

# A Critical Appraisal of the Role of Retribution in Malawian Sentencing Jurisprudence

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## Abstract

The theory of retribution is a central tenet in Malawian sentencing jurisprudence. Courts have given expression to retribution in various ways, most conspicuously through the recognition of the principle of proportionality as the most important principle in sentencing. Retribution has permeated courts' consideration of certain sentencing factors such as the seriousness of the offence, family obligations and public opinion. Overall, retribution rightly plays a pivotal role in Malawian sentencing jurisprudence by elevating the principle of proportionality to the most important principle in sentencing. Malawian courts have also noted that whether in pursuit of retribution or utilitarianism, the ultimate objective is to arrive at a sentence that is just and fair in relation to the crime and the offender. This also ensures that the sentence imposed does not offend the prohibition of cruel, inhuman and degrading punishment.

**Keywords:** sentencing, retribution, just deserts, punishment, Malawi

## 1 Introduction

The justification for punishment invokes three key questions: why punish? Who should be punished? How much? Theories of punishment fall into two groups: utilitarian and retributivist.<sup>1</sup> Utilitarian theories are more concerned with preventing future crime while retributivist theories focus on the past; that is, punishment as being deserved by offenders. Utilitarian theories include deterrence, incapacitation and rehabilitation. Oftentimes, penal systems exhibit a blend of these justifications. This article seeks to examine the judicial application of retribution in Malawi by analysing sentence decisions in which courts have alluded to retributive principles. It commences with a summary of the theory of retribution, then considers the role of the aims of punishment in Malawi generally. The article then turns to case law dealing with the sentencing of adult offenders to understand how retribution is applied in practice.

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1. B.A. Hudson, *Understanding Justice: An Introduction to the Ideas, Perspectives and Controversies in Modern Penal Theory* (1996), at 1.

## 2 Understanding Retribution

Although there are various versions of retribution,<sup>2</sup> the theory of retribution is generally based on four basic claims: the principle of wilful wrongdoing, the principle of proportionality, the principle of necessity, and the principle of inherent justice. The principle of blameworthiness or wilful wrongdoing holds that the justification for punishment is the blameworthiness of an offender who willingly commits an offence. The principle of proportionality is an essential consequence of the theory of retribution as it is based on the principle of just deserts. It demands that punishment must fit the crime; that is, the quantum of suffering inflicted on the offender should be proportional to the gravity of the crime. In determining the severity of punishment, a court must look to the moral culpability of the offender and the seriousness of the offence. Serious offences should be punished more severely than minor offences to reflect the moral gravity of the offences.<sup>3</sup> The gravity of an offence can be gleaned from the harm it causes and the moral culpability of the offender. Considerations external to the offence should have a minimal role, if any, in determining the punishment. Therefore, factors such as the prospect of rehabilitation, a plea of guilt, character, cooperation with the state, and prior convictions should not be major considerations in sentencing. Kant invoked the principle of just desert as the only principle that can ensure proportionality in sentencing and should be the basis for punishment.<sup>4</sup> The third principle of retribution is the intrinsic goodness of punishment. Punishment is seen as justified in

2. Retribution includes the repayment theory, desert theory, penalty theory, minimalism, satisfaction theory, fair play theory, placation theory, annulment theory and denunciation theory: see J. Cottingham, 'Varieties of Retribution', 29 *Philosophical Quarterly* 238 (1979); N. Walker, 'Even More Varieties of Retribution', 74(29) *Philosophy* 595 (1999).
3. H.L.A. Hart, *Punishment and Responsibility: Essays in Philosophy* (1968), at 234.
4. I. Kant, 'The Penal Law and the Law of Pardon', in M. Tonry (ed.), *Why Punish? How Much? A Reader on Punishment* (2010) 31, at 32. The principle of *lex talionis* or 'an eye for an eye' has been attacked as a 'barbaric law of retaliation in kind'. However, this criticism is based on a mistaken understanding that the principle demands that an offender should suffer the same harm that he has caused the victim, a conclusion that can understandably be drawn from a literal reading of the principle. Kant did not use the principle in this literal sense: see generally M.J. Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment', 28(1) *Oxford Journal of Legal Studies* 57 (2008).

itself. Kant<sup>5</sup> and Packer<sup>6</sup> therefore consider that while other goods may be derived from punishment, they must not be pursued for their own sake. Lastly, the principle of necessity stipulates that punishment is obligatory and that a state has a right to punish offenders. Other scholars have even argued that the moral culpability of an offender gives rise to a ‘duty to punish’<sup>7</sup> and that offenders have ‘a right to be punished’.<sup>8</sup>

The theory of retribution has its strengths and weaknesses. It is correct that the basis for punishment is really the fact that a person has wilfully committed a wrong and that punishment must be proportional to the gravity of the crime. The principle of proportionality is recognised as a central concept in sentencing that has been embraced in several international instruments and national constitutions. It ‘is rooted in the rule of law, legal safeguards and guarantees against the excessive use of force’ that effectively prohibit misuse and arbitrariness of punishments.<sup>9</sup> Retribution does however have its difficulties.

For instance, retribution ignores the external factors that account for criminality such as poverty, disadvantage and discrimination, upbringing and unemployment. Moreover, the desire to punish does not in itself justify punishment: the fact ‘that wrongdoing necessarily prompts a punitive impulse, does not make intrinsic retributivism a justification for punishment’. There are situations where a court may decide not to convict, let alone impose punishment, despite the fact that an offence has been proved beyond reasonable doubt. In short, retribution does not provide a general justifying aim for punishment but only its distributive principles; namely that only the guilty should be punished, and only in proportion to the gravity of their crime.<sup>10</sup>

A further criticism of retribution is its rejection of the consequences of punishment as a crucial part of the justification for punishment. While it is important to ensure that punishment is kept within the limits of the principle of proportionality, the challenge is ensuring how other goals like crime prevention can be achieved with due respect to the rights of offenders including the

right to human dignity. In this regard, Kant’s observation that offenders must not be used merely as a means to an end is instructive. It entails that the severity of punishment must not be detached from the gravity of the offence; that punishment must not be imposed simply to achieve some benefit such as community protection or deterrence. This is consistent with the right to human dignity and, to some extent, the right to liberty in cases where imprisonment or any punishment that involves restriction of liberty is imposed.

Retribution has also been criticised for its failure to clearly define proportionality. As noted by Frase, ‘excessiveness and disproportionality are meaningless concepts in the absence of a clearly defined and defensible normative framework’.<sup>11</sup> To understand the principle of proportionality, ‘it is necessary to determine the factors that are relevant to the seriousness of the offence and how offence severity should be gauged’.<sup>12</sup> A further challenge to proportionality is the inconsistent treatment of aggravating and mitigating factors in sentencing. The legislature and the courts should strive to treat these factors consistently and to develop standards as to when particular forms of punishment may or may not be imposed. For instance, imprisonment, regardless of its duration, is generally considered a severe form of punishment. Minor offences should not attract imprisonment.

Considering the above discussion, retribution must be relegated to a distributive principle of punishment, whereby it acts as a guide on the quantum of punishment; punishment must at the least reflect the gravity of an offence and the circumstances of an offender. This is based on an understanding that the principle of proportionality is a limiting principle, providing for an upper limit on punishment while leaving room for judicial discretion in determining the actual sentence imposed in each case. This allows a court to ponder other considerations when sentencing while being restrained on the maximum punishment it can impose.<sup>13</sup>

It is apposite at this point to consider more generally the role of the aims of punishment in Malawian case law before focusing on retribution. Thereafter, the article focusses on the way retribution finds expression in Malawian sentencing jurisprudence including whether and how the weaknesses of retribution identified manifest.

5. Kant, above n. 4, at 31-32.

6. H.L. Packer, ‘Theories of Punishment and Correction: What Is the Function of Prison?’, in L. Orland (ed.), *Justice, Punishment, Treatment: The Correctional Process* (1973) 183, at 184.

7. M. Moore, ‘The Moral Worth of Retribution’, in A. von Hirsch and A. Ashworth (eds.), *Principled Sentencing: Readings on Theory and Policy* (1998), 150. R.A. Duff, *Trials and Punishments* (1986), at 70; M.R. Gardner, ‘Rethinking *Robinson v. California* in the Wake of *Jones v. Los Angeles*: Avoiding the “Demise of the Criminal Law” by Attending to “Punishment”’, 98 *Journal of Criminal Law and Criminology* 429 (2008), at 480.

8. See, for instance, H. Morris, ‘Persons and Punishment’, in J. Feinberg and H. Gross (eds.), *Punishment: Selected Readings* (1975) 74, at 83; M.R. Gardner, ‘The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons’, 68(1) *Nebraska Law Review* 182 (1989); M.R. Gardner, ‘The Right to be Punished: A Suggested Constitutional Theory’, 33 *Rutgers Law Review* 838 (1981).

9. T. Lappi-Seppälä, ‘Sentencing and Punishment in Finland: The Decline of the Repressive Model’, in Tonry, above n. 4, 239, at 240.

10. H.L.A. Hart, ‘Prolegomenon to the Principles of Punishment’, in Tonry, above n. 4, 195 at 202-203; J. Jacobs, ‘Luck and Retribution’, 74(4) *Philosophy* 535 (1999).

11. R.S. Frase, ‘Limiting Excessive Prison Sentences Under Federal and State Constitutions’, 11(1) *Journal of Constitutional Law* 39 (2008), at 40.

12. M. Bagaric, *Punishment and Sentencing: A Rational Approach* (2001), at 164.

13. See N. Morris, ‘Desert as a Limiting Principle’, in von Hirsch and Ashworth (eds.), above n. 7, 180, at 184: ‘The concept of desert defines relationships between crime and punishments on a continuum between the unduly lenient and the excessively punitive within which the just sentence may on other grounds be determined’.

### 3 The Role of the Aims of Punishment in Sentencing

The justifications for punishment are of judicial and legislative relevance and have important policy implications.<sup>14</sup> They not only inform sentencing principles and practices but also determine the nature and severity of sentences.<sup>15</sup> The goals of punishment are also relevant in the execution of sentences and therefore affect post-sentence procedures such as parole. Malawi has a hybrid penal system that recognises all the traditional aims of punishment: retribution, deterrence, community protection (incapacitation) and rehabilitation. This hybrid approach is evident in the forms of punishment available. The law provides for, among others, the death penalty, imprisonment, fines, probation, community service and police supervision. The hybrid approach is also evident in how courts rationalise their choice of punishment. Imprisonment remains largely used for community protection and deterrence while rehabilitation is deemed suitable for young and first offenders. This sees courts exercising greater mercy to first and young offenders, opting for non-custodial sentences or short terms of imprisonment where the offence is very serious.

However, there seems to be some inconsistency as to the proper role of the aims of punishment during the sentencing process. The *Magistrate's Court Sentencing Guidelines*<sup>16</sup> state that the seriousness of the offence must be assessed before a court decides the aim of punishment in a particular case. This suggests that the decision as to which aim(s) of punishment to pursue must be informed by the seriousness of an offence. Writing in 1997, Chimasula Phiri J was of the view that the aims of a sentence must be the first decision to make in sentencing.<sup>17</sup> However, in the 2013 case of *Rep v. Kufandiko*,<sup>18</sup> Mwaungulu J decided that public interest considerations regarding the aims of punishment should only come into play after the right sentence has been identified. Similarly, *Rep v. Keke*<sup>19</sup> held that the goals of pun-

ishment ('public goals') must be the last factor to consider when sentencing.<sup>20</sup>

Since the factors that a court considers in sentencing and the weight attached to them is intricately linked to traditional theories of punishment, it is insignificant whether chronologically the aims of punishment are considered first or last in the sentencing process. Indeed, even where a court does not make specific reference to a particular theory of punishment, as is often the case in Malawi, the factors used in arriving at the sentence are the key to identifying the underlying rationale for the sentence imposed. Therefore, the aims of punishment are always the framework within which a sentence is imposed; the only difference is that courts will vary as to the emphasis they place on particular factors and, by implication, the theories of punishment they employ. It is this variance in emphasis that determines the quantum of punishment in the end.

Courts have drawn a clear distinction between the aims of punishment and sentencing principles. For instance, in *Rep v. Phiri*,<sup>21</sup> the accused, a first and young offender, was sentenced to seven years for the theft of three cows. The aim of the sentence was purportedly reformation of the offender. It was held on appeal that the sentence reflected confusion between the purpose of a sentence and sentencing. The court noted that the purpose of a sentence helps little in arriving at an appropriate sentence in a particular case. It found that the sentence was disproportionate in the circumstances and also in the light of sentences imposed in more serious cases. This judgment reveals that courts are wary of overemphasising the purposes of a sentence in the sentencing process as this might lead to a situation where the circumstances of the offender are overlooked or overemphasised. This would result in sentences that are either too lenient or too severe. *Rep v. Phiri* also reveals the centrality of proportionality in sentencing. Indeed, the High Court has warned that regardless of its purported objective, a sentence must be imposed in the context of a just and fair punishment in relation to the crime and the offender that does not offend the prohibition of cruel, inhuman and degrading punishment.<sup>22</sup> It is important to remember that sentencing principles derive from the aims of punishment.

Proportionality continues to be recognised as the paramount principle in sentencing and is therefore generally regarded as cutting across all other justifications of punishment. In *Rep v. Nangwiya*,<sup>23</sup> the court held that 'the

14. See C.C. Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (2008), at 23-30.

15. S. D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (2011), at 33.

16. Malawi Judiciary *Magistrate's Court Sentencing Guidelines* (2007), hereafter *Sentencing Guidelines*.

17. Justice Chimasula-Phiri, 'Sentencing Made Simple: A Practical Approach', Proceedings of a Malawi Judiciary Workshop on 'Bail and Sentencing' (1997), at 9.

18. *Rep v. Kufandiko* Confirmation Case No 126 of 2009.

19. *Rep v. Keke* Confirmation Case No 404 of 2010.

20. *Rep v. Keke* Confirmation Case No 404 of 2010, 3-4: 'Over all, in considering whether the sentence is cruel inhuman or degrading, the appellate court will investigate if the sentence fits the offence (crime), the victim, the offender, and the public interest or public goals. Courts sentencing at first instance must carefully examine these four heads of sentence and treat them in this order. In practical sentencing, the sentencer must operate in this order. This sequencing is more likely to produce uniform and fair sentences after properly considering factors exogenous to the crimes that are determinative of final disposal of the crime and the offender'.

21. *Rep v. Phiri* [1997] 2 MLR 92 (HC).

22. *Rep v. Keke* Confirmation Case No 404 of 2010, 8.

23. *Rep v. Nangwiya* Confirmation Case No 608 of 1997.

sentence passed must be just to the offender, the offence and the victim and should reflect the public interest in prevention of crime'. *Rep v. Nkhoma*<sup>24</sup> also held:

It is not proper that the court, to achieve any of the purposes of sentencing, retribution, deterrence, incapacitation, reformation and rehabilitation, should compromise principles of sentencing. Principles of sentencing are different from purposes of sentencing. Normally the purposes of sentencing do not assist the court in arriving at the appropriate quantum of a sentence. An appropriate sentence must achieve proportionality, equality and restraint. The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance.

Courts have also linked proportionality to the prohibition of cruel, inhuman or degrading punishment or treatment. The High Court has stated that long sentences that are disproportionate to the personal circumstances of an offender violate the fundamental right not to be subjected to any cruel and unusual treatment.<sup>25</sup> In *Rep v. Pose*,<sup>26</sup> it held that whether a violation had occurred would depend on the circumstances of the offence and comparable sentences both for an aggravated form of the offence and more serious offences.

## 4 Retribution in Malawian Sentencing Jurisprudence

The central principle of retribution is that the punishment must fit the seriousness of the crime and the blameworthiness of the offender. Retribution is widely employed as a justification for punishment in Malawi. While reference to the word 'retribution' itself is rare, sentencing courts have referred to notions of retributive justice in their sentencing judgments. For instance, they often make subtle reference to the notion of just deserts by stating that an offender 'deserves' a particular punishment. Retribution is also evident in that 'young'

offenders are generally treated with mitigation.<sup>27</sup> This is because they are regarded as being less blameworthy, committing crimes due to peer pressure, impetuosity, immaturity, youth or adventure.<sup>28</sup>

The seriousness of the offence is the most determinative factor in sentencing and indeed in the decision to imprison. Courts have prescribed that serious offences must be punished with long and immediate imprisonment in order to send the right message to society,<sup>29</sup> to mark the gravity and public disapproval of the offence, and to punish the offender.<sup>30</sup> It was stated in *Rep v.*

27. *Mzungu v. Rep* Criminal Appeal Case No 21 of 2007; *Rep v. Banda* Confirmation Case No 359 of 2012; *Rep v. Yasin* Confirmation Case No 219 of 2012. The definition of a 'young' offender is fluid because it is not fixed to a specific age or age range: see *Asekwe v. Rep* Criminal Appeal No 59 of 2000 (offenders aged 27 and 28 years); *Matewere v. Rep* Criminal Appeal No 63 of 2005 (23-year-old offender); *Rep v. Phiri* Confirmation Case No 430 of 2003; *Patel v. Rep* (23-year-old offender); *Rep v. Kachule* Confirmation Case No 234 of 2001; *Nzabva v. Rep* Criminal Appeal 6 of 2007 (21-year-old offender); *Phiri v. Rep* Criminal Appeal No 111 of 2006 (21-year-old offender); *Rep v. Magombo* Confirmation Case No 264 of 2011 (23 years young); *Rep v. Chatepa* Confirmation Case No 822 of 2004. In some cases, older offenders aged between 30 and 40 years have also been regarded as young offenders: see for instance *Sipiliyano v. Rep* Criminal Appeal No 59 of 1998 (34 years); *Rep v. Mtendere* Confirmation Case No 310 of 210 (34 years); *Chanza v. Rep* Criminal Appeal No 170 of 2005 (36 years 'very young'); *S v. Mbale* Criminal Case Number 32 of 2008 (32-year-old 'fairly young'). *Rep v. Magombo* Confirmation Case No 264 of 2011 (offender 35 years); *Rep v. Mtendere* Confirmation Case No 310 of 210 (offender 34 years); *Namizinga v. Rep* MSCA Criminal Appeal No 18 of 2007 (22 years old); *Namboya v. Rep* MSCA Criminal Appeal No 14 of 2005 (28 years 'fairly young') *Rep v. Malizani* Criminal Case No 219 of 2010, 5 (35 years not youthful age but may be taken beneficial to first offender as he has lived long without legal blemish); *Rep v. Masamba* Confirmation Case No 411 of 2013 (28-year-old offender). In *Rep v. Keke* Confirmation Case No 404 of 2010, the court attempted to expound some general principles to govern the treatment of age in sentencing which can be summarised as follows: Offenders below the age of 25 years should be punished with short and quick sentences because at this age involvement in crime may be due to 'impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending'. However, offenders above 25 years are considered to be mature enough to refrain from criminal behaviour based on a proper understanding of the consequences of crime. This means that on the one hand, such offenders deserve 'a full rigour of the sentence that fits the crime'. On the other hand, a court may be lenient in such cases because an offender has lived long without committing crime and therefore less likely to reoffend. Consequently, offenders aged above 25 may also be punished with 'short and quick sentences'. Here again the reason is that elderly offenders are less likely to reoffend. Sentencers must seriously consider suspending sentences for offenders aged 61 years and above. However, it appears that a court will not exercise leniency unless the offender is very elderly: see, for instance, *Rep v. Mulinganiza* Criminal Case No 306 of 2010 – 82 year old offender; *Rep v. Ng'ambi* [1971-1972] 6 ALR Mal 457 (HC) – 80 year old offender. Cf *Rep v. Misomali* confirmation Case No 527 of 1996, where a 55-year-old offender was considered to be 'a responsible adult' deserving of no mercy despite the fact that he was a first offender and had pleaded guilty.

28. *Rep v. Keke* Confirmation Case No 404 of 2010; *Rep v. Chavula* Confirmation Case No 93 of 2005, 5; *Patel v. State* Criminal Appeal No 81 of 2007. Research indicates that peer pressure is a common factor that influences older offenders to commit crime: see P. Burton et al., *Understanding Offenders: Prisoners and Rehabilitation in Malawi* (Pretoria: Institute for Security Studies, 2005), at 27.

29. *Chitsonga v. Rep* [1995] 1 MLR 86 (HC) 88.

24. *Rep v. Nkhoma* Confirmation Case No 3 of 1996.

25. *Rep v. Pose* [1997] 2 MLR 95 (HC).

26. *Rep v. Pose* [1997] 2 MLR 95 (HC).

*Masula*<sup>31</sup> that the consideration in sentencing should always be the seriousness of the offence. The seriousness of an offence can be garnered from the nature of the offence (the actions and mental component comprising the crime),<sup>32</sup> the circumstances in which it was committed<sup>33</sup> and the maximum sentence (which, theoretically, reflects the public's view of the offence and is an indicator of the public interest in a crime because it is set by parliament as the representative of the public),<sup>34</sup> the effect of the crime on society,<sup>35</sup> the motive<sup>36</sup> and the *modus operandi*.<sup>37</sup> The pursuit of community protection and deterrence, especially where the offence is serious, would also justify a departure from sentencing principles provided this does not result in an extraordinarily excessive sentence.<sup>38</sup>

The High Court has repeatedly held that serious offences must be punished with long and immediate imprisonment,<sup>39</sup> a principle to be departed from only in 'extremely rare' or exceptional circumstances when the mitigating factors outweigh the aggravating factors 'considerably', such that a court may opt to suspend the sentence or impose a non-custodial one.<sup>40</sup> In practice, serious offenders rarely escape imprisonment even in the

presence of strong mitigating factors,<sup>41</sup> more so where the offence was committed in the most austere of circumstances.<sup>42</sup>

30. *Rep v. Msowoya* [1987-1989] 12 ALR Mal 394 (HC).

31. *Rep v. Masula* Criminal Case No 65 of 2008.

32. *Rep v. Edisoni* Confirmation Case No 421 of 2001. Strict liability is mitigating factor: see *Mangani v. Rep* Criminal Appeal No 3 of 2007.

33. *Rep v. Maele* Confirmation Case No 654 of 2001; *Rep v. Themule* Confirmation Case No. 228 of 2002.

34. *Rep v. Iddi* Confirmation Case No 48 of 1998; *Rep v. Timba* Criminal Case No 88 of 2009; *Rep v. Misomali* Confirmation Case No 738 of 2000; *Rep v. Cheuka* Criminal Case No 73 of 2008. Offences that are serious by nature include murder, manslaughter, robbery, housebreaking (see *William Hassan v. Rep* Criminal Appeal No 102 of 2005) and theft by public servant (see *Rep v. Koloko* [1995] 2 MLR 723 (HC)).

35. *Rep v. Kambalame* Criminal Case No of 108 of 2002 (effect of corruption on economy considered).

36. *Rep v. Mbewe* [1973-1975] 7 ALR Mal 124 (HC) where the defilement of a 13-year-old girl in the presence of another person was found not to have been committed out of lust but aimed at degrading and humiliating victim; *Nyamatcherenga v. Rep* Criminal Appeal No 56 of 2000.

37. See for instance *Rep v. Tito* [1995] 2 MLR 638 (HC); *Rep v. Chikazingwa* [1984-1986] 11 ALR Mal 160 (HC); *Chimanya v. Rep* MSCA Criminal Appeal No 8 of 2006 (SCA) 5. The offence will be aggravated where the manner in which an offence was committed reveals elements that show a disposition beyond the ordinary elements or requirements of the offence portraying a dangerous criminal: see *Harry v. Rep* Criminal Appeal No 5 of 2005; *Asekwe v. Rep* Criminal Appeal No 59 of 2000 ('peculiar determination and criminal ingenuity', a 'real criminal mind at work'); *Rep v. Banda* Confirmation Case No 633 of 1999 (violent and evil person with a high level of criminality evidenced by the fact that the victims were terrorised and manhandled); *Idi v. Rep* [1994] MLR 99 (HC) 102 (19-year-old first offender described as 'a determined and dangerous criminal' after raping his victim while brandishing a knife). Aggravation of the offence may also be enhanced by the way the victims were treated by an offender: such as brutality (*Chinkango v. Rep* MSCA Criminal Appeal No 7 of 2009 (SCA) (victim was brutally stabbed to death); victim held captive (*Rep v. Alick* [1997] 2 MLR 73 (HC); *Mwale v. Rep* Criminal Appeal Case No 5 of 1994); victim threatened, humiliated or injured (*Rep v. Mandawala* Confirmation Case No 930 of 2003 (victim threatened); *Rep v. Layelo* Confirmation Case No 577 of 2000; *Rep v. Manjeza* [1995] 2 MLR 571 (HC) – complainant was tied up naked and his wife raped 'in a very disgraceful and revolting manner' in the presence of her husband and children; *Rep v. Malola Idi* Confirmation Case No 658 of 2000) repeated assaults (*Rep v. Mawayi* Confirmation Case No 794 of 2000; *Rep v. Makuluni* Confirmation Case No 276 of 2001; *Manuel Peter v. Rep* Criminal Appeal No 65 of 2008; *Nwangwu v. Rep* Criminal Appeal No 11 of 2008 (SCA); dangerous weapon was carried or actually used (*Rep v. Iddi* Confirmation Case No 48 of 1998; *Rep v. Mkoma* [1995] 2 MLR 598 (HC); *Rep v. Chikakuda* [1997] 2 MLR 288 (HC) 294; *Rep v. Masula* Criminal Case No 65 of 2008; *Naison v. Rep* Criminal Appeal No 42 of 1996; *Kachimanga v. Rep* Criminal Appeal 180 of 2005; *Khonje v. Rep* Miscellaneous Criminal Case No 41 of 2009; *Moses v. Rep* Criminal Appeal No 106 of 2006; *Uladi v. Rep* MSCA Criminal Appeal No 5 of 2008 (SCA), 20 years for murder where bare hands used to fight victim; *Kwalala v. Rep* MSCA Criminal Appeal No 3 of 2008 (SCA); *Rep v. Banda* Confirmation Case No 633 of 1999; *Rep v. Chalunda* Miscellaneous Criminal Case No 3 of 2008; *S v. Silumbu* Criminal Case No 39 of 2009, 30 years for murder using s dangerous weapon; *Ngulube v. Rep* Criminal Appeal No 35 of 2006 (SCA); victim tricked into the crime (*Wesle v. Rep* [1995] 1 MLR 367 (HC); *Rep v. Kamwendo*; *Rep v. Chida* [1995] 2 MLR 644 (HC); *Phiri v. Rep* Criminal Appeal Case No 54 of 2007).

38. *Banda v. Rep* [1990] 13 MLR 56 (SCA); *Kamil v. Rep* [1973-1974] 7 MLR 169 (SCA); *Kumwenda v. Rep* (1993) 16(1) MLR 233 (SCA); *Rep v. Katole* [1993] 16(1) MLR 472 (HC); *Rep v. Phale* [1991] 14 MLR 438 (HC); *Mpondamwala v. Rep* [1984-1986] 11 ALR Mal 306 (HC).

39. *Mtetera v. Rep* Criminal Appeal No 88 of 2005; *Rep v. Chavula* Criminal Appeal No 93 of 2005, 5; *Rep v. Austin* Confirmation Case No 1222 of 2003; *Rep v. Nkhoma* Confirmation Case No 554 of 1996; *Rep v. Mzuzi* Confirmation Case No 1607 of 1998.

40. *Rep v. Tomasi* [1997] 2 MLR 70 (HC) 72; *Rep v. Kufandiko* Confirmation Case No 126 of 2009.

41. *Mussa v. Rep* Criminal Appeal No 44 of 1995.

42. See also *Rep v. Mkoma* [1995] 2 MLR 598 (HC) 601; *Rep v. Mtaya* Confirmation Case No 98 of 1995; *Phiri v. Rep* Criminal Appeal No 6 of 1996; *Mbekeani v. Rep* Criminal Appeal No 48 of 2006, 20; *Lusale v. Rep* Criminal Case No 141 of 2005; *Lobo v. Rep* Criminal Appeal No 110 of 2008; *Rep v. Chavula* Confirmation Case No 93 of 2005, 6.

Offences considered serious include murder, manslaughter, robbery,<sup>43</sup> burglary,<sup>44</sup> housebreaking,<sup>45</sup> rape and theft by servant.<sup>46</sup> In some cases, courts have prescribed ‘starting points’ for serious offences flagged for long and immediate imprisonment. These include rape (six years),<sup>47</sup> robbery, (three<sup>48</sup> or four<sup>49</sup> years), burglary and housebreaking (six years)<sup>50</sup> arson<sup>51</sup> and theft of cattle.<sup>52</sup> Shorter sentences are considered more appropriate for less serious offences such as breaking into a building, minor cases of sexual indecency, petty frauds, assaults and other instances of violence causing minor injuries.<sup>53</sup> This model of starting points, underscored also by utilitarian justifications for punishment, is religiously followed in the *Sentencing Guidelines* which posit quanta of punishment for myriad offences and a sample of aggravating and mitigating factors, which should justify an upward or lower adjustment depending on the facts of each case. This model is manifestly problematic if only for the reason that it is in direct contrast with the spirit of Malawian penal law, which generally does not provide for minimum sentences, but only maximum sentences. The ‘mathematisation’ of sentencing that comes with starting points is hugely awkward. It confuses the pursuit of consistency with uniformity and indirectly creates an unlawful parallel system of discretionary minimum sentences not contemplated by the Legislature. In other words, the application of starting points effectively sets a standard sentence applicable across the board unless there is a justification to increase or decrease the sentence dictated by the starting point. For instance, a starting point of three years for an offence means that a court should consider three years as the basic sentence for that offence and may only depart from it if the factors tilt in favour of a higher or lesser sentence. This approach is akin to a system of discretionary mandatory minimum sentences where the law sets down a particular sentence and gives courts the power to depart from it if there is proper justification for doing so. This does not sit very well with Malawian penal scheme, which generally only provides maximum

sentences. The provisions simply create a ceiling and leave it up to the courts to determine what the sentence must be within that maximum. So, the application of starting points as advised in Malawi upsets this system. Laudably, the general principle that serious offences should be met with long and immediate imprisonment has been challenged on the basis that it does not duly accommodate the quest for rehabilitation,<sup>54</sup> ignores the adverse effects of lengthy sentences<sup>55</sup> and fails to promote ‘a deliberate policy of decongesting prisons’, which calls for short sentences even for serious offences such as manslaughter, robbery, rape, defilement, burglary, housebreaking, theft of bicycle, theft of livestock ‘and many more to be in the category of serious offences’.<sup>56</sup> The High Court has pointed out that guidelines that emphasise long imprisonment for serious offences are skewed because they ignore the importance of reformation of the offender as they only focus on retributive justice and deterrence without any consideration of the negative consequences of long sentences both on an offender and others.<sup>57</sup> More recently, courts have been called upon to exercise more restraint on the use of immediate imprisonment in sentencing all offences by not automatically imposing it for offences traditionally flagged as serious. Mwaungulu J in *Rep v. Yasin*<sup>58</sup> and *Khonje v. Rep*<sup>59</sup> has urged that in appropriate instances, offences such as burglary and housebreaking may be punished with suspended sentences or indeed a non-custodial sentence altogether. In several cases including *Rep v. Kachaso*,<sup>60</sup> *Kotamu v. Rep*,<sup>61</sup> *Muwamba v. Rep*,<sup>62</sup> *Foster v. Rep*<sup>63</sup> and *Tembo v. Rep*,<sup>64</sup> the High Court commended non-custodial sentences for simple theft. The pursuit of retribution has also seen courts discounting the relevance of certain factors to sentencing. For instance, the rejection of family obligations as a mitigating factor is partly based on retribution. Indeed, Chipeta J in *Rep v. Eneya*<sup>65</sup> emphasised that the consideration of family obligations may detract a court from imposing the right sentence by making it focus on the hardship a sentence may inflict on an offender’s family. Similar sentiments were expressed by Mwaungulu J earlier in *Chitsonga v. Rep*<sup>66</sup> who essentially stated that family

43. For instance, it was held in *Rep v. Chitembeya* that robbery with violence is a serious offence and offenders deserve severe sentences to deter them from further committing crimes and to protect society by keeping them away.

44. *Rep v. Misomali* Confirmation Case No 527 of 1996.

45. *Rep v. Tomasi* [1997] 2 MLR 70 (HC); *Rep v. Chizumila* [1994] MLR 288 (HC); *Rep v. Tembo* Confirmation Case No 726 of 2000 (irrespective of the mitigating factors, a simple burglary should be punished with no less than three years).

46. *Rep v. Madando* [1995] 2 MLR 733 (HC); *Banda v. Rep* Criminal Appeal No 221 of 2009.

47. *Rep v. Ndamera* Confirmation Case No 314 of 2001. Cf *Rep v. Msowoya* [1987-1989] 12 ALR Mal (HC) 394 recommending three years as the starting point for rape if the aggravating factors equal the mitigating factors.

48. *Rep v. Harry* [1997] 2 MLR 74 (HC).

49. *Rep v. Napulula* Confirmation Case No 665 of 2003.

50. *Rep v. Chizumila* [1994] MLR 288 (HC); *Chitsonga v. Rep* [1995] 1 MLR 86 (HC); *Rep v. Iddi* Confirmation Case No 48 of 1998.

51. *Rep v. Kathumba* [1997] 1 MLR 390 (HC) 392; *Rep v. Chitseko* Confirmation Case No 78 of 1997.

52. *Rep v. Phiri* [1997] 2 MLR 92 (HC) 94.

53. *Rep v. Iddi* Confirmation Case No 48 of 1998.

54. *Rep v. Kholoviko* [1996] MLR 355 (HC) 359-360.

55. *Ibid.*

56. *Rep v. Limbani* Confirmation Case No 839 of 2005, 2. The High Court has called for greater recognition of poor prison conditions as a mitigating factor. See *Rep v. Banda* Sentence Rehearing No 9 of 2016, 4; *Rep v. Khwalala* Homicide Sentence Rehearing No 70 of 2015, 4, explaining that poor prison conditions render imprisonment a ‘double punishment’; *Rep v. Senti* Homicide Sentence Rehearing No 25 of 2015, 11, noting that appalling prison conditions add a layer to imprisonment that constitutes ‘punishment on its own’ and put an offender in ‘double jeopardy’.

57. *Rep v. Kholoviko* [1996] MLR 355 (HC).

58. *Rep v. Yasin* Confirmation Case No 219 of 2012.

59. *Khonje v. Rep* Miscellaneous Criminal Case No 41 of 2009.

60. *Rep v. Kachaso* Confirmation Case No 26 of 2012, 6.

61. *Rep v. Kotamu* Confirmation Case No 180 of 2012, 6.

62. *Rep v. Muwamba* Confirmation Case No 247 of 2012, 2.

63. *Rep v. Foster* Confirmation Case No 1690 of 2005.

64. *Rep v. Tembo* Confirmation Case No 187 of 2013.

65. *Rep v. Eneya* Criminal Case No 53 of 2003.

66. *Chitsonga v. Rep* [1995] 1 MLR 86 (HC) 88.

hardship as a result of imprisonment is part of the price to pay when committing a crime.<sup>67</sup>

Punishment is also aimed at denunciation of certain conduct. For instance, the court in *Rep v. Kaira*<sup>68</sup> held that a sentence of three and a half years for defilement was not enough to reflect public revulsion of the offence and its seriousness. It noted that courts must be alive to public sentiments regarding offences and show public disapproval through the sentences they impose. The High Court has in fact reasoned that a combined consideration of all the aims of punishment (retribution, denunciation and deterrence) simply means 'that courts must pass meaningful sentences which will not generate contempt in the eyes of the public. Courts must pass sentences that will fit the crime, the defendant and also satisfy the legitimate expectations of the public'.<sup>69</sup>

Courts have also emphasised retribution by taking account of public sentiments in sentencing and being wary of public response to sentences. It was held in *Rep v. Chikuli*<sup>70</sup> that a victim must 'derive contentment in the sentence imposed'. Courts have also been encouraged to pass meaningful sentences that will reduce resort to mob justice on the part of society.<sup>71</sup> Madise J held in *Ngulube v. Rep* that sentences 'must reflect the general feeling of the public' and 'must not outrage members of the general public'.<sup>72</sup> Similar sentiments were expressed by the High Court in *Banda v. Rep*,<sup>73</sup> *Rep v. Steshi*<sup>74</sup> and *Phiri v. S*.<sup>75</sup> The problem is how to gauge the 'feelings' of the general public. There is also the vexing question of whether judicial officers are competent enough to determine the feelings of the general public.

Chombo J in *Rep v. Masula*<sup>76</sup> stated that a sentence should be of sufficient severity such that 'right-thinking members of the public with full knowledge of the relevant facts and circumstances learning of [the] sentence' should 'not question the court's sanity' or wonder if 'something had gone wrong with the administration of justice'. The material issue here is that a sentence should make sense to 'right-thinking members' of society who are well appraised of not only the circumstances of the offence and the offender but also the complexity of sentences as well as the basic principles of sentencing including that sentencing is not an exact science. In other cases, courts do not seem to give much thought to this matter, most prominently when the need to curb mob justice is invoked. As a result, they have by and large responded by imposing harsher sentences to avoid

mob justice. For instance, in *Mulewa v. Rep*<sup>77</sup> the High Court remarked:

Apart from other things, there is a perception that the increase in the number of [burglary] offences could only have come about because of the sentences that courts impose. Whether this perception is right or not, the public has resorted to mob justice, burning to death, not bringing to the courts, those that offend. It is a reaction, uncivil though it is, which can only be matched by an adjustment in our sentencing policy. This court has, therefore, for these reasons and many others approved of longer and immediate imprisonment.

Similar sentiments were expressed in *Rep v. Chizumila* where it was observed that mob justice is a result of public dissatisfaction with lenient sentences.<sup>78</sup> Again in *Rep v. Nkhoma*,<sup>79</sup> the High Court agreed with the trial court's observation linking mob justice attacks where suspected thieves had been burnt to death to lenient sentences. As I have argued elsewhere, mob justice cannot be resolved by enhanced sentences.<sup>80</sup>

## 5 Do All Offenders 'Deserve' to Be Punished?

As noted earlier, the retribution's claim that offenders deserve to be punished is not entirely correct.<sup>81</sup> In Malawi, this is borne out by a couple of provisions in the Criminal Procedure and Evidence Code (CPEC),<sup>82</sup> which prescribe various 'orders in lieu of punishment'. These orders include reconciliation processes, binding over (or orders to find security), discharge, probation and dismissal. Reconciliation processes are provided for in Section 161 of the CPEC. With regard to binding over, a court may order an offender to enter into a bond 'to keep the peace and be of good behaviour' for a specified period not exceeding one year.<sup>83</sup> If the bond is broken, the bond may be forfeited in accordance with Section 125 of the CPEC. The aim of binding over is to promote peace in the community and deter an offender from re-offending.

Discharge, probation<sup>84</sup> and dismissal may only be imposed where

67. See also *Rep v. Asidi* Confirmation Case No 955 of 1999.

68. *Rep v. Kaira* Confirmation Case No 689 of 2003.

69. *Rep v. Chavula* Criminal Appeal No 93 of 2005, 4.

70. *Rep v. Chikuli* Confirmation Case No 174 of 2005.

71. *Mulewa v. Rep* [1997] 2 MLR 60 (HC) 66.

72. *Ngulube v. Rep* Criminal Appeal Case No 63 of 2011, para 11.1.1.

73. *Banda v. Rep* Criminal Appeal No 7 of 2011.

74. *Rep v. Steshi* Criminal Appeal No 7 of 2001.

75. *Phiri v. S* Criminal Appeal No 63 of 2009.

76. *Rep v. Masula* Criminal Case No 65 of 2008, 2, citing *R v. Fawcett* (1983) 5 Cr App R 158.

77. *Mulewa v. Rep* [1997] 2 MLR 60 (HC) 66. See also *Rep v. Nkhoma* Confirmation Case No 3 of 1996 where the High Court agreed with the trial court's observation linking mob justice attacks where suspected thieves have been burnt to death to lenient sentences.

78. *Rep v. Chizumila* [1994] MLR 288 (HC) 306.

79. *Rep v. Nkhoma* Confirmation Case No 3 of 1996.

80. See E. Gumboh, 'The Application of Deterrence in Sentencing in Malawi', *Potchefstroom Electronic Law Journal* (forthcoming).

81. See Section 1.2 above.

82. See section 377 of the Criminal Procedure and Evidence Code, Chapter 8:01 of the laws of Malawi.

83. Section 338(1) of the CPEC.

84. Malawi does not have a functioning probation system for adult offenders.

the court thinks that the charge is proved but is of the opinion that, having regard to the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, *or* to the fact that the [offender] has not previously committed an offence, *or* to the nature of the offence, *or* to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment ...<sup>85</sup>

Discharge may be absolute or on condition that an offender refrains from committing further offences during a period of up to 12 months.<sup>86</sup> Probation may be imposed on various conditions in order to prevent a repetition of the same offence or the commission of other offences.<sup>87</sup> Conditional discharge and probation may be considered as postponed sentences since an offender will be liable to sentence if he breaches the conditions set by a court.<sup>88</sup> Section 337(5) of the CPEC requires that a court must warn the accused of this consequence. These orders act as deterrents because the possibility of receiving a sentence may act as an incentive for an offender to abide by the bond conditions and refrain from committing further offences. An order of dismissal of a charge is also aimed at deterrence. Since it is mandatory that a caution or admonition must be given in cases of dismissal,<sup>89</sup> dismissal acts as a warning to an accused, thereby creating a possibility that he will refrain from committing further crimes. Courts usually dismiss charges in dealing with minor offences committed in extenuating circumstances. Dismissal would also be appropriate for offences of vagrancy, loitering (or being an idle and disorderly person), nuisances by drunken persons and other offences, which are in fact more properly seen as social problems than criminal behaviour.

It may well be argued that Section 337 is a reaffirmation of well-established sentencing principles in as far as aggravating and mitigating factors are concerned. However, the provision depicts a departure from sentencing principles and retribution in that it allows a court to consider the relevant sentencing factors in the alternative and make an order that may otherwise be seen as manifestly inadequate and even outright offensive. This is evident from the wording of the opening paragraph of Section 337(1), which details that the orders are only applicable where a court is of the view that 'it is inexpedient to inflict any punishment' in view of a list of mitigating factors, namely,

youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, *or* to the fact that the offence has not previously committed an offence, *or* to the nature of the offence, *or*

to the extenuating circumstances in which the offence was committed.<sup>90</sup>

Ordinarily, retribution dictates that mitigating factors cannot be considered independently of the seriousness of an offence; the significance of mitigating factors is diminished when the offence is very serious. However, Section 337 makes it possible for a court to isolate mitigating factors from the seriousness of an offence. This is well demonstrated in the recent case of *Rep v. Mulinganiza*<sup>91</sup> where an 82-year-old terminally ill murder convict was discharged. Kamwambe J, noting that imprisonment would be an inappropriate penalty in the circumstances, said that it was

concerned with the welfare of the convict and this is the time that the court should be enticed to employ humanitarian considerations as the circumstances dictate or demand. This is the whole purpose of section 337 of the [Criminal Procedure and Evidence Code] which should be considered and facts in issue examined *regardless* of the seriousness of the offence. The court cannot afford to be impersonal, for if it were so, then genuine justice would fail to be attained.<sup>92</sup>

Even more recently, Kamwambe J in *Rep v. Kampira*<sup>93</sup> again discharged an offender convicted of manslaughter. Mindful of the seriousness of the offence, the court remarked:

The sentence I am intending to impose on the convict may seem to be novel and ridiculous for one who has taken away a person's life but, considering the circumstances stated above [that the accused is a first offender aged only 27 years at the time of committing the offence], it is the appropriate sentence. We do not only look at the seriousness or nature of the offence but also the circumstances surrounding the crime. It is imperative for me to consider section 337(1)(b) of the [CPEC] which I have rarely applied ... The convict is a first offender who I noticed to be genuinely remorseful. He did not just plead guilty before this court but he admitted to murder when he was charged by the police. This shows how cooperative and remorseful he was. He is of youthful age at 29 now ... In my mind there is some sort of obscurity or uncertainty as to the actual cause of death. In fact, the deceased contributed greatly to his own death

...

In view of what I have stated above, I discharge the convict forthwith under section 337(1)(b) of the CPEC.<sup>94</sup>

85. Section 337(1) of the CPEC. Emphasis supplied. See also section 24 of the Local Courts Act providing for a similar provision in relation to local courts.

86. Section 337(1)(b) of the CPEC.

87. See Section 4(1) of the Probation of Offenders Act, Chapter 9:01 of the Laws of Malawi.

88. Section 341(1) of the CPEC.

89. *Rep v. Ng'oma* Confirmation Case No 988 of 2007.

90. Section 337(1) of the CPEC.

91. *Rep v. Mulinganiza* Criminal Case No 306 of 2010.

92. *Rep v. Mulinganiza* Criminal Case No 306 of 2010, 7. Emphasis supplied.

93. *Rep v. Kampira* Homicide Case No 61 of 2015.

94. *Rep v. Kampira* Homicide Case No 61 of 2015, 4-6.



While neither *Mulinganiza* nor *Kampira* are immune from criticism regarding the sentences imposed, they show that Section 337 permits a court to focus on the circumstances of an offender in deciding how to deal with him. This depicts allowance for completely non-retributive ways of dealing with offenders. Further, it recognises that crime may be influenced by social factors such as home surroundings. In practice, Section 337 orders are reserved for minor offences committed in extenuating circumstances. Indeed, the author is unaware of instances other than *Mulinganiza* and *Kampira* where these orders were imposed for felonies other than theft simpliciter.

## 6 Conclusion

Retribution is hailed for recognising that wilful wrongdoing is the foundation for punishment and for its emphasis on the principle of proportionality, which requires that punishment must be commensurate with the seriousness of an offence. However, retribution is problematic in that it fails to give concrete meaning to what the principle of proportionality actually entails. It also does not take into account the fact that social factors influence criminal behaviour and cannot effectively deal with crime because it largely rejects the fact that punishment may be imposed to achieve certain goals in the interest of the public. Despite these weaknesses, retribution remains a relevant theory because, among other things, it embodies an important distributive principle of punishment, which should guide the imposition of punishment, namely that punishment must reflect the gravity of the offence. However, a penal system must also look to utilitarian theories of punishment such as deterrence, incapacitation and rehabilitation if it is to be a meaningful sentencing policy.

Ultimately, it can be said that retribution rightly plays a pivotal role in Malawian sentencing jurisprudence by elevating the principle of proportionality to the most important principle in sentencing. However, there are still some challenges in how this principle is applied in practice. Admirably, Malawian courts have also noted that whether in pursuit of retribution or utilitarianism, the ultimate objective is to arrive at a sentence that is just and fair in relation to the crime and the offender. This ensures that sentences do not offend the prohibition of cruel, inhuman and degrading punishment. If taken seriously, the principle espoused by Mwaungulu J in *Pose* and *Keke* is the key to principled sentencing in a constitutional democracy like Malawi, which prides itself in having a Bill of Rights with a plethora of protections for offenders. Sentencing is, after all, a human rights issue.<sup>95</sup>

95. L. Kurki, 'International Standards for Sentencing and Punishment', in M. Tonry and R.S. Frase (eds.), *Sentencing in Western Countries* (2001), at 331.