

**WHERE IS MY ACCESS: THE JUDGE'S ROLE IN ECONOMIC, SOCIAL AND
CULTURE RIGHTS ENJOYMENT?**

**Keynote Address delivered at the 6th Annual Economic, Social and Cultural Rights
Annual Conference held at Makerere University, Kampala, Uganda on 25th
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Representatives of Government Departments

Civil Society Leaders

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Ladies and gentlemen

Distinguished students

Let me first bring you greetings from the Warm Heart of Africa, Malawi. It is a country rich with beautiful people, amazing food, breathtaking mountains and a lake which is fondly called the Lake of Stars or the Calendar Lake. It is a country steeped in diversity in terms of culture, its people and an abundance of natural resources. Secondly, it is an

immense honour that I stand up here to address you at the Sixth Annual Conference on Economic, Social and Cultural Rights under the theme **Strengthening Access to Justice for Economic, Social and Culture Rights**. It is important to note that the theme is highly appropriate right now on the African continent as every country is now aiming for economic prosperity and development for its people. Therefore, my keynote address is suitably placed in this discussion that Africa is having and which I know as recently as last week, Malawi was having in a number of fora.

Before, I proceed into my address, it would be remiss of me if I did not tell you how much of an honour it is that I am here addressing such an esteemed gathering of people. I chose law as a career and I choose public service as my call. I am hoping that my passion for law and its ability to change context for a person, group, community or nation is a call which I think African nations need to hear. Please allow me to thank my hosts for this trip to the Pearl of Africa, the Initiative for Economic, Social and Cultural Rights and Makerere University School of Law. I must thank them because they are giving me an opportunity to someone from the Judiciary to speak on national and continental issues outside of the court and away from the bench which is usually where I most speak from. The ability to discourse with various players in society, is an amazing opportunity for growth and acquiring of knowledge which I greatly treasure.

In beginning today's conversation, it is fundamental that it is rooted in the rule of law. Undeniably, everything in this world and our interactions in it are based on a normative framework whether written or unwritten including economics, societal issues as well as culture. In order to understand, the core nature of economic, social and cultural rights, Eleanor Roosevelt's words add a lot of value to the debate -

"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighbourhood he lives in; the school or college he attended; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned

citizen action to uphold them close to home, we shall look in vain for progress in the larger world".¹

Arguably, economics, societal issues and culture are the bedrock for most people, groups, communities and nations. Interestingly, everyone realizes that economics is critical for any country and its development. Taking into consideration my country Malawi, we are classified as a least developed country with an estimated 70% of the population living below the poverty line and with the majority of the poor in Malawi are women.². Accordingly, the critical discussion on economics and how persons in our countries are able to enjoy their rights in this area is a fundamental aspect that needs interrogation. These interrogations also come at a time where a lot of countries are looking at how their people will benefit from African Continental Free Trade Area Agreement (AfCFTA) which was signed on 21, March, 2018 in Kigali, Rwanda. Malawians are asking themselves, how does the Agreement benefit them individually, collectively as well as a nation as a whole especially looking at the fact that the Agreement promises increased business opportunities in terms of cross-border movement of professionals, unlimited markets and economies of scale which will result in reduced cost of doing business, improved efficiency and profitability. The question is how does the villager enjoy from these gains in terms of his or her own rights as well as development.

Turning to social rights, they are vitally critical to development as society is the foundation for our countries. The enjoyment of such rights like the right to education, affordable housing, health or social security are issues in this Century which have become pivotal especially in a world that is ever growing and resources are diminishing. It is undeniable, that apart from litigation in the various judiciaries across the world on civil

¹ Eleanor Roosevelt, Excerpt from a speech by Eleanor Roosevelt at the presentation of "IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights." Thursday, March 27, 1958. United Nations, New York. <https://ironline.american.edu/blog/our-basic-human-rights/> (accessed: 20th September, 2019).

² Malawi Systematic Country Diagnostic: Breaking the Cycle to Low Growth and Slow Poverty Reduction World Bank – <http://documents.worldbank.org/curated/en/723781545072859945/pdf/malawi-scd-final-board-12-7-2018-12122018-63680421642580639.pdf> (accessed 19th September, 2019)

and political rights, social rights are being seen on our case load more often than not. Therefore, a critical look on how access to justice affects their realization is timely.

Turning to culture, which on the African continent which if I may be allowed is only comparable to religion in terms of context and its rootedness. Culture is very deeply rooted in most African societies and has a major bearing on a number of issues including how we develop as well as enjoyment of rights as noted its interaction with equality, non-discrimination and human dignity. In a world where development is topical, cultural rights are a component that should not be overlooked. It is therefore undeniable that these rights play a central role for changing and developing society and according to Eide and Rosa stated that taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include a major concern with the protection of vulnerable groups, such as the poor. Further that fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements³. This is why this discussion today is very important.

At this point, it is important to highlight that my address will mainly focus on the role that the Malawian judiciary has played in the enjoyment, promotion and protection of economic, social and cultural rights. However, it will make comparatives with a number of African jurisdictions as well as international ones so as to contextualize and buttress issues as well as highlight some of the inefficiencies challenging the Malawian and at times African judiciaries.

Firstly, it is imperative that I start with the Constitutional set up of Malawi where in section 4, it states that this Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it. Furthermore, the

³ Eide, A. and Rosas, A. 1995. 'Economic, social and cultural rights: A Universal Challenge' in A Eide *et al.* (eds.), *Economic, Social and Cultural rights*. Martinus Nijhoff Publishers, pp 17-18

Constitution has placed solely the responsibility of interpreting the Constitution on the Judiciary⁴ as per section 11 -

- (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.
- (2) In interpreting the provisions of this Constitution a court of law shall –
 - (a) promote the values which underlie an open and democratic society;
 - (b) take full account of the provisions of Chapter III and Chapter IV; and
 - (c) where applicable, have regard to current norms of public international law and comparable foreign case law.
- (3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.
- (4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

The deliberate emphasizing the above sections is because they prove essential in the issue of access to justice which is the topic of discussion herein. Accordingly, section 12 of the Constitution is one which discussion should also take note of –

- (1) This Constitution is founded upon the following underlying principles –
 - (a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
 - (b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
 - (c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;
 - (d) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
 - (e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and

⁴ Section 9 of the Constitution – sets up the separate status, function and duty of the Judiciary

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

(2) Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognized communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest.⁵

It should be noted that from the beginning that the Malawian contextual framework on human rights has been immensely stimulated by Chapter IV of our Constitution which provides for our Bill of Rights. This Chapter captures a number of fundamental rights and important for the topic herein is section 15 anchoring everything under it. Section 15 provides that –

(1) The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

(2) Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.

In terms of the rights which we are focusing on today, the following sections are what exist in the Malawian legal set up – section 25 on education, section 26 on culture and language, section 27 on slavery, servitude and forced labour, section 28 on property⁶, section 29 on economic activity, section 30 on right to development and section 31 on labour to mention a few. Understandably, the list is not exhaustive but their explicit

⁵ See also sections 13 and 14 on principles of national policy and application of the policy principles

⁶ **Zione Ntaba (As Executor of the Will and Estate of Late GM J Ntaba) v Commissioner for Lands et al**, Civil Cause No. 624 of 2010 – a case where the Applicant sought deceased property which was grabbed and fraudulently transferred to be returned. The Court held in favour of the Applicant and the will's provisions were upheld.

presence provides a great legal basis for legal challenges that come before our courts. It should be emphasized that having the Bill of Rights which encompasses these rights offers a conducive basis for the Judiciary to interpret and enforce the law where there are violations.

Accordingly, it seems appropriate that we address the issue of access to justice at this point before moving deeper into the rights conversation. Arguably, access to justice for most legal persons is usually in terms of the right to legal redress in a court of law or the right to a fair trial in strictest sense. However, the rights discourse in terms of access to justice as a principle of the rule of law has to take everything into consideration, that is, not just the formal justice system but also the informal justice system. In the simplest terms it has to be broader. Access should include issues of legal literacy, legal empowerment, availability of 'frontline justice' like paralegals in the communities are issues which our jurisdictions need to be discussing. This discussion becomes more pertinent when one examines the issues captured in Sustainable Development Goal 16. Any person in looking at the issues involved in SDG 16.3, one realizes that access to justice should also address structural barriers like language, physical access, context and understanding. Arguably, the issue is what does effective access to justice look like. Furthermore, for economic, social and cultural rights, what does access to justice achieve for the individual, group or country.

The argument is that access to justice has to be looked at broadly especially in terms of the promotion and protection of rights. For instance, in the Ugandan case of *James Muhindo v Attorney General*⁷ where the 5 Applicants had suffered land evictions including where one were tear gas was used were seeking a number of remedies including a declaration that the lack of adequate procedures governing evictions violates the rights to life, dignity, and property under articles 22, 24, and 26 of the Constitution, as well as state obligations under the International Covenant on Economic, Social and

⁷ Miscellaneous Civil Cause 127 of 2016(HC)(Kampala) - https://www.escr-net.org/sites/default/files/caselaw/hc-civil-division-uganda-2019-3_0.pdf

Cultural Rights as well as an order compelling the government to develop comprehensive guidelines to govern land evictions. The court recognized that some of the evictions were legal although forced but noted that they were accompanied with a number of human rights violations including inhuman and degrading treatment. The court further noted that the law must still be followed for instance due process, procedural guarantees of consultation as well as notice needed to be followed in such circumstances. The court held that there was no legislation for evictions as such its absence violated the above articles as such it ordered the Ugandan government to start an expedited process of developing regulations of eviction and the development should be participatory and inclusive of affected persons.

In discussing access, most African countries including Malawi can proudly state that courts are available in most of our countries that have varying jurisdictions to hear matters. It is also acknowledged that most of these courts are functional. However, access is also limited because of distances people have to travel to seek justice, costs associated with justice, number of judicial officers available, speed in delivering justice, ease of use like language, legal awareness levels, technicalities due to procedures. For instance, in Malawi, justice is predominantly accessed through lay magistrates as professional magistrates are few and are centrally concentrated in district and towns. The Justice for All report states has found that 4.5 billion people are excluded from the opportunities the law provides and over 1 billion people lack legal identity. More than 2 billion are employed in the informal sector and the same number lack proof of housing or land tenure. This makes them vulnerable to abuse and exploitation and less able to access economic opportunities and public services. It also states that in total, 5.1 billion people meaning two-thirds of the world's population lack meaningful access to justice. While people in all countries are affected, the burden of this injustice is not randomly distributed among people. The justice gap is both a reflection of structural inequalities and a contributor to these inequalities. Women and children find it hardest to access justice. One billion children are victims of violence, for example. Half of women believe it is pointless to report a case of sexual harassment to the police. Poor people, people with

disabilities, and people from minority ethnic communities are among the vulnerable groups that find it hardest to access justice. Their experience of injustice increases the likelihood that they will continue to be left behind⁸. These statistics should make us question the status of these issues in our countries. It is worrisome to note that most of our countries lack data on justice and this lack means the justice sector including judiciaries are not able to adequately serve the people.

It should be stressed that it is imperative that judiciaries across the world be mindful of these realities on access to justice and begin to address them. For instance, on the matter of costs so as to ensure access, a recent United Kingdom Supreme Court decision is illustrative. In *R(on the application of UNISON) v Lord Chancellor*⁹ where it was held that the fees regime in relation to the Employment Tribunal system was unlawful as such quashed the 2013 Fees Order that had introduced the fees. Significantly, the court addressed the constitutional right of access to justice by stating that the Fees Order had the effect of preventing access to justice. It was also indirectly discriminatory under the Equality Act 2010 because the fees for certain claims particularly disadvantaged women. Importantly, the court held that the right of access to justice (including access to the courts and tribunals) was a core constitutional right and inherent in the rule of law because it ensures that the laws created by Parliament and through the common law are applied and enforced. Further the court highlighted that access to the courts can only be curtailed by legislation and not allowed through subsidiary legislation passed by the Lord Chancellor. Comparatively in Malawi, in *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande*¹⁰, a case where the Chief Justice executed powers vested in his office and with the approval of the Minister of Justice under section 32 of the Courts Act revised up court fees and which increase was exorbitant because Malawians had moved from paying 0.48USD to 50 USD. Naturally, the country was not

⁸ Justice for All – The Task Force of Justice Final Report – <https://www.justice.sdg16.plus> (accessed on 16th September. 2019)

⁹ 2015 EWCA Civ 935

¹⁰ Judicial Review Cause No. 41 of 2011 (HC)(PR)(Unrep)

happy with the situation. A case was brought before the court which included a number of issues, that is, the Chief Justice and Minister had exercised their powers unreasonably and not in line with their authority by revising the court fees. Further that they had infringed on the right to access justice by the said revision. Notably, this case ended at an injunction because it was settled out of court after 3 years and a new schedule was promulgated with lesser fees.

Undeniably, courts have to also be mindful of the inability of a lot of the litigants coming before it asserting rights violations in terms of the Constitution in their cases. This is a big access issue because it goes to the context of understanding violations in human rights terms. In a recent case before my court of *E L v The Republic*¹¹, EL a woman living with HIV and on antiretroviral treatment (ART) who was convicted of a crime under section 192 of the Penal Code for breastfeeding another person's child. The child did not contract HIV and the evidence indicated that the breastfeeding was accidental and unintended. EL appealed her conviction and sentence in the High Court. My court set aside EL's conviction and sentence. It stated that courts and the police to ensure that people living with HIV must have their human rights protected in the criminal justice system. More so as in this human rights era, the law should remember to uphold the accused person's rights to privacy, dignity and due process. Further the following sentiments were made because this woman's right to privacy to her health information was violated -

"4.4 In determining matters before them, it is important that courts must always ensure and protect a person's constitutional rights. This court is in agreement that freedoms and rights provided for in the Constitution should be promoted and protected. Therefore, the Constitutional tenets of a right to a fair trial as espoused in section 42 are issues which this court and Malawian courts should be ever mindful in matters before them. It is paramount that throughout the process of trial, an accused person's rights should be considered and where possible upheld. Consequently, a recognition that justice must be done by ensuring fairness and equity for the persons involved in all aspects of the trial.

4.14 It is important that after noting the legal issues above, it is pertinent that this court deal with the issue implied in this case that the Appellant aimed at passing on HIV/AIDS to the complainant's baby through the breast milk? I want to discuss this matter despite that my determination above has already

¹¹ Crim. Case No. 36 of 2016 (HC)(ZA)(Unrep) - <https://malawilii.org/mw/judgment/high-court-general-division/2016/656>

shown that the lower court decision is defective. Firstly, there is fundamental issue which raised concerns for me, was the Appellant's right to dignity and privacy as guaranteed by section 19 and 21 of the Constitution violated. In the trial transcript, one notes that the Appellant's status as well as treatment were introduced into evidence in court. This court wonders how the police obtained information and how the court admitted such into evidence. I would like to caution that such matters need courts to be specially concerned and careful with. The police need to ensure that they do not in the pursuit of serving and protecting do so by breaking the law and violating people's rights. Further the court's need to be vigilant in terms of admission of such into evidence where such has very shaky basis to comply with the Criminal Procedure and Evidence Code."

It is my considered opinion that in ensuring that it undertakes its role of interpretation, protection and enforcement of rights, the judiciary must also make itself effective by creating the spaces for strengthening access to justice. Courts can intentionally ensure an environment that embraces strategic impact litigation which allows access to various players especially *amicus curiae* like professional bodies of lawyers, accountants, national human rights institutions to mention a few. The strategic role of such players in a jurisdiction that is still growing its jurisprudence cannot be overemphasized especially where a country is working on ensuring inclusive growth for its people. In *The Republic v Mayeso Gwanda*¹² stressed that where a law inherently lends itself open to arbitrary or discriminatory application or enforcement, such a law is inherently bad law as it offends the constitutional fundamental principles of human dignity and non-discrimination. Notably, it has been argued that neither the Applicant nor Amici Curiae have provided evidence to show that the section is discriminatory. However, taking an account of the cases cited by the Applicant, *Amici Curiae* as well as the State, it clearly emerges that whilst one cannot invariably conclude that Section 184(1)(c) only applies to poor people, sex workers or homeless people, the very conception of the provision, that provides very broad discretion to police officers to arrest and prosecute people under this section, lends itself obviously open to arbitrary or discriminatory application or enforcement.

¹² Constitutional Court Case No. 5 of 2015 – <https://malawilii.org/mw/judgment/high-court-general-division/2017/23>
para 4.83

Unquestionably, economic, social and cultural rights cannot be enjoyed without the judiciary. However, one also raises the question, is there a heavy reliance on the courts for such enjoyment or enforcement. This question is more pertinent when one realizes that these rights in their very nature are meant to be realized progressively. Nevertheless, the Committee on Economic, Social and Cultural Rights offer insight that despite the progressive realization, these rights are always justiciable as long as States meet the minimum core obligation of the right. For example, States must ensure the general availability of essential food, primary health care, basic shelter, and basic education. Otherwise, the State will be considered to be failing to meet its obligations under the International Covenant on Economic, Social and Cultural Rights unless it demonstrates it has taken every effort to use all its resources to satisfy the minimum obligations¹³. Furthermore, the Committee has also identified certain rights and obligations that the State should immediately implement, including - undertaking to ensure the equal right of men and women in their enjoyment of economic, social, and cultural rights under article 3) or providing all workers with fair wages and equal remuneration for work of equal value without any distinction, particularly guaranteeing that women's conditions of work are not inferior to men's work conditions under article 7(a)(1)) or ensuring the right to form and join trade unions, and to go on strike under article 8 to mention a few¹⁴. It should be noted that despite these comments, States still argue non-justiciability and the Malawian case of **Gable Masangano v Attorney General et al**¹⁵ made some wonderful statements on this issue -

"In so far as the Respondents argue non-justiciability of the matters before us, it is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age

¹³ CESCR, *General Comment No. 3, The Nature of States Parties Obligations*, para. 10.

¹⁴ *Ibid*, para. 5

¹⁵ Constitutional Case No. 15 of 2007 (HC)(PR)(Unrep) -

where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison as complained of by prisoners. Prisoners may have their right to liberty curtailed by reason of lawful incarceration; they however retain all their other human rights as guaranteed by the Constitution whose guardians are the Courts. What happens in prisons is no longer sacrosanct.

This provides yet further evidence that the issues before us cannot categorically be described as non-justiciable. We will therefore proceed to deal with them. The reference to Section 13 of our Constitution on principles of national policy and Section 14 of the same Constitution on the application of the said principles of national policy that they are directory in nature as a basis for saying that the present matters are non-judiciable does not provide a sound basis for the argument.

No part of our Constitution is a no-go area for the courts in so far as Section 9 of the same Constitution places the responsibility of interpreting, protecting and enforcing the Constitution on the Judiciary. "(my emphasis)

It is also imperative that the issue of enforcement of the said decisions be part of the discussion. In terms of enforcement, we are also looking at what courts are saying in terms of interpretation of the law apart from enforcement of its decisions. Interestingly in the *Gable Masangano* case, the court had this to say in terms of what it means for enforcement of the law -

"The argument that it is impossible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds tantamount to arguing that the Respondents cannot obey the law for the reason given. There is a specific law on provision of specific quantities of clothing and accessories to male and female prisoners. That is a valid law of the land which must be complied with. The law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the minimum requirement. The framers of the law setting the minimum standards surely must have known that the minimum standards are achievable and must be achieved. No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law and fulfill their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the Respondents have a responsibility to

comply with the minimum standards set in the Prison Regulations by providing the minimum number of clothing and accessories as specifically stipulated in the Regulations."

A close and critical review in terms of enforcement, are the lessons most judiciaries in Africa are learning that courts may not fully deliver on economic, social and cultural rights. The realization is that in most of these cases deal with systematic violations by duty bearers. Therefore, the person who the courts find against is the Executive arm of Government thus there is a laxity to fully implement such court decisions. This creates a huge gap as the litigant would have been successful but they are unable to enjoy the fruits of their litigation. For instance, the various orders made in the *Masangano* and *Gwanda* cases are still yet to be implemented by the various Ministries and Government departments ordered to do so. This inability to fully realize the rights for those affected has a serious impact on governance and the rule of law and because the cost on the party not adhering is usually calculated and they do not see it as damaging to them. Courts are therefore worried about this continued impunity as it has rippling effect on the administration of justice and governance as a whole. Understandably, the realization that implementation of court decisions on these rights is a process oriented endeavour as well as resource heavy, brings into play the need for strategies that are aimed at strengthening the institutions of governance to deliver on their constitutional mandate and uphold the rule of law when ordered to do so. It would also be critical for effective access to justice to be delivered, there is need for the impact and visibility of the judicial decisions to be prioritized and this is a role which judiciaries underplay and leave to parties or civil society to do. Undoubtedly, prioritizing visibility of judicial decisions on these rights would greatly affect the legal literacy and empowerment needed to continue to push the agenda for the realization of economic, social and cultural rights.

I should observe the role of the judiciary in the enjoyment of economic, social and cultural rights is a complementary one. There is need to understand the complementary role is there so as to point out the failings and inadequacies which are present in our various sectors or areas and provide solutions and remedies. As a result, it is in that context that I stress the words of Judge Chile Eboe-Osuji who stated that courts do not exist merely to

make life inconvenient for the Executive Branch. But, in the nature of things, the idea of checks and balances portends that Courts will occasionally differ from the Executive Branch on how to look at things. Indeed, all through history, such tensions have occurred from time to time in liberal democracies such as Australia, Canada, United Kingdom, United States and elsewhere. But such occurrences never justified any attempt to destroy judicial independence or public confidence in the judicial system¹⁶. I would add especially where the judiciary is simply doing its constitutional function of interpreting, enforcing and protecting, there is no need for any organ of Government to view judicial decisions as 'fights' against them. Courts are playing their role and this point was very ably put by Justice Kalembera in the *Mayeso Gwanda* decision where he said if the dignity of a person is upheld and respected by organs of state, there would be no breach or violation of a person's dignity. No human being should have his/her dignity or freedom compromised. However, it is clear as has been said elsewhere, and I agree, that poverty, hunger, oppression and injustice make it impossible to live a life commensurate with this dignity.

Additionally, to the challenges faced by the judiciary in its role, there are a number of major issues affecting the enjoyment of rights generally as evidenced by the World Justice Project Rule of Law Index scores which showed that more countries declined than improved in overall rule of law performance for the second year in a row, continuing a negative slide toward weaker rule of law around the world with the second largest decline in criminal justice and the third being on fundamental rights¹⁷. These worrying trends will create a situation which Nelson Mandela was urging as to avoid when he said to deny people their human rights is to challenge their very humanity.

¹⁶ICC President's keynote speech "A Tribute to Robert H Jackson – Recalling America's Contributions to International Criminal Justice" at the annual meeting of American Society of International Law 29th March, 2019- <https://www.icc-cpi.int/Pages/item.aspx?name=190329-stat-pres> (accessed on 21st September, 2019)

¹⁷ <https://www.worldjusticeproject.org/our-work/publications/rule-of-law-index-reports/wjp-rule-of-law-index-2019> (accessed on 22nd September, 2019)

My final words on the issues, most cases in Malawi and I am sure Uganda are still handled at village or district level where issues of human rights are not considered as effectively and efficiently to achieve justice so vigilance is key even at these levels. Vigilance requires investing in our communities especially with legal knowledge. Undeniably, there will be continued litigation to reduce violations and discrimination as long our countries do not address the inequalities and vulnerabilities that exist in our society. Consequently, our courts need to remain accessible to address these violations.

Increased advocacy and lobbying especially with regard to the Executive's policy and legislative agenda is a must and cannot be avoided by all including the judiciary. Therefore, laws should support civil society organizations as well as other justice bodies like legal aid institutions, law societies or law schools to demand justice and represent persons needing legal assistance. Further coordinated, collaborated and targeted planning, budgeting and implementation by policy and decision makers for the full realization of economic, social and cultural rights is critical. Let me add that adherence to the rule of law especially respect for court decisions where such have been made is fundamental since we have put the same in our constitutions. Protection of human rights requires that we have fair and functioning justice institutions that will promote and protect the human rights of people as prescribed in laws and conventions as such we should ensure that these exist and are maintained in our countries. Lastly, we all need our societies to be good and just ones as such upholding the rule of law is the underpinning to such societies.

In conclusion, I would like to remind us that the role of the judiciary is dynamic and central to human rights enjoyment, promotion and protection as such judiciaries must continue to be beacons of light where there are violations. So these words which I echoed in the *Mayeso Gwanda* case continue to ring true even now and I am sure for futures to come -

"4.84 Therefore, this court upholds the Applicant and amici arguments that the section is unconstitutional because it is discriminatory. As a strong believer in human rights especially the aspect of protection and promotion of

*personal freedoms and rights like equality, non-discrimination, liberty, dignity to mention a few. Sitting in this institution whose core values and role is the pursuit of justice and fairness, why should we be saving a law that will continue to target poor people and treat them discriminately? This court does and echoes Warren, C.J.'s words in **Trop v Dulles**, 356 US 86 on why courts should uphold constitutionality where there has been infringement of rights-*

"We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.""

Thank you for your kind attention.