

IRELAND PROMOTING THE RULE OF LAW IN MALAWI

Three Irish lawyers went to Malawi in August to work on a criminal justice project for the coming year. One of those lawyers, Sonya Donnelly, reports



Sonya Donnelly is a practising barrister

Irish Rule of Law International (IRLI), partially funded by Irish Aid, sent three Irish lawyers – Sonya Donnelly BL, Ruth Dowling BL and Carolann Minnock – to Malawi in August to work on a criminal justice project for the coming year. IRLI is a project-orientated, non-profit charity established by the Law Society and Bar Council and is dedicated to promoting the rule of law in developing countries. In Malawi, IRLI is using the experience and knowledge of Irish lawyers to assist in the alleviation of inhumane conditions in prisons by reducing the numbers held in pre-trial detention. The project intends to tackle overcrowding in the prisons through capacity building, training of police officers and magistrates, running bail clinics, becoming involved in the prosecution-led diversion projects, and representing defendants for minor cases in the magistrate's court.

Pre-trial detention

Like elsewhere in Africa, the excessive and extended use of pre-trial detention in Malawi is symptomatic of failings in the criminal justice system. The practices of excessive detention and the holding of prisoners on remand have a broad socio-economic impact, in that men and women are held in prison, often for

many years, without being brought before a court. The project has met homicide detainees who have been in prison without attending court once in over seven years. There have been some progressive changes. The Malawian constitution and recent case law provides a solid legal framework for regulating pre-trial detention, in particular, the fair trial rights of accused people, and the recent enactment of pre-trial-detention

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time limits further strengthen these provisions. However, officials, especially lower-level magistrates (lay judiciary), must receive the necessary training to enable them to exercise firm judicial control over the criminal justice process and enforce custody time limits, which are currently routinely infringed with no consequence.

A recent report, released in August

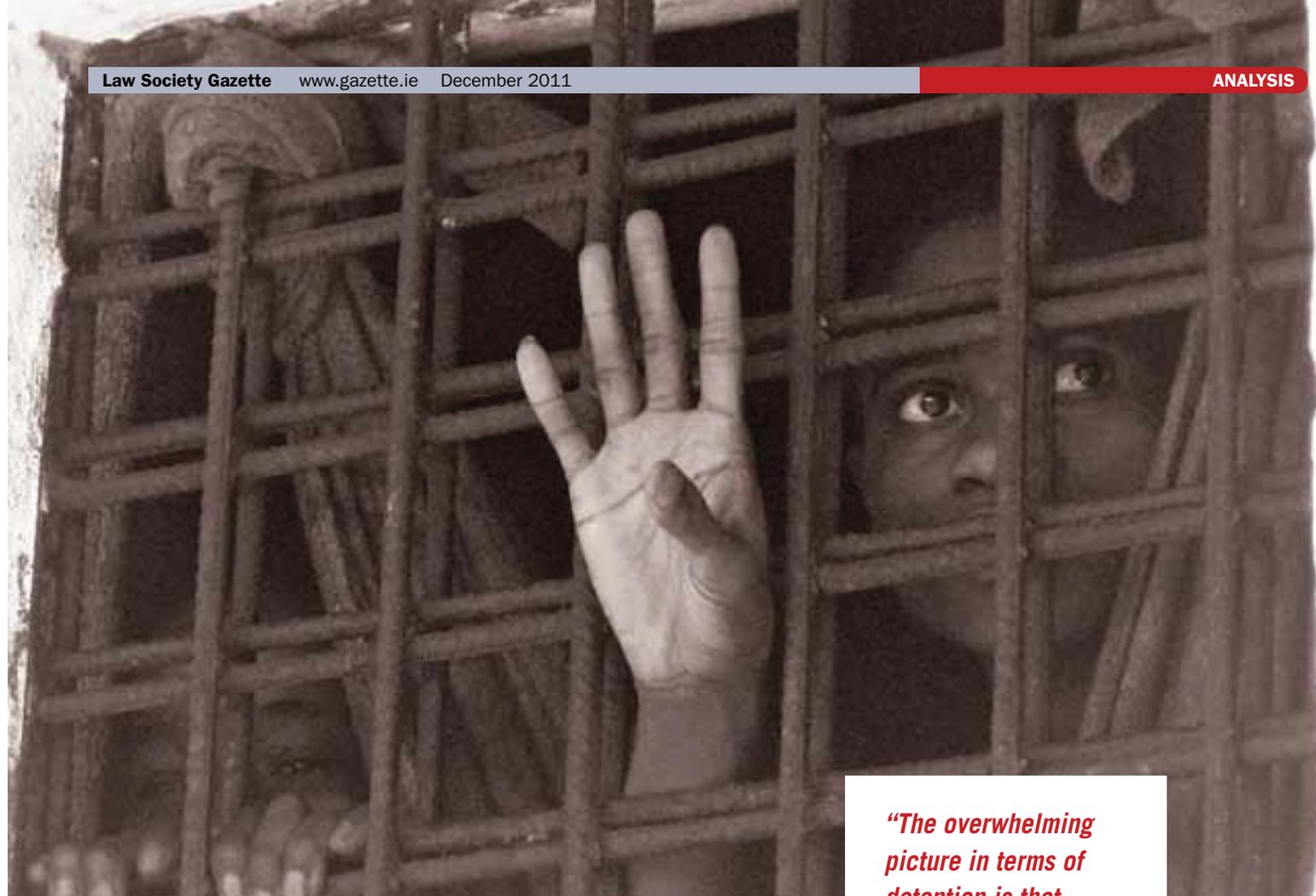
by the Open Society Initiative for Southern Africa (OSISA) found that, of the six adult prisons studied, 8,000 people each year are admitted to pre-trial detention and 6,000 children are admitted to Kachere children's detention centre. This suggests that one in every 250 Malawian men enter these prisons each year. Added to that, given that there are 23 prisons in Malawi and that many are the larger prisons, this report could suggest the actual population entering remand each year may be as high as one in 100 men. On a recent visit to Maula

prison, we discovered that there were 1,986 prisoners in the prison, which has space for only 700. Almost 600 of those were remandees, 122 of whom were being held on expired warrants. Of the approximately 15 bail statements on murder charges we took in one morning in September, over 70% had been in custody longer than one year without trial and without access to a lawyer.

Significant challenges

The introduction of a new constitution with a comprehensive bill of rights in 1995, after decades of autocratic rule, brought hope to the country and marked the dawn of a new era for the criminal justice system. Despite this, almost 20 years later, there are significant challenges facing Malawi's quest to accord fair-trial rights to accused persons. The reasons for this are manifold. The criminal justice system has been slow to adapt to the demands and standards set in the 1995 constitution. Institutions such as the Directorate of Public Prosecutions, the Malawi Police Service and even the judiciary have proved inadequate in terms of institutional framework, structure, attitude and capacity. Finally, as in many struggling economies where poverty and deadly diseases are endemic, the strengthening of the justice system is not high on the government's priority list.

The overwhelming picture in terms of detention is that conditions in police cells are poor, violate the rights of detainees in material ways, and frequently exceed the 48-hour rule. The project has come across detainees who have been kept in police custody for a number of months. The ageing state of many Malawian police stations



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and the insufficient capacity and nature of cell accommodation are the cause of many of the major concerns, and sufficient funds will remain a challenge for the foreseeable future. While conditions in the prisons are also seriously overcrowded, there had been a brief hope for that conditions would improve after the Masangano case ([2009] MWHC 31, 9 November 2009), where the High Court found the applicant had been subjected to torture and cruel, inhuman and degrading treatment, an infringement of his non-derogable rights under section 44 of the Malawian constitution. The court noted that overcrowding had contributed to the death of 259 inmates in a space of about 18 months and, in its final paragraphs, gave the state 18 months to improve conditions. Unfortunately, at the time of writing, the judgment has not been complied with, the deadline being May 2011. As the ‘hot season’ has just started,

it is likely that the number of deaths due to overcrowding will continue to rise.

The project recently started to visit Kachere children’s prison for young male offenders. Today, Kachere holds approximately 130 prisoners. The prison is incredibly small and visibly overcrowded. The OSISA report stated that Kachere is currently at 200% capacity. Of the 130 juvenile prisoners at Kachere prison, many are pre-trial detainees. The project has just started to work with organisations already involved in the system to apply for bail or progress the cases of these young men. The *Child Care Protection and Justice Act 2010* was enacted in July 2010 – however, it is not currently operative. That said, the act does indicate a willingness to take a new approach to dealing with young offenders, as the fifth schedule of the act sets out diversion options available to magistrates whereby a young offender may be diverted away

from prison.

One other project we are looking to become involved with is representing prisoners at the civil-society-led ‘camp courts’. Sometimes the prisons in Malawi lack the transport or the petrol, given the severe shortage the country is currently experiencing, to bring the prisoners to courts – or the courts lack the space to hold the prisoners at court in cells. Accordingly, paralegals invite the magistrates to establish ‘camp courts’ inside the prison. The paralegals draw up lists of those on remand that have overstayed, are held unlawfully, or have been granted bail but cannot afford the terms set by the court. They discuss the lists in advance with the prosecuting authorities. Magistrates attend court with the court clerk and police prosecutor and work through the list: they grant bail

to some, reduce the amount set by an earlier court by way of bond or surety for bail, and dismiss cases where

the accused has overstayed, or set a date when the accused must appear for trial. The chief benefit of this mechanism is that prisoners see the law in action. Magistrates see inside the prisons and are able to do something practical to alleviate the situation. As a consequence, tensions in prison are reduced, and the lower judiciary becomes more thoughtful about the utility of alternatives to prison in appropriate cases.

If you would like more information about this project, including a direct link to our fundraising page, you can access our website at www.irishruleoflawmalawi.com, as well as the IRLI website at www.irishruleoflaw.ie. ©