malawilii.org/mw/judgment/high-court-general-division/2005/80 (accessed 28 September 2021).

78 Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154.

79 [2017] 1 WLR 4193.

80 *Michalak* (n 79) para 20.

81 A le Sueur, M Suskin & J Murkens *Public law: Text, cases, and materials* (2013) 695.

consequences of pre-marital pregnancies, she resorted to unsafe abortion by an unqualified practitioner. She developed complications that later required complex and expensive medical procedures in several referral hospitals in Kenya. JMM survived with a kidney disease arising from the unsafe abortion but succumbed to the complications three years later.

JMM's mother, PKM, blamed her daughter's ordeal and eventual death on the respondents. She argued that the government of Kenya withdrew the National Guidelines on the Management of Sexual Violence in Kenya of 2009 (Sexual Violence Guidelines), promulgated in pursuance to section 35(3) of the Sexual Offences Act. The government also stopped implementing the National Training Curriculum for the Management of Unintended, Risky, and Unplanned Pregnancies (Training Curriculum on Pregnancies). The said section 35(3) offers the option of terminating a pregnancy where such pregnancy arises from a sexual crime. PKM also contended that the government did not provide clear information about the available services for legal termination of pregnancy.

The petitioners challenged the respondents' decision to withdraw the Sexual Violence Guidelines and the Training Curriculum on Pregnancies. The challenge was based on two main grounds of judicial review and constitutional review. Regarding the former, the petitioners argued that the withdrawal was 'arbitrary', 'without justification', 'unlawful', 'irrational' and 'unreasonable'. They further argued that it contravened section 47 of the Kenyan Constitution, as it was made without prior written notice and reasons to affected persons.

Regarding the constitutional review, the petitioners contended that the withdrawal of the Guidelines undermined several rights and freedoms guaranteed to women under the Kenyan Constitution and international human rights instruments. These are the right to life; the right to health, which includes the right to reproductive health; the right to equality and non-discrimination; the right to dignity; the right to freedom from cruel, inhuman and degrading treatment; the right to access to information; and the right to freedom of expression. On this basis, they argued that the conduct of the respondents violated the Kenyan Constitution.

The petitioners succeeded on both grounds. The Court found that the withdrawal of the Sexual Violence Guidelines and the Training Curriculum on Pregnancies, amounted to an unlawful administrative action (namely, contrary to the Sexual Offences Act, 2006 and Fair

Administrative Action Act) and arbitrary (as there were no public consultations before the withdrawal). At the constitutional level, the Court found that the withdrawal amounted to an unconstitutional limitation to a litany of women's rights. Most importantly, the Court found that it violated women's rights to safe abortion under section 26(4) of the Kenyan Constitution.

In the views of the authors of this chapter, *FIDA* succeeded for two reasons. The first is the position explicitly taken by the Kenyan court on judicial review and abortion. For a start, the Kenyan court appreciated that judicial review under Kenyan law is grounded in the Constitution, as the Kenyan Constitution makes explicit reference to judicial review as both a remedy[82] and constitutional right.[83] Further, the Kenyan Constitution explicitly provides for a right to abortion in certain circumstances. Its section 26, which provides for the right to life, uniquely states:

> (a) Every person has the right to life.
> (b) The life of a person begins at conception.
> (c) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.
> (d) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

The Court held that section 26 enacts 'a right to abortion where, in the opinion of a trained health professional there is need for emergency treatment, or that the life or health of the mother is in danger'.[84]

The Court approached the petition as one involving the interpretation and application of the Constitution. As such, the Court deliberated on the issues by reiterating the 'applicable constitutional principles'.[85]

82 Under sec 23 of Kenyan Constitution, among the reliefs available in proceedings for enforcement of fundamental rights and freedoms is an 'order of judicial review'.

83 Sec 47 of the Kenyan Constitution provides for the right to 'fair administrative action'. It states: '(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall – (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.'

84 *FIDA* case (n 20) para 369.

85 *FIDA* (n 20) para 345.

The Court considered section 20 of the Kenyan Constitution (which provides for the application and interpretation of the Bill of Rights) and guiding principles when interpreting the Constitution. According to the Court, these include requirements that the Constitution must be given a 'purposive' and 'liberal' meaning and that provisions of the Constitution 'must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other'.[86] From such a standpoint, the Court could 'unshackle' itself from the constraints that often tie courts in judicial review applications.

In Malawi, section 19(2) of the GEA firmly establishes the fundamental right of every individual to make a choice regarding parenthood. However, the true intent of this law can be somewhat elusive because it needs further interpretation, as it is constrained by Penal Code provisions prohibiting pregnancy termination except when it is necessary to save the pregnant woman's life. While organisations such as Nyale Institute have made efforts to decipher the law's intent, the inherent vagueness within the legislation presents significant challenges for both healthcare providers and their patients.[87] This ambiguity opens the door to varying interpretations of the law, which is particularly unfair when the final decision is left to the discretion of the healthcare provider, when providing certain services may lead to backlash due to societal stigmatisation.

To address these critical issues and bring clarity to the situation, it is crucial for an authoritative body, such as the courts, responsible for interpreting the law, to step in and eliminate uncertainties. This would enable healthcare providers to carry out their duties confidently while empowering clients with a more comprehensive understanding of their legal entitlements. One effective way to realise these legal rights is through strategic litigation, such as the approach taken by JMM in Kenya, which involves seeking court interpretation of the legal framework. This approach can help establish clear legal precedents that guide future decisions and actions, ultimately ensuring that individuals' rights are protected and upheld in practice.

86 *FIDA* (n 20) para 346.

87 G Kangaude 'Under what conditions is the termination of pregnancy legal in Malawi?' Nyale Institute, 21 September 2023, https://nyaleinstitute.org/2023/09/21/under-what-conditions-is-the-termination-of-pregnancy-legal-in-malawi/ (accessed 30 September 2023).

7 Motivation and recommendations for future public interest litigation on abortion

Addressing the right to life, the Human Rights Committee (HRC) has stated that the 'obligation of states parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life'.[88] One such threat arises from pregnancy before the age of 18 years, which poses significant risks to the health and life of the pregnant minor.[89] The risks are increased by compounding factors such as being an unmarried adolescent, pregnancy resulting from sexual violation and socio-cultural factors. In legally restrictive environments, adolescents are likely to terminate unwanted pregnancies unsafely.[90]

The HRC also powerfully expounded on the right to life and access to safe abortion: 'States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.'[91]

Some girls seeking services at the MoH OSCs request terminating their pregnancies, but the MoH does not entertain such requests unless there is an associated medical condition.[92] Despite the legal provisions that allow abortion to save lives and the constitutional guarantee of the right to life in section 16 of the Constitution, pregnant minors in Malawi are compelled to carry unwanted pregnancies to term.[93] Until

88 UN Human Rights Committee (HRC) General Comment 36, art 6 (Right to life), 3 September 2019, UN Doc CCPR/C/GC/35 (2019) para 7.

89 T Grønvik & I Fossgard Sandøy 'Complications associated with adolescent childbearing in sub-Saharan Africa: A systematic literature review and meta-analysis' (2018) 13 *PloS one* e0204327.

90 S Atuhaire 'Abortion among adolescents in Africa: A review of practices, consequences, and control strategies' (2019) 34 *International Journal on Health Planning and Management* e1382-e1384.

91 UN Human Rights Committee (n 88) para 8.

92 That was the first defendant's argument in *CM (Minor)* that, upon examining the CM, they did not find any comorbidity associated with the pregnancy, meaning that they identified no risk to health or life of the pregnant child.

93 UN Human Rights Committee (n 88) para 3: The HRC has advised states not to interpret the right to life narrowly, because the right to life 'concerns the entitlement of individuals to be free from acts and omissions that are intended or

the case of *CM (Minor),* no one had challenged this injustice in court or sought to clarify the legality of the blanket denial of access to safe abortion. The government's failure to take proactive measures to ensure full implementation of access to safe abortion presents an opportunity for women and girls to seek justice through the judicial system.

Public interest litigation in other thematic areas in Malawi has yielded positive results, such as the Constitutional Court's declaration of section 184 of the Penal Code on rogues and vagabonds as unconstitutional.[94] This trend suggests that public interest litigation on abortion has a fair chance of being determined in alignment with constitutional standards and Malawi's international obligations. However, for such litigation to have meaningful impact, it must be supported by the women and girls it aims to benefit.[95] Writing about the successful litigation on abortion in Ireland, the authors' views are instructive: 'In 2018, Ireland legalised abortion for the first time. Yet it was not the court system or legislators who were responsible. It was the massive women's movement that took to the streets and organized combative actions to secure the right to abortion.'[96]

Drawing inspiration from successful abortion litigation in Ireland, where women's movements played a pivotal role in achieving legalisation, the authors stress the importance of recognising that public interest litigation on constitutionally guaranteed rights is an expression of the people's power rather than solely the domain of the courts. Courts are meant to serve the people and, as such, stakeholders, including non-governmental organisations (NGOs) and sponsors of public interest litigation, should view litigation as a means, not an end. They should prioritise facilitating access to courts to empower grassroots communities.

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may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

94 A Majamanda 'Analysing the effectiveness of strategic litigation on reproductive rights: A case of abortion laws in Malawi' in KK Mwikya, C Osero-Ageng'o & E Waweru (eds) *Litigating the Maputo Protocol: A compendium of strategies and approaches for defending the rights of women and girls in Africa* (2020) 153-154.

95 Commission on Legal Empowerment of the Poor 'Making the law work for everyone', Report of the Commission on Legal Empowerment of the Poor, vol I (2008) 4.

96 E Lee & R Belano 'Ireland and Argentina won abortion rights through struggle. Protecting our rights here won't be any different' *Left Voice* 11 December 2021, https://www.leftvoice.org/ireland-and-argentina-won-abortion-rights-through-struggle-protecting-our-rights-here-wont-be-any-different/ (accessed 9 January 2022).

This empowerment implies involving communities in the litigation process through educational campaigns, public coverage of court proceedings, and explanations of the judicial outcomes' significance for the effective implementation of remedies. Public interest litigation should be inclusive and encompassing, emphasising the mobilising of community support. Ultimately, it should be seen as an expression of the people's power to shape their destiny and ensure the realisation of their fundamental freedoms. This approach, regrettably missing in *CM (Minor)*, should guide future public interest litigation efforts in pursuing justice and advancing the legal right to safe abortion.

8 Conclusion

The criminalisation of termination of pregnancy in conjunction with the introduction of Western medical practices during the colonial era in Malawi by the United Kingdom has had a profound and lasting impact on maternal health issues. This historical context has left a legacy that continues to affect the ability of girls and women to access safe abortion services. Despite positive steps taken in recent years to recognise sexual and reproductive health and rights, particularly through the Gender Equality Act, the patriarchal abortion regulations established during colonial rule still hold sway, often overriding the human rights protections enshrined in the Constitution.

The penal law remains a formidable barrier for girls and women who find themselves in situations where they wish to terminate a pregnancy. The legal framework, while allowing abortion in cases to save the pregnant woman's life, is vague and lacking in specificity. This ambiguity creates significant challenges for both healthcare providers and potential clients. Healthcare providers may hesitate to offer legal abortion services, fearing legal repercussions if they misinterpret the law. On the other hand, potential clients, even those with high-risk pregnancies, may be deterred from seeking legal services due to confusion about their eligibility or misguided beliefs about the law. This environment, compounded by the ongoing stigma surrounding abortion, creates conditions in which girls and women cannot fully realise the sexual and reproductive health and rights guaranteed by the Gender Equality Act and the Constitution. The case of *CM (Minor)* represents a significant milestone in the ongoing effort to clarify the legal framework surrounding abortion in Malawi. It marked the first attempt to address the complexities and ambiguities

within the existing laws. Moreover, it served as a valuable learning experience for all stakeholders involved in public interest litigation in the country.

As we conclude this chapter, we are aware of a second case that has been filed before the High Court of Malawi, to clarify access to legal abortion for a child whose pregnancy resulted from sexual violation. It serves as a testament to the power of the people, in this case, a girl, to leverage the available mechanisms of justice in pursuit of their legal rights. It is a sign that progress is possible and that through collective effort and determination, the path toward ensuring comprehensive sexual and reproductive health and rights in Malawi shall continue to evolve in favour of realising these fundamental rights for everyone.

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