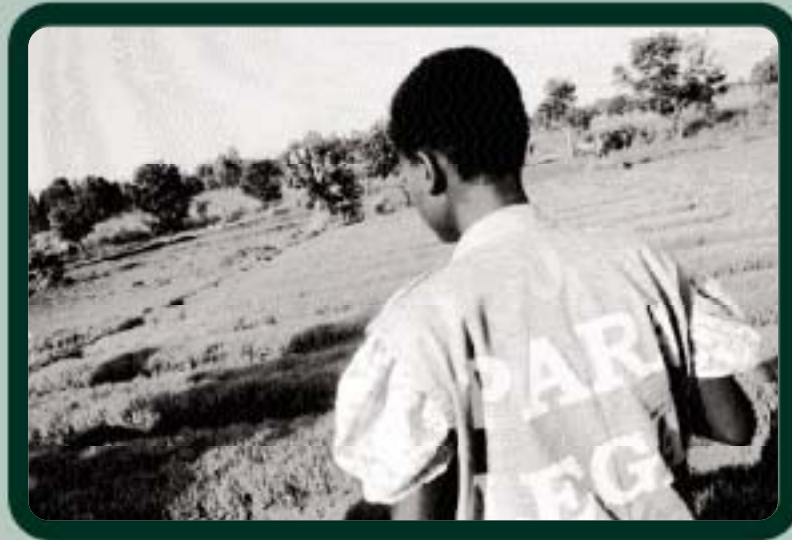


Paralegal Aid Clinics



A Handbook for Paralegals Working in Prison

This manual has been developed through a collaborative effort by the teams from Eye of the Child (EYC), Malawi Centre for Advice, Research and Education on Rights (CARER), Youth Watch Society (YOWSO) with Penal Reform International (PRI).

Penal Reform International is an international NGO, founded in 1989, with consultative status with the United Nations and the Council of Europe and observer status with the African Commission on Human and People's Rights.

PRI seeks to achieve penal reform, whilst recognising diverse cultural contexts; by promoting:

- the development and implementation of international human rights instruments with regard to law enforcement, prison conditions and standards;
- the elimination of unfair and unethical discrimination in all penal measures;
- the abolition of the death penalty;
- the reduction in the use of imprisonment throughout the world; and
- the use of constructive non-custodial sanctions which encourage social reintegration whilst taking account of the interests of victims.

PRI has central offices in London (international headquarters) and Paris, regional offices in Moscow, Bucharest, Tblisi, San Jose (Costa Rica) and Kathmandu, and programme offices in Kigali, Lilongwe and Bujumbura.

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How to use the manual

Welcome to the Paralegal Advisory Service (PAS) trainers manual for conducting paralegal aid clinics (PLCs) inside prison. This manual has been written for paralegal facilitators who will conduct PLCs in prisons aimed principally at remand prisoners. The manual contains six modules.

The more you use this manual as a reference, the more you will learn what is necessary for you to be able to conduct the clinics in prisons. It will also help you in your day-to-day work in the prisons.

The manual is divided into specific activities within each module covering various aspects. Through out the manual, there are notes to assist paralegals in understanding and using the materials presented. Read the manual with constant reference to the resource information. Emphasis in the manual is put on enabling prisoners to help themselves wherever possible - eg: in bail applications and pleas in mitigation before the courts. Since many of the terms are technical in nature, they cannot be substituted with vernacular explanations and still maintain conceptual integrity. Reinforce the reading of the text with attention to the boxes highlighting significant ideas as notes for paralegals. The manual will need to be updated and you are encouraged to make notes of improvements and suggestions from participants.

Modules 4 and 5 concentrate on homicide remand prisoners.

Acronyms

CP&E	Criminal Procedure and Evidence Code
HRH	Human Rights Handbook
ICCPR	International Covenant on Civil and Political Rights
MC	Malawi Constitution
MOJ	Ministry of Justice
MSW	Making Standards Work
OC	Officer in CHarge
PC	Penal Code
PLC	Paralegal Aid Clinic
SMR	UN Standard Minimum Rules for the Treatment of Prisoners

Symbols



Estimated time an activity will take



Materials needed for an activity

Trainers Notes

Consider whether:

- The participants are knowledgeable about the prisoners' rights and court trial process. Those who are knowledgeable, make an effort to get them to share their knowledge with the others.
- Always remember to use examples that have relevant or contextual meaning. It is also important to always respect the knowledge and experience of your participants. As much as possible, try to incorporate their knowledge and experience into the training.
- Be accountable and responsible. Keep a record of all participants contributions.
- Be helpful to everyone who requires your assistance. If you can not answer a participant's question, find out the correct response and follow up.
- Bring Prison Officers into the PLC/discussion whenever possible and encourage their active participation.

Helpful hints during the sessions and how to be more effective

- Always try to answer in away that applies to all prisoners. Never be a judge.
- Be friendly, polite, courteous and patient. If participants start arguing, remind them of the main issues or the materials for discussion. Avoid getting involved in the arguments.
- Be punctual. Set the training sessions for a reasonable time to avoid boredom, and observe the dates and times agreed for the activities.
- Have respect for age and tradition. Respect knowledge and experience and try to draw on the collective wisdom of the participants.
- Actively involve everyone in the sessions. Do not allow any one person to dominate the discussions. The objective of the training session is to provide civic-education on Prisoners' Rights and Court Trial Process. This manual has therefore been designed to give you the trainer all the information you need for conducting the sessions.
- Ensure that participants are comfortable and can hear you and others clearly. On the first day there should be self-introductions. Any special guests who may be attending the training should be introduced.
- Always state the objectives or goals of the training, especially of each chapter.

- Let participants know in advance the ground you are to cover in the PLC. If possible, write it on a flip chart. Remember to give the participants the opportunity to comment on the proceedings and express their expectations.

- Participants should be encouraged to share their opinions in the sessions. They should respect the rights of others to speak and express their opinions.

At the end of each clinic, conduct a brief summary of what has been discussed.

Recap on the Course and Closure

Aim

- To give participants an overview of what has been discussed in the clinic



5 mins

Steps to follow

- 1 Tell the participants that you will do a summary of what has been discussed in the clinic. After that you will go back to peoples expectations and see whether they are satisfied that the clinic has met those expectations
- 2 Summarize the points made in the clinic
- 3 Any questions can be picked up at the beginning of the next clinic

Modules 1-6



Activity one

Welcome and general introduction

Aims of Activity one

- To introduce the Paralegal to the participants (Prisoners)
- To welcome the participants to the clinic
- To introduce the participants to the aims of the clinic (what are we trying to learn from the clinic)



10 mins



Newsprint (flip charts) with aims of the clinic written on it

Steps to follow

- 1 Tell the participants what your name is, where you come from and which organization you represent
- 2 Welcome everyone to the clinic
- 3 Use the flip charts setting out the aims of the clinic. Go through the aims of the clinics (ie in other words, tell participants what it is all about and what you hope people will learn from the clinics)

Aims on the flip chart

- 1 To explain how the criminal justice system works; from the moment of arrest to appeal
- 2 To provide some basic introduction to the criminal law (eg: for those charged with homicide to understand the difference between murder and manslaughter)
- 3 To go through summary trial in the Magistrate's Court and trial in the High Court so that each stage is explained and participants know what to expect and understand what is happening when it is happening
- 4 To discuss daily prison life - offences, discipline, complaints mechanisms, rights and responsibilities
- 5 To help prisoners help themselves (ie with bail applications and conducting their own defence)

Activity two

Group introduction and expectations

Aims of Activity two

- To introduce participants to each other and to the Paralegal
- To use ice-breakers* so that participants will feel more relaxed with each other
- To understand the participants expectations of the clinic
- To give participants an understanding of the outline of the PLC



20 mins



Flip chart and Write Markers

Steps to follow:

- 1 Ask participants to introduce themselves to the nearest person and say what their expectations are
- 2 Ask participants to introduce the same person to the group and their expectations

Paralegal Notes

Record all the participants' expectations on a flip chart and visit them at the end of the workshop to see and evaluate if the clinics meet the participants' expectations.

*Examples of ice-breakers include any game that makes people laugh or do something silly (equally) but may also have a moral/meaning, ie: spelling your name with your waist/head (silly); standing in pairs, holding hands and seeing how many times you can hit each other's leg (if you co-operate you can make many more hits than if you compete); standing in a circle (of 6 people) and holding hands with different people, then without speaking trying to untangle yourselves (builds teamwork) etc.

Activity three

Arrest and detention

Aims of Activity Three

- To explain how an arrest is made
- To explain and discuss how a person can be kept in a police station or sent to prison



45- 60 mins



CP&E ss20-32, 250, 267
MC Article 42

Steps to follow

1

Use a story-line: either invite a prisoner to tell his/her story of the arrest to the moment of detention and use the questions below to prompt a general discussion (they are all taken from Art 42 (1) and (2) of the MC)

Or: begin your own story from the moment when a person is arrested and tell it in a way that shows how the police failed to observe the constitutional rights set out below. This story should be developed throughout the clinic so that it captures the participants' interest and is more real.

Questions:

- * Did you understand why you were being arrested?
- * Were you advised that you need not say anything?
- * Were you beaten - did you offer any resistance?
- * How long before you were taken to court?
- * Was it possible to have got you there within 48 hours?
- * Were you fed?
- * Did you receive any medical treatment?
- * Did you receive a visit from a relative, or doctor - were you told you could?

Take notes of the answers; how many in the group were advised, beaten, fed, received a visit. On average how long did it take before people were brought to court.

Paralegal Notes

Police have wide powers of arrest (CP&E s 28); basically they can arrest anyone whom they:

- (a) find about to commit a crime. For example, a police officer who comes across a man about to throw a stone through a shop window: s/he can arrest that man.
- (b) find in the act of committing a crime.
- (c) believe has committed a crime (based on reasonable grounds). For example, a policeman can arrest a man whom he sees running fast down a street carrying a bag and being chased by a security guard.

However at the moment of arrest police must inform you of the reason for arresting you.

The 48 hour rule (MC Article 42) (2) (b) - some misconceptions: it does not mean that after 48 hours, the person must be charged or bailed. It simply means that the police cannot keep a suspect in their charge for more than 48 hours without taking him to court. The purpose is to stop the police keeping people for as long as they wish to and to make them accountable to the court (ie not a law unto themselves).

The value of this is that the court (and members of the public) can see how the person is being treated (whether he is being beaten).

If the police are not ready to proceed then they simply ask for more time and the court will grant it and bring the person back before the court to see how the investigations are going and the strength of the case against the accused.

Appearance in court

Either continue with the story you have started or ask another participant to describe what happened to him/her and explain what s/he saw and understood of the court proceedings.

Questions:

- * did you understand what was happening?
- * did anyone explain what was happening?
- * was anything said about bail - do you understand what bail is?
- * Were you told when you would be brought back to court?
- * Have you been brought back to court?

Again take notes

Paralegal Notes

Remand period: the maximum time a court can keep a person in prison is 15 days (CP&E ss 250, 267). At the end of this period, s/he must be brought back to the court. The purpose is to monitor progress in the case and ensure there is no unreasonable delay.

Bail is the provisional release of an accused person pending trial. In most countries bail is a matter of right. Everyone should be granted bail UNLESS the crime is so serious AND the accused is likely to

- a) run away and not stand trial (abscond); or
- b) commit further offences on bail (ie he is a professional criminal); or
- c) interfere with witnesses or the evidence (ie threaten/bribe witnesses not to give evidence against him in court). Then even if there is a risk that the person will, say, abscond - the court can impose a condition on bail (ie a surety is paid in a certain sum to secure the attendance of the accused at the next appearance). Then if the accused fails to appear, the person standing for the accused will forfeit the sum of money lodged as surety.

If the offence is not serious then the person must be granted bail (unconditionally).

Activity four

Bail

Aims of activity four

- To explain what bail is and how it operates
- The conditions for granting bail
- To assist participants make their own bail application



45 mins



New bail guidelines, CP&E ss 118-125, HRH p33-36

Steps to follow

- 1 What is bail? Ask the participants what they understand by 'bail'.
Discuss using the notes below

Questions
* Did the police/court discuss bail with you?
* Did the court ask if you wished to apply for bail or how to?
* Do you think your offence qualifies for bail - why?
* How do the members of the public understand this procedure?
* Do you think it confuses people? How could the confusion be addressed?
- 2 Go through the new bail guidelines
- 3 Go through the bail forms and explain them and what the PAS will do (ie: assist them fill in the forms and take them to the appropriate court (magistrates or High) and put them before the appropriate person - and follow them up)
- 4 Role play a bail application (invite a group of prisoners to participate and the others to watch: one will represent the police, one the magistrate and one will make the application - see notes below for good points)

Paralegal notes

The constitution gives the arrested person the right to be released from detention with or without bail. Similarly the criminal procedure and evidence code recognizes the possibility of an arrested person being released on bail. (CP&E ss 118-125)

A court or police officer can grant 'bail', whereby the accused person is allowed to go about his ordinary business provided that he attends court or the police station at the time and on the date appointed.

Bail is a matter of right unless the prosecution can show that in the circumstances of the case, the accused should be kept in custody because of the serious nature of the offence and because there is a real risk s/he would commit further offences, or interfere with the evidence /witnesses or simply fail to appear for trial.

So important is this right that if the accused can show that s/he can satisfy the concerns of the prosecution (ie by reporting regularly to a police station to show that s/he is keeping out of trouble and in contact; and/or by asking a relative to stand for him/her in a large sum of money which will be forfeit should the accused not appear for subsequent appearances) then bail should be granted notwithstanding the views of the prosecution.

(see: HRH pp33-36)

Three agents may grant bail: the 'most senior police officer' in the police station; a magistrate; and a High Court judge.

The new bail guidelines state:

- Police may not admit a person to bail for offences punishable by death, eg: treason, murder, rape, armed robbery, burglary (I.3)
- Bail conditions shall not be unreasonable (I.8, II.7)

Guiding principles:

A. Likelihood that the accused will fail to appear for trial ('evade his trial')

In determining this issue, the court should take into account among other things:

- the nature and seriousness of the offence
- the strength of the case against the accused
- the nature and severity of the punishment likely to be imposed
- family/community ties etc

(see: II.4.a.i-x)

B. Likelihood that the accused will interfere with the evidence

The court should take into account:

- whether the accused knows the witnesses
- whether they have already made statements and agreed to testify
- the relationship with the witnesses and the extent to which they could be intimidated
- whether the investigation has already been completed etc

C. Likelihood that the accused will endanger the safety of the community or commit a further offence

The court should take into account:

- any threats made
- any resentment the accused may have against any person
- past conduct of the accused indicating a pre-disposition to violence etc

D. In exceptional circumstances, the likelihood that the release of the accused will disturb public order or undermine public peace or security

The court should take into account:

- community shock or outrage were the accused to be released (given the nature/circumstances of the offence)
- leading to public disorder
- safety of the accused person
- public feelings of insecurity were the accused to be released

Juveniles: in addition, the court should take account of:

- the welfare of the juvenile
- the interests of the juvenile to remove him from association with any 'undesirable' person
- release defeating the ends of justice

In applying these principles, the court shall weigh the interests of justice against the right of the accused to his personal freedom. Factors to take into account include:

- the period already spent in custody
- the probable period s/he will spend in custody until disposal
- the reason for delay and any fault for which attributable to the accused
- detention impeding preparation of his defence
- state of health of the accused

Questions:

- How many applications can be made?

A: If bail is refused, you cannot make another one unless you can show that there has been a 'change of circumstances' since the last time you applied (ie months have passed, a relative has returned and can stand surety, you have a fixed address to stay at etc).

- Can I appeal?

A: Yes you can appeal refusal by the magistrate to the High Court.

How to make a bail application

Good points to make:

Simple case not involving violence

- first offence
- family man (supporting wife and number of children) or single parent head of household
- in employment
- fixed address with strong community links
- offence does not include any act of violence

This shows the accused is:

- unlikely to re-offend while on bail
- unlikely to run off and fail to appear for trial
- unlikely to pose a threat to the community/others/society

More complex/serious case involving some violence

You may need to explain:

- the circumstances in which the offence was committed to explain that it was a one-off or unusual and unlikely to be repeated
- means to pay the court - or produce a relative or someone who can pay some money - as a 'surety' to ensure you will appear for trial
- offer to report regularly to the local police station (so they know you are around and keeping out of trouble)
- offer to move away to live with a relative or someone more distant - so the risk of re-offending or exciting trouble is reduced
- offer not to try and contact the alleged victim of the offence

Over-long time period on remand

- Time spent in custody
- Uncertain how much longer
- Delay not caused by the accused
- No idea where witnesses are - no statement taken
- Poor prison conditions
- MC 42 (2) (f) (i) guarantees the right to trial "within a reasonable time"

Activity one

Court Structure

Aims of Activity One

- To show the hierarchy of the courts and how the courts relate to each other
- To explain the sentencing powers of the magistrates



30 mins



Flip chart, CP&E s 4

Steps to follow:

- 1 Set out a visual aid of the court hierarchy (Magistrates Court - High Court - Supreme Court)
- 2 Describe various grades of Magistrate and their powers (see notes)

Paralegal notes:

Court hierarchy: the Supreme Court is the highest court and ultimate court of appeal. The High Court tries all capital criminal cases and serious civil matters. It also acts as the Court of Appeal from the magistrates court. The Magistrates Court is the court of first instance in all criminal matters (ie every case starts at the Magistrates Court).

There are professional and 'lay' magistrates. Professional magistrates are qualified lawyers and are 'resident' magistrates. The lay magistrates go through training. There are four grades of magistrate.

The resident magistrates and magistrates of the first and second grade can try any offence save for treason, murder and manslaughter.

Sentencing powers (CP&E s 14):

- Resident and first grade magistrate: any sentence up to 14 years
- Second grade: can impose a fine not exceeding MK1000 or a term of imprisonment not exceeding 5 years
- Third grade: maximum MK 500 fine and 12 months imprisonment
- Fourth grade: maximum MK250 and six months imprisonment



Activity two

Layout of the Magistrates Court

Aims of Activity Two

- to explain what the court room looks like and who is who



30 mins



Flip chart, plan of a court
(Booklet: Makhoti na Imwe)

Steps to follow:

- 1 Present a sketch of the court room: ask participants to explain the lay-out (ie where the magistrate sits, the dock, witness box)
- 2 Indicate from where the prisoner will be produced (ie from a cell)

Paralegal Note:

You should prepare this in advance and keep a clear sketch of a court room. Attach stickers with names (MAGISTRATE, WITNESS, ACCUSED, POLICE etc)

Activity three

First Appearance and plea stage

Aims of Activity Three:

- To explain what happens when you are produced at court
- To explain the procedure and the difference between Not Guilty and Guilty pleas
- To explain adjournments
- To illustrate a plea in mitigation



60 mins



Role Play, MC Article 42 (1) (c)
CP&E ss 251-252

Steps to follow:

- 1 It is your first appearance in a court: you know who the people are in their various positions around the court. Now what is happening?
 - the clerk will identify you - Is your name J Phiri? If it is you say yes; then the clerk will tell you the charge and ask you to sit down
 - the prosecution (police officer or paralegal from MoJ) will either ask for the charge to be put or ask for an adjournment; if it is to put the charge, the Clerk will ask you to stand and read out the charge (that you on such and such a day stole a chicken from so and so) and ask if you plead Guilty or Not Guilty? It can happen quickly, what do you do? Do you understand the charge? Do you want legal advice? If it is your first appearance, you can ask for an adjournment (for a few minutes or a few days) to consider the matter and take legal advice. If you understand fully and are ready then you will say Guilty or Not Guilty
 - If the prosecution request an adjournment (to continue investigations or prepare the papers for trial/committal) then the magistrate will adjourn (put the case off) to another date. In any event it should not be longer than 15 days if you are in custody (CP&E s 250).
 - At this point and before you are taken back to prison, the status of bail should be reviewed. If you have not made a bail application, this is the time to make one. If you have and it was refused, then you can argue change of circumstances. In any event, bail must be discussed and you can remind the court to do so.

2 **Plea of Guilty:** prosecution open the facts before the magistrate/judge (tells the court what you did). Defence then enter a plea in mitigation (you or your lawyer give your version - where it differs - and tell the magistrate/judge about your personal circumstances and argue for a lesser sentence by inviting him/her to take into account certain mitigating factors - or elements that reduce the seriousness of the charge (ie the facts of the case: considerable provocation; or the fact that you immediately surrendered to the police and gave a frank account of what happened; or that you have expressed remorse and sought to compensate the family of the victim etc)

3 The magistrate/judge can then proceed to sentence. S/he can adjourn (suspend) proceedings to another day so that there is time to prepare any report s/he may have ordered.

4 Plea of NG means there has to be a trial and the matter will be adjourned (there will be no further consideration of your case) for a date to be fixed. There may be a number of adjournments because: a) you are not produced at court by the police; b) witnesses fail to appear; c) prosecution is not ready. If the adjournment is not your fault and there appears to be no progress, you should apply for bail since you are being prejudiced.

Role play a plea in mitigation (see notes below). Draw up a simple set of facts (use an example provided in discussion or by a participant). Invite a prisoner to plead in mitigation and invite the others to determine sentence. You will need to prepare this in advance with the participants or in a break.

Paralegal Notes:

1. If a person admits to the offence charged then there is no need to hold a trial. The trial is for the purpose of establishing guilt or non guilt.
2. A plea of Guilty means that the person accepts the prosecution version of events. It is therefore important to know what the prosecution version is. If there is any disagreement with parts of it (I did not say that - it did not happen quite like that) but agreement with the substance (there was a fight and I did hit him over the head in the course of it) then the details can be corrected by the lawyer in mitigation.
3. Mitigation is quite technical and very important. The accused should be

represented in serious matters (ie: rape, armed robbery or other offences attracting long sentences). It should not be rushed and the content should include all relevant details.

4. Where the accused is not represented, assist them with these self-help examples

How to Make a plea in Mitigation

Style of address: Your worship

Good points to make in mitigation

- This is a **first offence** (therefore out of character, not the way you usually behave)
- I am **in work** (set out the job you have and income you bring home and how long you have had it and what the effects of imprisonment will be - ie you will lose your job; if you are a farmer or work for yourself, say so)
- I am a family man (wife, state number of children and other dependants, their ages); or I am a mother of young children; or single parent head of household
- **Circumstances of the offence** - this could involve a whole range of factors, such as:
 - Financial pressure - if so go into the surrounding facts and circumstances in which the offence was committed: ie: need not greed - did not profit from the offence - had debts to pay
 - Degree of provocation - if violence was used, the degree of provocation (remember being drunk is neither an excuse nor very good mitigation) or make a point of indicating the use of violence was not excessive (ie you hit him once and that was it)
- I am sorry for what I did (and a plea of guilt indicates remorse). This sounds better if it is supported by evidence that you have made an offer of compensation to the victim, or at least an apology in writing. Saying it in court is better than not at all, but you wouldn't you
 - In sexual offences, this is especially important
- If several offences are involved, argue for concurrent terms (ie to run together) as they were all linked (ie you are a burglar and stole from a number of houses over a period of time. As a result you face three or four charges (counts). You should argue that since the nature of the offence is the same and you have admitted them all, the court should roll the sentence into one rather than pass consecutive sentences)

Aids:

- pay or offer restitution/compensation in advance if possible or at the time if not
- offer an apology (better if it was already made prior to plea - as above)
- letter to the court from a respected local member of the community
- call witnesses to come and tell the court what a good person you really are; how surprised everyone is and that this offence is entirely unlike you (out of character)

Paralegal Notes:

Plea bargaining

This does not exist in the American sense in Malawi (ie if you help us we will help you - tell us who did it and you will get off scot-free). There is bargaining to the extent that the facts of the case would allow the prosecution to offer a lesser charge if the accused pleaded Guilty to it, but that if s/he did not then s/he would have to take his/her chance with the jury.

Sentence

Concurrent or consecutive - if there is more than one offence to sentence on, the magistrate/judge must indicate whether the terms of imprisonment s/he has imposed should follow one after the other (consecutively: ie theft 2 yrs, burglary 4 yrs and manslaughter 10 yrs = 16 years) or be rolled up into one sentence and run together, therefore making a total of 10 years.

When should sentence start

From the date of arrest or judgement of the court? Normally when the magistrate/judge passes sentence s/he will indicate when the sentence should start from. Your lawyer should make it clear if there is any doubt. For if the matter is not clearly stated on the committal warrant (ie the document setting out the length of sentence authorizing the person's detention in prison), then the prison authorities will start the sentence from the day of judgement.

Legal representation:

It is a constitutional requirement (MC Article 42 (1) (c) that every person who is detained, including every sentenced prisoner shall have the right to consult confidentially with a legal practitioner of his or her choice to be informed of this right promptly and where the interest of justice so requires to be provided with such services of a legal practitioner by the state. In homicide cases it is mandatory for the state to do so unless otherwise so decided by the accused.

Activity four

Summary Trial

Aims of Activity Four

- To show the participants the order of events in a summary trial



45 mins



Flip chart, court lay-out
Role Play, CP&E ss 246-261

Introductory remarks

Previously we looked at what happens in a plea of Guilty. Now we turn to what happens when a plea of Not Guilty is entered and the matter is listed for trial.

Steps to follow:

- 1 The police/prosecution open the facts of the case**
This will be a summary of the allegation and the witnesses they will call to prove the case
- 2 Calling the evidence**
The police will call the first witness. S/he will enter the witness box and take the oath (depending on his/her religion). S/he 'swears to tell the truth the whole truth and nothing but the truth'. The prosecution will then ask the witness to give his/her account of what happened. You are not allowed to ask any questions or say anything at this stage (however monstrous the lie/story being told by the witness). When the witness has finished giving his/her account, then it is your turn
- 3 Cross-examination**
This is your turn to put questions to the witness. This is very important. It is in this time you must put forward your account, so that the magistrate hears your side, takes a note of it and can observe the reactions of the witness and what s/he says in response to the matters you ask or put to the witness. It is also the time when you cast doubt on the prosecution version of events: to show that the witness is inaccurate, confused or mistaken in his/her recollection and therefore cannot be relied on to the standard of proof required in criminal courts (satisfied beyond reasonable doubt)

How to conduct your own cross-examination

Do's and don't's

Tone: is important. However angry you may be, keep your voice measured and steady. Try and appear polite and calm.

Speeches: avoid them. Your time will come for this at the end, not now.

Questions: keep them short. You can ask as many as you like, so avoid wrapping a number into one.

Persistence: is fine so long as you avoid repetition. If the witness says s/he is not lying, there is no point insisting that s/he is. You need to show the magistrate through questions that s/he is or must be or at least is inaccurate or somehow confused

Suggestions: are a good idea - eg: it was a long time ago and you cannot be sure now can you? Or: do you agree that it could have happened another way and that you might have forgotten?

Stick to the point: don't go firing off questions all over the place. Finish one point before moving on to another

Make your challenges: where the witness says you did something and you are emphatic you did not, then you must say so - eg: this did not happen; or I did not do that; or it was not like that at all, what happened was this ...If you want to add: you are lying, then do so - but it is wiser not to say so to a police officer. They won't budge and the magistrate won't thank you for it.

- 4 **Re-examination:** This simply means the prosecution can ask questions to clarify those you asked and which may have cast doubt. Once this is over the witness leaves and another enters and the same procedure is repeated. This goes on until the witnesses are exhausted
- 5 **Special witnesses:** Some (usually police officers or doctors) are called to produce an exhibit (such as a knife or interview). Again you have the opportunity to question them.
- 6 At the end of calling his evidence, the prosecution 'closes' his case.
- 7 **Defence case:** this usually starts with you giving evidence. You do not have to give evidence. You can remain silent and simply say the prosecution has not proved its case. You may need to be a lawyer to be sure of that, however, so it is best (in magistrates courts) to give evidence.

How to conduct your defence

Tell your story:

Speak slowly and distinctly. The magistrate will take notes, so do not rush.

When you have finished, the prosecution will then question you (cross-examination as above). He will suggest that his version is true and yours fabrication. Or he will say that you intended to do what you did (when your account is that you did not). Don't try and be clever. Just answer his/her questions simply and clearly.

- 8 **Calling witnesses**
As with the prosecution, you can call your own witnesses. Call them in one at a time. Ask them to give their account and then leave them to be cross-examined by the prosecution. Make sure they cover the important points of your story and support the account you have given (eg: they were with you and you could not therefore have been at the scene of the crime; or the light was very bad and there was a lot of confusion, so it was impossible to say who was doing what).

When you have finished calling your witnesses, you close your case ie you say to the magistrate words such as: 'That's my case, your worship'.

- 9 **Final speeches**
The prosecution can then sum up the case to the magistrate or not. Then it is your turn. If the case is short, your address will be short too. There is no point repeating facts/evidence that were heard minutes before.

The purpose of the speech is to summarise the evidence in your favour and show it in its best possible light. Point out doubts in the prosecution case or aspects that appeared uncertain and claim the benefit of these doubts/uncertainties.
- 10 The magistrate will then retire to consider his/her verdict and write up his/her judgement.

Activity five

Appeal

Aims of Activity Five

- How to lodge an appeal



30 mins



MC 42(2) (f) (viii),
CP&E Code ss 346-363

Steps to follow

1 The right to appeal Discussion (ask participants)

- * what does it mean?
- * do prison officers explain when you come to prison?
- * do they themselves know?

Note: you can appeal against conviction and/or sentence. You can appeal conviction on a matter of law (technical) or on new facts that have emerged since the trial to establish innocence (eg an alibi or other important witness that could not be found before the trial). You cannot appeal a conviction after entering a plea of Guilty (though you can appeal the sentence CP&E s348).

2 How to appeal Discussion

- * what do people think?
- * can you wait years or does it have to be fairly soon after the trial/sentence?
- * what form should it be in - what should it contain?

Note: The CP&E Code states an appeal needs to be lodged within 10 days of the judgement (s349). Even if this period has elapsed, an appeal will be entertained where you can show 'good casues' s349 (4)The appeal is in the form of a petition setting out the grounds of appeal. This is technical and usually requires legal advice.

3 Petition is reviewed

Note: a judge of the High Court will review the petition and if it is frivolous (not serious) or vexatious (ie abuses the magistrate / police / judge / jury etc) then it will be dismissed. If not then a date will be set for hearing and the court will send for a record of the case. The appeal court can reverse the finding of the lower court and order the appellant to be released, order a retrial, reduce or increase sentence of the court etc. The appellant has the right to be present in court.



Activity one

Definition of a crime

Aims of Activity One

- To define 'crime'
- To clarify what makes an act criminal under the laws of Malawi
- To explain the difference between a felony and a misdemeanour



60 mins



PC ss 4, 7-20

Steps to follow

1 What is a crime?

A crime is an act which is prohibited by law and which a person commits knowing what s/he is doing to be wrong and nevertheless goes on to do the act.

Example 1:

A child under the age of 7 in Malawi cannot commit a crime because s/he is presumed incapable of knowing what is right from what is wrong at such an age.

In the same way, a person who is insane/mad cannot be guilty of an offence for the same reason.

Example 2:

An accident is not a crime, because the person committed the act without intending harm to anyone.

2 A criminal act

The act must be wrong and directly cause the harm. Most people generally know what is a criminal act. The law usually follows common sense. Everyone knows theft is wrong and if your conscience tells you what you are doing is dishonest, that is a good guide.

Sometimes an act starts quite innocently then ends in a crime - when a person goes too far.

Example 3:

In a bottle store you enter into an argument with someone. The argument becomes heated. The person suddenly attacks you

when you have offered no violence or threat of violence towards him - he has committed the offence of assault.

The act must cause the harm.

Example 4:

You are being jostled in the market and you elbow someone in the stomach. The person dies 10 days later in hospital.

The prosecution have to prove that your elbow directly caused death for you to be prosecuted.

3 Criminal intent

But no act is sufficient by itself. It must be accompanied by a guilty mind. You must intend the consequences of your act; or go ahead and don't give a thought to the consequences.

Example 5:

You go into the shop and pick up some shopping. You pick up a packet of biscuits and put them in your basket. You pay for everything but the biscuits. You are stopped outside and asked about the biscuits. You say you forgot about them. Yet they were hidden under some clothes.

Is the explanation innocent?

Example 6:

You are driving an ox-cart through the village and making the oxen run faster and faster. Someone shouts: hey watch out! But you carry on whipping up the oxen. A child is in the way and you cannot stop them in time and the child is run over.

You did not intend to run over the child, but you must have known there was a risk of someone being hurt by such driving. Someone called out and you took no notice.

Paralegal Notes

In summary:

A crime is made up of two parts: the act (*actus reus*) and the guilty mind (*mens rea*). Unless these two parts are present, no offence is made out.

The principle is simple to state and more complex to apply. There is no certain answer to anything which is why judges are so fond of saying 'each case must be tried on the merits'.

Further the act must directly cause the harm complained of.

In Malawi a crime is categorised as a felony or a misdemeanour. A felony is more serious and becomes such if punishable with prison for 3 years or more. Crimes/offences are listed in the PC (ss 7-20)

Activity two

Burden and standard of proof

Aims of Activity Two

- To emphasise it is the prosecution who bring the case and for them to prove it
- To a high standard



60 mins



CP&E ss 187,188, HRH p46
ICCPR 14 (2)

Steps to follow:

- 1 The burden of proof rests on the prosecution to prove the case against the accused. The accused does not have to say anything. He is presumed innocent until proven guilty. He can stand silent in the dock and say nothing.
- 2 The standard of proof is high in criminal matters: it is proof beyond all reasonable doubt. It is proof to a standard where you can be sure of the guilt of the accused. If there is a reasonable doubt, then s/he must be acquitted.

Paralegal notes

Presumption of innocence

The criminal law is based on the presumption that a person is innocent until proved guilty (see Article 14(2) ICCPR, HRH p.46). Any doubt must be resolved in favour of the accused. Presumption of innocence means the person must be treated as if s/he were innocent - therefore the press and authorities should not make comments or issue statements that prejudice the issue.

The burden of proof is not static. It can and does switch to the defence in the course of a case. For example, if a witness is called to prove the prosecution case and the witness is credible, then the defence will have to cast doubt on the accuracy of the

witness' testimony if s/he is to be acquitted. It is no good sitting there and saying nothing when the prosecution are bringing forward damning evidence. The ball thrown into your court has to be thrown back (CP&E ss 187,188).

Alibi: an alibi defence is where you say you were not at the scene of the crime and therefore could not have committed the offence alleged. The burden is on the defence to prove the alibi, ie you have to call the witness who will stand in court and testify that you were a thousand miles away at the time.

The standard is higher than civil proceedings where it is on 'a balance of probabilities'.



Chichiri Prison, Juvenile Section

Activity three

Common Defences

Aims of Activity Three

- To clarify what amounts to a defence to a charge and illustrate some common defences



60 mins



PC ss 7-16, 21-24, SMR p82,
MSW iv 95-97, HRH p236

Steps to follow:

1 What is a defence?

Defences are the arguments and/or supporting evidence that an accused person puts forward at trial to win an acquittal. It is usually along the lines: I did it but have reasons for doing it which justify my acquittal. Outright denial of having anything to do with the offence is not so much a defence to the charge as a refutation of it.

2 Some common defences

Self defence)	
Insanity)	absolute defences
Alibi)	
Provocation)	
Intoxication)	partial defences
Duress)	

An absolute defence is one that if made out requires an immediate acquittal. A partial defence acts to defeat the most serious charge but may not get the accused off the hook entirely. For instance, in a charge of murder, the defence make out that the accused was provoked by the behaviour of the deceased and reacted in an understandable way. This can have the effect of reducing the charge from - or acquit the accused of - murder and substitute manslaughter.

3 Self defence

Acts which can amount to self-defence:

- You assault me and I use reasonable and proportionate force to defend myself
- I think that you are about to assault me and strike first
- You assault someone else and I hit you in order to protect that person

Acts which may not amount to self-defence:

- You assault me with your fists and I produce a gun and shoot you
- You assault me with a weapon and, having disarmed you, I go to another room and fetch a weapon which I use to assault you

Paralegal notes

Ignorance of the law is no defence (PC s7).

Self defence is an absolute defence and entitles the accused to be acquitted of the charge. It is a pure example of natural justice, if you like (only saints or madmen actually 'turn the other cheek'). Self defence should be distinguished from 'tit for tat' or an 'eye for an eye': this is revenge or 'reprisal'.

Whether or not self-defence succeeds will depend on all the facts and circumstances of the case. There are certain ingredients to guide you in determining whether or not it may succeed:

Reasonable belief that an attack is imminent

It is contrary to common sense to suggest that you have to wait to be attacked before defending yourself. It may be justified to strike a person who stands in front of you, obstructing your path, gesticulating and making threatening noises. It would be better if possible to walk away, however.

Also it is commendable (and public spirited) to go to the defence of someone else. The law does not require you to, but if you go to assist someone who is being robbed and knock that person out, you are acting in defence of another and so acting lawfully.

Reasonable and proportionate force

If a person hits you with an open hand, it is hardly proportionate to stab him with a knife. The degree of violence offered and the injury sustained do not justify such a use of force.

However (there are always 'howevers'), no-one would suggest you can measure precisely the degree of force to use to defend yourself in the heat of the moment. The person assaulting with his open hand may be a husband who has done this many times before and accompanied his assault with verbal threats ('this time I am going to kill you') and I as a beaten wife this time pick up a knife to defend myself. In such circumstances, self-defence may well be made out even if the force I used does not appear to be proportionate.

The events take place at the same time (ie there is no cooling off period)

When events happen very fast in a climate of violence, then it can be argued that if with hindsight I did over react in the amount of force I used, it was understandable in the circumstances at the time (as in the wife beating example above).

What is less easy to argue is if the event has effectively stopped and the threat is past and I then deliberately produce a weapon or commit a further act, rather than walk away - can this still be argued as self-defence? It is unlikely.

Cases of 'mob justice' fall under this heading for the person is no longer a threat and yet two or more people take it on themselves to cause serious injury to someone, often with fatal consequences. This constitutes the offence of murder or manslaughter, depending on the circumstances.

4 **Insanity**
The plea: not guilty by reason of insanity is an absolute defence. The accused may have committed the act but lacks the guilty mind because of his/her mental state, s/he is unable to appreciate the right or wrong of what s/he did.

Paralegal notes

Earlier, you recall it was stated that a criminal act has two elements: there is the act which must be accompanied by the guilty mind. If the accused through some 'disease of the mind' fails to understand that what s/he did was wrong, then s/he cannot be guilty of an offence (PC s12).

A medical report on the mental state of the accused is required and the person is then remanded to a mental hospital until such time as s/he is fit to be released back

into society.

Note: mentally ill persons should not be kept in prison (SMPR R82, HRH p234), instead they should be placed in a mental hospital. However where they are kept in prison, they should be treated with especial care and receive adequate treatment (see MSW section IV. paras 95-97).

5 **Alibi**
This is to say that you were somewhere else at the time the crime was committed and therefore it was impossible for you to have committed the offence alleged.

Example:

A burglary takes place in B's house at midnight. The victim remembers looking at his watch and seeing the time. You are charged with the offence, yet you were with friends on the other side of town at midnight. They all make statements that you were with them.

Paralegal notes

To prove an alibi, the burden shifts to the defence. Therefore the accused has to call evidence at his trial (a witness) to prove that he was where he said he was. A member of the accused's family is not going to be a very strong witness, because s/he will come forward and may be willing to lie for his/her family member. The best alibi witness is someone not connected to the accused but who can positively state s/he was where s/he said s/he was at the time in question.

Alibi does not often succeed.

6 **Partial defences**

Provocation

This should be given its ordinary meaning:

Example 1

A man is drunk in the bottle store and being a general nuisance, insulting people. You step up and ask him to leave. He does not and you strike him.

This constitutes an assault by you. You cannot argue self-defence on these

brief facts. But you could enter mitigation that you were seeking in good faith to defuse a situation provoked by the victim to avoid unpleasantness, thus either the police would not press charges or the sentence (depending on the injuries sustained) would be light (a discharge)

Example 2

A husband (E) comes home unexpected at night and finds another man (F) in his house alone with his wife. In the emotion of the moment, E picks up a stick that is near at hand and strikes F on the head and kills him instantly.

The proper charge in such circumstances (if there were no other aggravating features) would be manslaughter, since E acted on the spur of the moment when the circumstances clouded his reason.

Paralegal Notes

Provocation is a common defence to the charge of murder in domestic cases. The defence 'I was provoked' acts to reduce the seriousness of the offence as it takes 'intent' out of the equation. In other words, you did not act 'in cold blood' or gratuitously, you acted because of the circumstances prevailing at the time and brought about because of the anti-social or offensive behaviour of another. The facts should suggest that the victim 'brought it on himself'.

Therefore, if provocation does not acquit you of the offence, it does offer an excuse which can be entered in mitigation of sentence.

7 Intoxication

To say I cannot remember what happened as I was too drunk; or I did not mean to do what I did, but I was drunk, is not a defence nor an excuse (PC s13).

Paralegal notes

A person who voluntarily consumes alcohol or drugs, and because of that engage in criminal conduct, is just as guilty as the person who commits an offence while sober. However, an accused person who involuntarily consumed drugs or alcohol and committed a crime under that state is not guilty. Involuntary consumption of drugs or alcohol is manifested when accused persons through no fault of their own consume drugs or alcohol, ie they were tricked. This defence rarely succeeds.

8 Duress

I did it because I was forced to. If I did not go along with them, they said they would kill me (PC s16).

Paralegal notes

Duress only really arises when you are trapped into having to choose between the lesser of two evils.

Sometimes a person (H) argues that s/he committed the offence because s/he was forced to by another who threatened harm to the life, limb, property or a relative of H. This is the defence of 'duress'.

The threat must be real and immediate if it is to succeed. Accordingly it is not commonly invoked and is a very difficult defence to run successfully. It is never a defence to kill someone else (it may be mitigation).

9 Offences involving other people: conspiracy/joint enterprise

When more than one person is involved in an offence, you have an agreement (or conspiracy) to embark on a criminal course of action (or joint enterprise). One person may be the leader (principal) and the others may be there to assist (as accomplices or 'aiders and abettors'). Everyone will be guilty of the offence equally, though some may receive heavier sentences than others (the ring leader for example).

Example

- You and your friends agree to rob a shop. Your role is to stand outside and act as look-out.

> You are jointly guilty with the others of robbery. Since everyone was working together according to one plan and everyone had their allotted roles/jobs to do.

- In the course of the robbery, one of the gang kills someone ...

> You are all guilty of murder. For the same reason.

- But we did not discuss this?

> Tell it to the judge or jury. If you did not intend hurting anyone, why bring along weapons? You must have realized that force was going to be used and that it may be excessive. If you did not think about it, then you should have done. You take the consequences. You will need to show that this was not part of the agreement (eg in the course of the robbery, shouting out: 'what are you doing? You are crazy, stop!' may not be enough. You may have to do more like go to the defence of the person being attacked to show that this was not part of the agreement (rather than your courage failing at the last minute)

Activity four

Common offences

Aims of Activity Four

- To explain common offences involving dishonesty and violence



45 mins

PC ss 132, 238, 241, 253
254, 271, 309

Steps to follow

1 Theft

Definition - A person who dishonestly appropriates property belonging to another person with the intention of permanently depriving the other of it is guilty of theft.

Breaking this down, the prosecution must prove beyond all reasonable doubt the following:

- the act was dishonest (mistake is not dishonesty)
- there was an 'appropriation' (whether a physical act of taking or an assumption of ownership)
- of property belonging to another (ie it was not abandoned or given away or lost)
- and the intention was to take it permanently (ie not borrow it)

Example 1

X passes a car in the street with the window open. There is a cell phone on the seat (property belonging to another). He leans in (dishonest) and picks the cell phone up (appropriation). He walks off with it (intention permanently to deprive).

Paralegal notes

Section 271 of the Penal Code defines theft as follows:

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-

- an intent permanently to deprive the general or special owner of the thing of it;
- an intent to use the thing as a pledge or security;
- an intent to part with it on condition as to its return which the person taking or converting it may be unable to perform
- an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at that time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

2 Housebreaking and burglary

Definition - Housebreaking occurs by day and burglary by night. It is committed when a person 'breaks any part, whether external, or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, flap, or other thing intended to close or cover an opening in a building, or opening giving passage from one part of a building to another, deemed to break the building'.

Paralegal notes

A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

In our society housebreaking and burglary occur frequently. Section 309 of the Penal Code states that :

Any person who-

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in such building, tent or vessel, breaks out thereof, shall be guilty of a felony termed "housebreaking".

Both offences attract serious sentences if the accused person is tried and found guilty (death sentence or life imprisonment).

3 Assault

Definition - If I lay a hand on someone unlawfully, ie without the person's consent or in a manner that cannot be justified, then I am guilty of assault.

Example 1

A policeman seizes you by the arm. His action constitutes an assault unless he acts with words of arrest or under reasonable suspicion that you have committed an offence.

Kinds of assault

Common assault, Assault occasioning actual bodily harm, Wounding, Grievous harm, Murder, Rape

Paralegal notes

An assault varies in degrees of seriousness. The example above constitutes a common assault and would hardly amount to an offence. The degrees of assault increase in seriousness from common assault (s253) through assault occasioning actual bodily harm (ABH, s 254), to assault on a police officer in the course of his duties through to unlawful wounding (s241) and grievous harm (s238) which constitutes a serious assault one step away from murder.

What aggravates the offence (ie what makes it more serious) is when the act is either:

- accompanied by intent : it is one thing for A to strike B, it is another if A keeps on hitting B - this suggests A intends to cause B really serious harm; or
- the victim is a magistrate, police or prison officer or someone acting in an official capacity

ABH involves some visible mark, such as a bruise; wounding need only involve the breaking of skin to constitute the offence; grievous harm is serious injury, such as a broken bone or knife wound or any injury hazardous to life accompanied by the intent to cause that harm.

Note: Rape is also an assault (s132). The offence has an additional element to prove, ie penetration ('unlawful carnal knowledge')

Example 2

A man (A) and a woman (B) meet at a party. They enjoy each other's company. A escorts B back home. A pushes B into the grass. B resists and tries to reject the advances of A who ignores her and has sexual intercourse.

A has committed the offence of rape. A has had 'unlawful carnal knowledge' (old language - modern day terminology prefers the more precise wording of 'penetration') without B's consent.

Example 3

Same facts, but A is interrupted by the sound of others coming back the same way and he stops before the act of penetration. B calls out and A is apprehended by the returning people.

A would be charged with attempted rape. He had gone beyond preparatory stages and had B in the grass and about to commit the act when he was interrupted.

Activity five

Sentencing

Aims of Activity Five

- To explain the principles underpinning the punishment of a criminal act



60 mins



Extensive discussion

Steps to follow:

- There are four sentencing principles: deterrence, incapacitation, rehabilitation and retribution

1. Deterrence

The first aim of punishment is to deter future crimes. By punishing the offender the theory is that s/he will be deterred from any future offending and others in society will be deterred by the sentence passed by the court

* Discussion points

Note: Paralegals to note the comments

- Does this theory hold true?
- Does anyone think of the likely consequences (ie the sentence of the court) before they commit an offence?
- Is not the likelihood of arrest a stronger deterrent?
- Does the death penalty, for instance, actively deter people from crime (ie murder, armed robbery?)

2. Incapacitation

By keeping the offender in prison for a number of months/years, it becomes physically impossible for him/her to commit further crimes and pose any threat to society.

* Discussion points

- Does it make sense to incapacitate everyone - whatever the offence?
- It may be the person who robs others is a threat and needs to be incapacitated so that normal people can get on with their lives without fear; but someone who steals because s/he is hungry - or someone who is unable to pay a fine - is that person a threat to other people and to be kept in isolation from others?

3. Rehabilitation

There is a saying: people go to prison **AS** punishment and not **FOR** punishment. The justification for prison is to keep a person in a safe place where s/he can receive education, skills training and other assistance that will turn the person into a 'more useful' member of the community. On his/her release, the person is equipped to lead a life without needing to commit further offences.

* Discussion points:

- What rehabilitation programmes exist in prison?
- Do you learn skills that will assist you on release?
- What sort of programmes would you like to see? Can you help yourselves in anyway - how?

4. Retribution

This is society's response to the offender: punishment - officially sanctioned and administered by the courts. Mob justice is the unofficial sanction of the society when the formal justice system fails to deliver.

* Discussion points:

- Do these principles strike chords with you or do they appear alien and strange?
- The approach seems to be punitive - do you agree with this?
- Or should the approach be more restorative - for instance, a wrong has been done, now what can be done to compensate the victim and community for what has been done and restore the balance and harmony that existed before?

2

Community Service: an example of a restorative approach to justice

Community Service is an Order of the Court whereby the offender is offered the opportunity to compensate society for the wrong done by performing unpaid work within the community for the benefit of the community. Community Service is only available for certain types of offences and for certain types of offender. Of course, serious offenders who are a risk to the community will not satisfy the criteria for a Community Service Order.

Paralegal notes

Community-based sanctions, if properly structured, offer many advantages to victims, to the public, and to offenders and their families. Some of those advantages include the following:

- Community service is cheaper;
- Families ties are preserved, which in turn will enhance the likelihood of success of rehabilitative endeavours;
- Community Service saves government resources. Currently it costs the government over MK1,500-00 to feed one prisoner per month;
- Community service helps to reduce the prison population, thereby easing conditions in prisons;
- The offender has the opportunity to have counseling to discuss issues that may have resulted in offending;
- Offenders will be openly seen working for the community rather than incarcerated and forgotten;
- By serving their sentences in the community, offenders can avoid the criminal influences that seem to prevail in prisons; and
- Public institutions will receive free service, therefore making financial savings.

The evident advantages of Community Service encouraged GoM in 1999 to amend the Penal Code to include Community service as one of the punishments that a Court of Law can pass. Subsequently the Criminal Procedure and Evidence Code was also amended to incorporate Community Service as an option for petty offences attracting a custodial sentence of 12 months or less. It is only minor offenders who accept their guilt who may benefit from a Community Service Order.

Persons working under a Community Service Order are sent to a public institution such as hospital, healthy clinic, school, etc to carry out voluntary work for a number of hours. Before a Community Service Order is made, the offender is critically examined by the Court as to his/her personal circumstances so that the Court is satisfied that the offender is willing and able to complete the Order. If the offender absconds or re-offends s/he will be brought back to court to answer and maybe sent to prison.

Note: Invite a Community Service Officer to attend this session.



Activity one

Evidence

Aims of Activity One

- To explain what is evidence and what is not evidence



30 mins



HRH pp93-99, CP&E ss 168-245

Steps to follow:

- Take up the story line again: describe a typical murder scene - outside a bottle store. Get the participants to add colour to the scene. Let them become witnesses because it is what people actually saw happen that can amount to evidence
- Assume there is gossip in the village about the crime and lots of people accusing so and so. Ask whether this is evidence against the accused.
NB: This is hearsay and NOT evidence
- Look at the body and describe the marks on it. These should be noted in the post-mortem. Ask the participants what the significance of the marks might be and whether there was one blow or a series of marks.
NB: The number of wounds and location of the wounds would for instance assist or not the defence (eg: if the defence was self-defence and the wounds were in the back of the deceased - this may present some difficulty;) however if the accused showed that he had wounds to his hands and wrists from defending himself against a knife, these would obviously assist his case
- Add more colour and reality to the story paint a bright picture and then unravel it and consider what is capable of being evidence and what is not - eg: the knife, the club, gun, bullets and fingerprints (see below under real evidence)

Paralegal Notes

In criminal cases everyone is presumed innocent until they are proved guilty. At the center of proof lies evidence. It is the evidence against an accused that convicts him/her of the crime.

Evidence is anything that is relevant to proving what really happened AND is produced at court AND is admissible against the accused. Some matters may be highly relevant but NOT admissible as evidence - eg: the reputation of the accused (nasty piece of work). Other 'evidence' may have been obtained through pressure (ie police treatment to obtain a confession) and therefore inadmissible.

President Banda stopped the High Court from hearing criminal cases after several people were acquitted of a notorious crime because the evidence was insufficient to convict them. He said: everyone knows they are guilty. He then transferred criminal cases to the Traditional Courts. You know what happened then. People were not entitled to be represented and were tried according to 'custom'.

The purpose of evidence rules is to ensure so far as possible that the case is tried on the facts and objectively verifiable truth. The rules are there to protect the accused from arbitrary judgement. If the police do their work, they should gather the evidence to prove the case against an accused. If they do not, then the accused will be acquitted (including those who are guilty).

The Laws of Evidence are complex and this is not the place to go into them in detail. Accused persons will need to consult with their lawyer who will advise them. Anything may or may not be evidence depending on the purpose for which it is being put forward. The sources of evidence are to be found in the CP&E Code ss 168-245.

Real evidence (see HRH p 94): The knife used to stab, the club used to beat, the gun and bullets to shoot the person - these are real objects and are called 'real' evidence. They are 'exhibited' in court (ie physically produced).

Police can conduct tests on these objects to see if they really were the weapon used to inflict the injuries - they can test the blood to see if it matches the victim/accused; they can test for fingerprints to see if they match those of the accused; they can test the gun (ballistics) to see if the bullet found in the deceased matches the gun found on the accused etc. The development of science in this area

has gone a long way to prove conclusive guilt in some cases eg: rape - whether the DNA in the semen stain matches the accused; the issue then turns on consent. In the case of burglary, a single fingerprint can prove conclusively that the accused was there - the burden on him is then to establish he was there for innocent purposes, and so on.

***** Discussion points:

- What do people think about this law? Do they think people should be protected by such rules?
- What do they think about the Traditional Courts? Do they think customary law is more just or more fair than the formal courts? Why (encourage discussion and note the observations)?



Activity two

Murder and manslaughter

Aims of Activity Two

- To define murder and manslaughter and explain the difference between the two



45 mins



PC ss 208, 209, 214, flipchart

Steps to follow

- 1 Ask anyone if they know the difference between murder and manslaughter.
- 2 Record the contributions from participants on flip chart.
- 3 Quickly paraphrase the contributions from participants and put it down on the chart and read it aloud to the group.
- 4 Explain to the group the difference between murder and manslaughter.

Paralegal Notes

The Malawi Constitution under section 16 stipulates that "Every person has the right to life and no person shall be arbitrarily deprive his or her life".

This section is fortified by the Penal Code in ss 208 and 209 where murder and manslaughter are defined and their penalties are stated.

Murder is the unlawful killing of a person with 'malice aforethought'. This means with intent to kill the person or inflict really serious harm. So if you punch someone and then jump up and down on their head, the act goes beyond assault and becomes an effort to really harm the person - if the person dies as a result, then you are guilty of murder. It does not matter that you did not mean to kill him/her, you must have realized or ought to have realized that by stamping on their head you risked causing serious injury.

Manslaughter is unlawful killing of a person without malice aforethought (ie without intending to kill them or cause really serious injury). So, a person comes up to you and is rude and aggressive. You push him away and he falls into an oncoming bus and dies. Your act caused his death, though you did not intend it. This would attract a charge of manslaughter.

Murder attracts a mandatory sentence of death. While manslaughter varies on the facts of each case. It can attract the death sentence and it can result in a discharge. For instance in the case mentioned above, the judge might well find that there was so little fault and the deceased had brought the misfortune on himself by behaving in the way he did and suspend any prison sentence or even discharge the accused.

Questions:

- What if I killed the person but did so to stop him killing me?
 - > This is self-defence. Self-defence is an **ABSOLUTE DEFENCE** to a charge of murder or manslaughter. You should therefore plead **NG** to the offence charged and go for a jury trial.
- What if the prosecution make it sound far worse than it was?
 - > Then you should tell your lawyer and make it clear that you do not accept this version. Be careful that your version does not suggest you to be innocent for then the judge will ask for the charge to be put again and enter a plea of **NG** and you will have to go for trial
- What if the prosecution offer a lesser charge (ie manslaughter) but I am still not guilty?
 - > This is very difficult. If you are charged with murder and have been in custody for five years and then the prosecution offer a charge of manslaughter on the basis that you plead **G** to the charge, then the likelihood is that you will walk out of the court home because the sentence will take into account the five years you have spent in prison awaiting trial. On the other hand, a jury could convict you of murder and you will be sentenced to death. You need to think about this very carefully and discuss the matter with your legal adviser.
- What if I admit to killing the person but did not mean to?
 - > Then you will tell your lawyer who will then offer the prosecution a plea to the lesser charge of manslaughter.

Activity three

Defences

Aims of Activity Three

- To explain the defences in law to murder and manslaughter



45 mins



PC 214

Steps to follow

- 1 Self defence is an absolute defence which if accepted by the jury will result in the acquittal of the accused - (In each question below - invite the group to discuss and come up with answers before supplying the one suggested. This will also serve to refresh the participants of Module 3 and whether participants understood self-defence)
 - A man attacks you in the street, you defend yourself - are you guilty of an offence?
 - The man attacks you with a knife and raises his arm to stab you. You grab his arm and deflect the blow: he stabs himself and dies - are you guilty of an offence?
 - The man is attacking another person with a panga. You see him raise the weapon to strike the person over the head. You run up and strike the man one blow. He dies. Are you guilty of an offence?
 - The man attacks you with his fists. You seize a knife and stab him - are you guilty of an offence?

Paralegal Notes

Suggested answers:

1. No - this is pure self-defence. Where someone attacks you and you think they are going to strike you, you are entitled to defend yourself using such force as is reasonable in the circumstances.

2. No - the attacker caused his own death by a) attacking you b) with a knife c) which you deflected: self-defence is made out.

3. No - self-defence extends to defending others. If you think that someone is about to be injured by another you are entitled to defend that person and claim you only acted to protect the other person.

4. Probably, yes - the amount of force used in self-defence was not 'reasonable' or proportionate to the threat offered. However sometimes it is difficult to weigh up the degree of threat offered in the heat of the moment and the matter could go before a jury to determine on hearing the sides give their account.

2 Alibi

An 'alibi' defence means that you were somewhere else at the time the crime was committed and therefore you could not have been responsible.

Paralegal Notes

Note: if the accused relies on alibi, the defence lawyer will need to call witnesses to prove the alibi. For example an accused who claims to have been at the movies with Daisy and Catherine at the time a crime was committed needs to call Daisy and Catherine as witnesses to testify to the alibi and the manager of the movie house to prove the film was showing at the time.

3 Insanity

If a person was insane at the time s/he committed the offence, then the accused is not criminally responsible for his/her act.

Paralegal Notes

Note: insanity is a legal defence. There is a legal definition of insanity which will require medical proof. The insane accused pleads Not Guilty by reason of insanity and is then committed to a mental institution for treatment, subject to psychiatric reports.

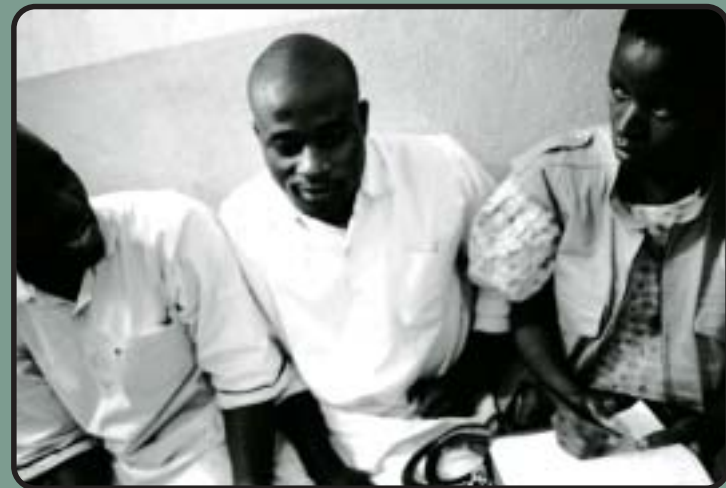
4 Provocation

This is a partial defence and serves to reduce a charge of murder to manslaughter. What amounts to provocation is often a matter for the jury; but the prosecution can reduce a charge from murder if on the facts, provocation appears to be made out. Provocation is often pleaded in domestic cases where the accused acts in the heat of passion and loses his self control. (PC s 214)

Paralegal Notes

Note: provocation (rather like insanity) arises where a person's reasoning and thought processes are temporarily clouded by the intense emotion of the moment, which cause the person to act unthinkingly and blindly.

Example: Man arrives home late at night and finds his wife in bed with another man. He picks up a weapon and strikes the man.



Activity four

Jury System

Aims of Activity Four

- To inform the participants about the jury (system) i.e. who the jury is, what is its purpose
- To explain the meaning of verdict, majority verdict and a hung jury



45 mins



Flip Chart, Markers, hand out

Steps to follow:

- 1 Define who is a juror and how they are appointed.
- 2 Explain to participants how jurors learn their duties.
- 3 Tell participants how many jurors
- 4 Tell participants about swearing of the jurors

Paralegal Notes:

Explain that all murder trials are tried by the jury. Who are non-lawyers; ordinary citizens and they are oriented before they try any one. They are formally sworn in as jurors in which they take a solemn oath to determine the case on the evidence and act impartially.

The jury tries the **FACTS** in the case. The judge applies the **LAW**. The jury must take the law from the judge; the judge must take the findings on the facts from the jury. The jury reach a **VERDICT** ie an agreement among themselves on the accused's guilt or non-guilt. At the end of the trial, the jury is asked if they have agreed on their verdict if they answer yes, then the foreman stands and is asked what is the verdict of the jury. He will answer either Guilty or Not Guilty. It may be the foreman indicates that they cannot agree on a verdict in which case the judge will either give

them more time (and reach a majority verdict), or he will discharge the jury and order a re-trial at a later date.

A majority verdict is one where at least 9 members of the jury are agreed on the verdict, thus 11:1 say he is Guilty; or 10:2 or 9: 3. Anything less than 9 means the jury are 'hung' and cannot agree and will be discharged.

If the judge disagrees with a jury's verdict, there is nothing he can do. They alone judge the facts.

Questions:

- If I know someone on the jury panel and know that he bears me a grudge; or if I recognize someone I know to be related to the family of the victim or to a police officer what can I do?
 - > You can challenge their presence in the jury and request that they stand down (by giving the reasons)
- But jurors know nothing about the law, why should I trust them?
 - > They do not need to know anything about the law. This is the function of the judge. Their job is to listen to the account given by both sides, through the evidence in the form of witnesses, or real objects (ie a knife, club etc) and come to a view whether they are satisfied so that they are sure the person accused of the crime is guilty of it.

* Discussion point:

Do you think the jury system is fair? Why not? What would you recommend in place?

(Note the observations made)

Some Case Studies

Peter is cutting down a branch of a tree near the busy road. While in the process of cutting the branch, the branch falls down and hits John who is passing by. John sustains head injuries and is admitted to the nearest clinic. Two hours later he is pronounced dead. Peter is then arrested. What offence is Peter likely to be charged with?

- It is clear that the death of John was caused by Peter. However, it was not the intention of Peter to kill John. A reasonable person should have known that his act - without due warning to others - endangered the lives of other road users. It is, therefore, proper to charge Peter with manslaughter due to his recklessness.

George is a drunkard who usually comes home late at midnight. One day he comes home earlier than expected and finds his wife in bed with Patrick: they are both naked. George picks up a knife from his kitchen and stabs Patrick in the chest. Patrick runs away and ten days later he dies. The police arrest George.

- The time lapse is long. However unless there is any other cause, it seems George caused the death of Patrick. The problem is the knife and George going to the kitchen to get it and then stab Patrick. It is not as if he turned up, saw the situation and then reacted. He saw the situation then deliberately went off to get a weapon. The proper charge on these facts would be murder.

Would the charge against George have been different if he picked the knife right there in the bedroom?

- Yes, for then George could have rightly pleaded provocation and that he killed Patrick in the heat of passion therefore attracting the reduced charge of manslaughter.

Zagwa had a maize mill at Lizulu trading centre. Thieves had been troubling him by stealing valuables from his premises. To catch them, he connected live electricity wires to bars covering the maize mill doors and windows. One day three kids were playing football near the building. As they were playing, one of the kids got tired and decided to go and seek shelter at the building. There he saw naked wires which were connected to the bars and thought of picking them up. Upon touching the wires, the child was electrocuted and died instantly. Is Zagwa guilty of murder or manslaughter?

- Zagwa is likely to be charged with manslaughter because he caused the death of the child due to his reckless disregard for the lives of others. Zagwa had not posted any signs warning of the danger nor taken precautions to ensure innocent people were not put at risk.

A group of people is traveling to Lilongwe by a mini-bus. The mini-bus is traveling at an accelerated speed. Some passengers in the mini-bus complain about this to the driver to reduce his speed. The driver ignores the passengers and continues at speed until the mini-bus plunges into a river as it tried to cross over the bridge just after negotiating a sharp bend. Three people die on the spot, five sustain serious injuries and eleven have minor injuries. The driver runs away and after some time is apprehended and appears in court. Is the driver guilty of murder or manslaughter?

- The driver is likely to be charged with manslaughter for causing death by reckless driving. By driving at a high speed, he should have known that he was creating an unreasonable risk of death to his passengers and other road users.

A young man named Ziphindo married a girl named Zimlet. After a year in marriage the two are blessed with a baby boy. They name the baby Zampona. One day Ziphindo leaves his home for a drinking spree. He comes back at around 6:00 p.m. and the first thing he asks for is his son who is only 14 months old. His wife gives him the child. He plays with the child by throwing it up and down in his hands. He does this several times and his in-law who is sitting near pleads with him to stop doing this because Ziphindo is excessively drunk. Ziphindo objects saying that he is proud of his son, his blood and continues throwing him up and down until he falls on the floor. The baby instantly faints and is taken to hospital. On arrival it is pronounced dead and Ziphindo is arrested by the angry family members and taken to police. Is Ziphindo guilty of murder or manslaughter?

- Ziphindo is likely to be charged with manslaughter because he caused the death of his beloved due to his recklessness. Ziphindo should have known that throwing his son whether drunk or sober put the child at risk. The interesting question that arises is the sentence - clearly this was accidental and the grief to the parent is punishment enough - should the judge pass a term of imprisonment or suspend that term so the father can be with the family?

Mary is a daughter of a rich man in the capital city of Lilongwe. She is assisting her father in fixing new prices on some items in their biggest shop in the city centre. Since the shop has many sales representatives, business goes on as usual. While fixing prices, Mary sees James, one of the customers, pick two tablets of soap and hide them under his pants. Mary watches James closely until he gets out of the shop without paying for the soap. She shouts for help so that people in the city should assist in apprehending James. After chasing James for almost one kilometer he is apprehended by three strong young men, Ted, Jack and Petros. The three men get some petrol and set James ablaze. He dies on the spot. Are the three young men guilty of any offence?

- The three young men are likely to be charged with murder because mob justice is no defence. It was the duty of the three young men to take James to the nearest police station rather than taking justice into their own hands. All three men are equally guilty because they acted together, even if one took the lead.

On Saturday 28th December, 2000 Mabvuto went to a disco at Choma Bar and Restaurant in the city of Mzuzu. In order to enjoy the evening he invited two friends to join him that day. The three men bought nine bottles of beer and started drinking. Before they could finish their beers one man joins them uninvited and picks up one beer and starts drinking it. Mabvuto asks the man to replace the beer. Instead the man gets angry and beats up Mabvuto. Mabvuto picks a full beer bottle and hits the man with the bottle on the head. The man sustains injuries and dies at Mzuzu Central Hospital. Is Mabvuto guilty of any offence?

- Mabvuto appears to be acting in self-defence. If the facts are made out it is likely that he would be acquitted of any offence therefore the DPP may recommend discharging the accused in the public interest and to avoid the unnecessary expense of a useless trial.

Activity one

Committal Proceedings

Aims of Activity One

- To explain the procedure by which a case comes to the High Court, the purpose of the committal proceedings and what happens when the case is committed for trial



15 mins



Flip chart/ Flip Chart Paper, Markers, Dictionary and Booklets Makhoti ndi Inu, CP&E ss 262-271

Steps to follow:

- 1 Ask participants what they think is the purpose of committal proceedings.
- 2 Explain to participants what happens during the committal proceeding.
- 3 Explain to participants what happens after committal to the high court.
- 4 Distribute the booklets, brochures and hand outs if any.
- 5 Ask the participants to make comments or ask questions on the lecture, PLC or presentation.

Paralegal Notes

The committal proceedings are a 'screening' process which ensure those cases that are ready and suitable go to the High Court for trial so as to avoid delay or wasting court time in the higher courts.

The Magistrate's Court cannot try homicide cases. They are considered too serious. Therefore the case starts in the Magistrate's Court from which it is sent (or committed) to the High Court for trial.

In homicide cases, the DPP issues a certificate to state that the case is a proper one to be tried by the High Court. Once the court receives this certificate it can then commit the person for trial on the charge(s) as set out on the certificate.

Notice is then served on the Registrar of the High Court and a copy goes to the DPP. The case should then be ready for trial.

No evidence is heard - though there is provision for this. The documents are put together and handed into the court who make copies. No trial can be heard unless it has first been committed for trial from the Magistrate's Court.

21 days before trial, the DPP should provide the accused or representative with a list of the persons it is proposing to call to give evidence at trial and a statement of the substance of the evidence of each witness.

The MC states that the trial should take place 'within a reasonable time' Art. 42 (2) (f) (i)

It is not clear what a reasonable time means. It would seem that four years is not a reasonable time.

Activity two

Court lay-out and rules

Aims of Activity Two

- To provide participants with knowledge of the judicial system, legal process, and courtroom procedure
- Distinguish the roles of different personnel in court system
- To provide the participants with exposure to legal resource persons such as Judges, lawyers etc
- To help clarify participants attitudes towards the law and legal system



20 mins



Flip chart, Markers
Malawi CARER Courts and you
(makhoti ndi inu) 1999.
Name cards, Poster of court setting.

Steps to follow

Describe what you see: participants should begin by focusing on the elements of the visual. Asking them to describe everything they see on the court settings poster.

1

- What things do you see?
- What do people represent?

Analyse the visual: At this step, participants should be asked to analyse what they see. This should be done by asking questions such as:

2

- How do the elements of the visual relate to each other?
- How do you interpret what you see?

Clarify the participant's beliefs: Participants should be given the opportunity to express their opinions about what they see. For example:

3

- what do you think of the lay-out of the court? Why do you think it is like that?
- how does the lay-out compare with the village? Should it be changed to fit in with traditional ways? How?

4

Summarise the session: distribute the name cards to the participants while explaining to the participants using the paralegals notes below. Participants should keep on holding the name cards

Paralegal notes:

In order to explain better to the participants, it is important for them to be familiar with the physical setting of the courtroom. The poster and name cards depict the lay out of a typical courtroom.

Have participants with name cards take their places. The name card includes: the judge, the attorneys, the witnesses, the jury, bailiff, courtroom observers and members of the public.

Now explain different roles as following and distribute Malawi CARER booklet

- The judge
- The lawyers
- The witness
- The jury
- A bailiff
- Courtroom observers
- Public Gallery

Activity three

Starting the trial

Aims of Activity Three

- To explain what will happen at trial in the High Court



75 mins



Role play, discussion

Steps to follow:

1 Review the plea stage earlier

- Divide participants into groups of three or four to discuss the meaning of plea (buzz Groups 5 minutes).
- Tell participants to return to the large group and ask each group to say aloud what they discussed.
- Record on a flip chart (newsprint) what ever feed back you get from each group.
- Summarize the participants input from the newsprint.
- Stick up a newsprint that contains the real meaning of plea and read aloud to the group.
- Ask anyone who went for plea to explain his/her experience on how it was conducted.
- Summarize the topic by giving the right procedure of plea and its consequences (See paralegal notes)

OR: ROLE PLAY: PLEA OF NOT GUILTY AND GUILTY

Select three participants; 1 should be a judge, 1 accused and 1 court clerk. Enter a plea of not guilty.

Do the same with a plea of guilty.

2 The plea entered was NG and therefore a trial has to take place

- The indictment / charge has been read and a plea of Not Guilty entered
What happens next?
- The jury is empanelled and sworn in
What about objecting to someone being a juror, for instance

you know him to be married to a police person or related to the victim in the case - can you object?
What happens next?

- The Prosecution open their case: it is a summary of the evidence they will put before the jury to prove the guilt of the accused beyond all reasonable doubt.
What happens next?
- The prosecuting counsel then calls his witnesses and asks them to give their account of what happened.
- At the end of giving their account or statement, the defence counsel asks questions of the witness or cross-examines the witness

Paralegal Note:

This is an important stage. The defence lawyer puts your version of events to the witness who must agree or disagree with it. You must follow the dialogue closely and make sure your lawyer gets it right. If s/he does not, call his attention and explain it to him. Similarly if s/he misses something out, tell him/her before the end of the cross-examination.

- Then the prosecution can ask further questions of the same witness or re-examine the witness. So that any doubt or confusion raised by the questions of the defence counsel can be clarified for the jury.
- This process of statement, cross-examination and re-examination is repeated for each witness.

Note some witnesses are called to produce an exhibit, ie a real piece of evidence such as the weapon or article stolen or other incriminating item found on the accused.

- No case to answer: at the end of the prosecution case, the defence can argue that there is no case to answer, that the prosecution have failed to make out any case against the accused or that the witnesses have been exposed as liars or in some other way fail to substantiate the charge.

Note: This is no easy matter. The prosecution simply have to raise a reasonable suspicion that you were in some way involved. They do not have to prove anything at this time - so unless you can show that the suspicion is unfounded or the witnesses are acting in bad faith, it will fail.

- Defence counsel then opens for the accused. He too can address the jury with an opening speech summarizing the case he is about to present; or simply get on with calling the evidence for the defence. If the accused has agreed to give evidence, s/he will be called first.

Note: the issue of whether or not to give evidence is one that needs to be discussed with your lawyer

- As with the prosecution, each witness is cross-examined after giving his/her account. The accused is cross-examined too by the prosecution.
- Once the witnesses are finished, the defence close their case and both sides address the jury. The prosecution sum up first and then the defence.
- The Judge then sums the case up to the jury
- The Jury retire to consider their verdict
- * The verdict should be unanimous (ie all the members of the jury agree). If they cannot all agree after a period of time decided by the judge, the judge has them back in and advises them that he can accept a majority verdict whereby at least 9 agree.

- Once the jury have decided on their verdict, the usher brings them back into court and the foreman is asked to stand and asked the following questions:

- Has the jury reached a verdict upon which they are all agreed?
- Yes
- Does the jury find the accused guilty or not guilty?
- Not Guilty
- Not Guilty and that is the verdict of you all?
- Yes

- o Then the judge immediately discharges the accused who is free from that moment to leave the dock and go home
- o If the verdict goes the other way and the accused is found Guilty, then the judge proceeds to sentence

3 Sentencing

Role play:

1. take one of the stories you have discussed and invite someone to play the prosecutor and another defence counsel and everyone else plays the judge
2. Divide into three groups, one with the person chosen to prosecute and the other with the person chosen to mitigate. The third group thinks about the sentence it is going to pass before listening to the 'lawyers'. Invite the groups to discuss how they will present the facts of the case for the State and on behalf of the accused.
3. The prosecutor opens the facts of the case, the defence counsel mitigate. The others can ask questions (like a judge) and seek explanations.
4. When the facts have been opened and mitigation entered, the group acting as judge then agree the sentence.
5. The judge group then pronounces sentence

Note: you should not be surprised to find the sentence on the high side.

Discuss it afterwards and how they came to the number of years.

Questions:

- o What sentence did they think of before listening to the prosecution?
- o What sentence did they think of after listening to the prosecution and before listening to the defence?
- o What sentence did they think of after listening to the defence?
- o What decided them to increase or decrease the sentence?
- o Did anyone hold a strongly dissenting view from the consensus?
- o Why? What sentence would they have passed?

Paralegal Notes

Where the case has gone to trial and the jury have returned a guilty verdict, there is no need for the prosecution to open the case. However he will stand and tell the judge about the offender's criminal record.

Where the case has not gone to trial and the accused has entered a plea of Guilty, then the prosecution will open the facts of the case. These should be agreed beforehand. It may be the defendant does not agree certain details which make the facts sound worse and so cause the judge to pass a stiffer sentence. The defendant is admitting guilt, thus the judge assumes the facts are agreed. If they are not, the defendant must say so - even from the dock. It may be that if the matter complained of is only a detail, the prosecution will agree not to mention it. However if it is important, then it may be the prosecution will seek to prove it by calling the police officer or other witness to give evidence under oath (a mini trial of the facts) and again defence counsel can cross-examine.

Aims of Module Six

- To clarify the law regulating prison and offences committed in Prison
- Explain complaints mechanisms
- Introduce prisoners' rights

Note: This is a delicate section and should be treated with sensitivity. The Prison Act should be the guide here but it is out of date and many provisions have fallen into disuse. This places everyone in a difficult situation because prisoners and prison officers lack clarity in this important area.

Accordingly, this section should use the current Prison Act but consist mainly of group discussions of the issues. Paralegals should avoid telling prisoners how to behave etc. The involvement of Prison officers is important in this section and they should be invited to present activities and actively join in the discussions.

You might therefore want to rehearse this PLC with selected prison officers (those who have shown interest in the PLCs).

You should act as facilitator rather than teacher and so keep a low profile. Provoke discussion and search for constructive solutions.

Activity one

Offences committed in prison

Aims of Activity One

- To explain the range of offences that can be committed in prison



45 mins



Prison Act ss 89,91, MC Article 42
HRH p2

Steps to follow

- 1 Explain the prison offences**
Prison offences are listed in s89: there are over 44 and range from mutiny to insubordination.
- 2 Proceedings**
 - Any charge should be heard by a magistrate in court; or
 - within the prison by either the Commissioner or Officer in charge or a visiting magistrate.
- 3 Punishment**
Current sanctions are only: loss of remission.

* Discussion point:

- * Are prisoners regularly charged with prison offences?
- * How are the matters heard/processed?
- * Do prisoners feel the system is a fair one? Do they receive a hearing?
- * What are the sanctions (punishments)?

Note observations made in the course of the discussion

Note: The sanctions listed indicate how out of date the legislation is. Apart from a term of six months and loss of remission (s91), corporal punishment (proscribed by the MC) and solitary confinement are included.

Activity two

Complaints mechanisms

Aims of Activity Two

- To explain available complaints procedures in prison and outside



45 mins



Prison Act ss 21, 41

Steps to follow

1

Inside prison

The Prison Regulations under s 21 states that the officer in charge shall:

- provide every prisoner with the opportunity of making complaints to him which s/he shall investigate and redress any legitimate grievance.
- that a prisoner may speak to a visiting justice or official visitor (under s41, the OC should supply the magistrate with the name of a prisoner who has expressed a wish to meet with him/her)
- a note of any complaint made should be entered in the prisoner's file together with a note of the action taken by the officer

2

Other

- Court: every prisoner has the right of appeal against conviction and/or sentence to the High Court.
- Petitions may be made to the Minister through the Officer in Charge which the Minister may transmit to the president for his consideration/decision; petitions may also be made to the Chief Commissioner.
- Constitutional bodies:
 - * Prisons Inspectorate
 - * Office of the Ombudsman
 - * Malawi Human Rights Commission
- In addition, there are NGOs, religious groups and the press.

Communications can be made by letters, interviews, articles.



- * Do you apply these mechanisms? Why not?
- * Can you suggest other more informal mechanisms - would a committee of prisoners/Prison Officers work?

Activity three

Prisoners Rights

Aims of Activity Three

- To set out the limits of police powers and the duty of prisons and courts in protecting the rights of prisoners



60-75 mins



MC Art 19 and 42, MSW, SMR, HRH p28-30

Steps to follow

1

Go through Article 19 (dignity of all persons shall be inviolable) (further reading: HRH pp28-30)

Questions:

- Do your conditions respect human dignity?
- What about staff conditions?
- How would you describe something as 'degrading'?
- How could conditions be improved?

2

Use Article 42 to invite a discussion about rights. You could ask them what rights people under arrest and detention and awaiting trial ought to have and elicit the following type of responses:

- we should at least know what we are charged with
- we should not have to wait for years before appearing in court
- we should be able to prepare our defence etc

3

Then go through Art 42 to show what rights they have (they may be surprised) and discuss any technicalities. The discussion should provoke laughter and cynicism because they are stated on paper but unrealized in practice

4

This might provoke further discussion on how rights can be enforced: prison officers should be brought into this discussion (indeed all discussions).



Discussion point (note observations):

- What would you say are the most serious violations of your rights in prison? Why? How could the situation be improved?
- If you could change one thing in your situation now - what would that be - how would you do it?

Paralegal Notes

Article 42 of the Malawi Constitution stipulates the rights of a person under arrest. Under this article, the law states that every person shall be presumed innocent until the prosecution proves that person guilty of the offence. It is therefore important that each person's rights should be respected even though he is under arrest. (refer: MC Art 42 in the appendix. HRH p2)

Appendices



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Paralegal Advisory Service - Code of Conduct

Preamble

The purpose of the Code is to provide clear guidance to, and regulate the conduct of, the paralegals both within and outside the prison walls and to promote the trust and confidence of the prison authorities while respecting the independence and integrity of the paralegals as human rights monitors.

Paralegals will be bound at all times by this Code of Conduct.

Accordingly, I, the undersigned, agree the following:

1. To work in co-operation with the prison authorities at all times and to seek the advice and guidance of prison staff when in doubt. In particular, to notify the prison authorities in good time of dates and times of proposed visits and to advise promptly of any cancellation.
2. To submit at all times to the authority of prison staff while on prison premises including the right of the prison staff to search my person.
3. To refuse any request made to me by a prisoner or relative/friend that might compromise the security of the prison and specifically, not to communicate messages (verbal or written), or any item whatsoever (concealed or openly) for a prisoner or relative/friend of a prisoner.
4. To refer any communication from the press to the prisons public relations officer or the paralegal co-ordinating team; and not to issue any press statement or otherwise communicate to the press myself save through the channels prescribed.
5. To wait for permission before entering the prison; and even when prior consent of the authorities has been granted to abide by any decision withholding right of admission.
6. To hold open meetings with prisoners and welcome the attendance of prison officers.
7. To refuse any meeting with a prisoner to which the rules of confidentiality should apply unless either the consent of the authorities has been requested and granted beforehand; or in the company of a certified legal practitioner or other member of a formal body.
8. To withdraw promptly from any scene in which prison staff and prisoners are in dispute.
9. To quit the prison premises promptly at the invitation of a recognised staff member.

Relevant Sections of the Malawi Constitution

Chapter 3: Fundamental Principles

12. Constitutional Principles

(iv) The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental 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.

(v) 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.

Chapter 4: Human Rights

15. Protection of human rights and freedoms

(2) Any person or group of persons with sufficient interest in the 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 Government to ensure the promotion, protection and redress of grievance in respect of those rights.

19. Human dignity and Personal Freedoms

(1) The dignity of all persons shall be inviolable

(2) In any judicial proceedings or in any other proceedings before any organs of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(3) No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

(4) No person shall be subject to corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of the State.

(5) No person shall be subjected to medical or scientific experimentation without his or her consent.

(6) Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be;

a) detained without trial

b) detained solely by reason of his or her political or other opinions; or

c) imprisoned for inability to fulfill contractual obligations

27. Slavery, servitude and forced labour

(1) No person shall be held in slavery or servitude

(3) No person shall be subject to forced labour

41. Access to justice and legal remedies

(1) Every person shall have a right to recognition as a person before the law

(2) Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.

42. Arrest, detention and fair trial

(1) Every person who is detained, including every sentenced prisoner, shall have the right:

- a) to be informed of the reason for his or her detention promptly; and in a language which he or she understands
- b) to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State
- c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State
- d) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religion counsellor and a medical practitioner of his or her choice;
- e) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and
- f) to be released if such detention is unlawful

(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right:

- a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
- c) not to be compelled to make a confession or admission which could be used in evidence against him or her;
- d) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an un-convicted person;
- e) to be released from detention, with or without bail unless the interests of justice require otherwise;
- f) as an accused person, to a fair trial, which shall include the right-
 - i) to a public trial before an independent and impartial court of law within a reasonable time after having been charged;
 - ii) to be informed with sufficient particularity of the charge;
 - iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial
 - iv) to adduce and challenge evidence, and not to be a compellable witness against him or herself;
 - v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
 - vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or punishment than that which was applicable when the offence was committed;

- vii) not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;
 - viii) to have recourse by way of appeal or review to a higher court than the court of first instance;
 - ix). to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and
 - x) to be sentenced within a reasonable time after conviction;
- g) in addition, if that person is a child, to treatment consistent with the special needs of children, which shall include the right -
- i) not to be sentenced to life imprisonment without possibility of release;
 - ii) to be imprisoned only as a last resort for the shortest period of time;
 - iii) to be separated from adults when imprisoned, unless it is considered to be in his or her interest not to do so, and to maintain contact with his or her family through correspondence and visits;
 - iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;
 - v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role; and
 - vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.

45. Derogation and public emergency

(6) Where a person is detained under a state of emergency such detention shall be subject to the following conditions -

- a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible and in any case not later than 48 hours of detention;
 - b) the name of every detainee and a reference to the measures in terms of which he or she is being detained shall be published in the Gazette within five days of his or her detention;
 - c) when rights entrenched in section 19 (6) (a) or section 42 (2) (b) have been suspended -
 - i) the detention of a person shall as soon as it is reasonably possible but not later than ten days after his or her detention, be reviewed by a court, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace and order;
 - ii) a detainee shall at any stage after the expiry of a period of five days after a review under subparagraph (i) to be entitled to apply to a court of law for further review of his or her detention and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;
 - d) the State shall for the purpose of a review referred to in paragraph (c) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- 7) If a court finds the grounds for the detention of a person to be unjustified

or illegal it shall order his or her release and that person shall not be detained again on the same grounds unless the State shows good cause to a court prior to such re-detention.

Chapter X: The Ombudsman

123. Functions and powers

1) The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.

126. Remedies

Where the investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall -

- a) direct that appropriate administrative action be taken to redress the grievance;
- b) cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance; and
- c) refer a case to the Director of Public Prosecutions with a recommendation for prosecution

Chapter XI: Human Rights Commission

129.

There shall be a Human Rights Commission the primary function of which shall be the protection and investigation of violations of the rights accorded by this Constitution or any other law.

130.

The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this Constitution, but shall not exercise a judicial or legislative function and shall not be given powers to do so.

Chapter XVII: Prisons

163. The Malawi Prison Service

The Malawi Prison Service shall consist of all penal institutions, labour camps, special and secure schools, and other institutions that are used to house, detain and rehabilitate persons sentenced to imprisonment in whatever form such imprisonment may take, but shall not include holding cells in police stations.

167. The Prison Service Commission

- 1) There shall be a Prisons Service Commission with the powers and functions conferred on it by this Constitution and by an Act of Parliament.
- 2) The Prison Service Commission shall have the power to appoint persons to hold or act in offices in the Prison Service of Malawi, other than the Chief Commissioner for Prisons, including the power to confirm appointments and to remove such persons from office.
- 3) The Prisons Service Commission shall, subject to this Constitution and any

Act of Parliament, exercise disciplinary control over persons holding or acting in any office to which this section applies.

4) The Prison Service Commission may, subject to such conditions as may be laid down by and Act of Parliament, delegate powers under this section by directions in writing to any member of the Commission or to any public officer or public body, being part of the Malawi Prisons Service.

5) Where any person or body may, from time to time, exercise powers under this section on behalf of the Prisons Service Commission, in accordance with subsection (4), the Prisons Service Commission shall-

- (a) require that person or body to furnish reports in such a manner or form as the Commission has specified in the directions by which it is delegated those powers;
- (b) hear such complaints or appeals from persons in sufficient interest relating to the exercise of powers under this section and shall have the authority to -
 - (i) quash the decision of a person or body exercising such powers;
 - (ii) exercise such disciplinary powers with relation to such person or body, subject to the conditions laid down by an Act of Parliament;
 - (iii) revoke directions delegating powers to any person or body;

Provided that nothing in this section shall prejudice the right of any person who is the subject of a decision made by or on behalf of the Prisons Service Commission to appeal to the High Court or the right of any person with sufficient interest in such a decision to petition the High Court for judicial review of that decision.

169. The Inspectorate of Prisons

(1) There shall be an Inspectorate of Prisons which shall have such powers, functions and duties in relation to the Malawi Prison Service as are conferred on it by this Constitution or an Act of Parliament.

(2) The Inspectorate of Prisons shall exercise its powers, functions and duties independent of any direction or interference by any other person or authority.

(3) The Inspectorate of Prisons shall -

- (a) be charged with monitoring the conditions, administration and general functioning of penal institutions taking due account of applicable international standards;
- (b) have such powers as shall be required for it to make investigations and shall have the power to require any person to answer questions relating to such subjects as are relevant to those investigations;
- (c) have the power to visit any and all institutions within the Malawi Prison Service with or without notice and without let or hindrance; and
- (d) exercise such other powers as may be prescribed by an Act of Parliament.

(6) The powers conferred on the The Inspectorate of Prisons by this section shall also be exercisable by the The Inspectorate of Prisons with respect to holding cells in police stations.

170. Composition of the Inspectorate of Prisons

(1) The Inspectorate of Prisons shall consist of the following members -

- (a) such Justice of Appeal or Judge as shall from time to time be nominated in that behalf by the Judicial Service Commission, who shall be chairman;
- (b) the Chief Commissioner for Prisons or such person as he or she may nominate in that behalf being a senior member of the Malawi Prison Service;

- (c) such member of the Prisons Service Commission, other than the Chief Commissioner of Prisons, as shall from time to time be nominated in that behalf by that Commission;
- (d) such Magistrate as shall from time to time be nominated in that behalf by the Commission; and
- (e) the Ombudsman

(2) The Inspectorate of Prisons shall have the power to co-opt persons as representatives of any local or international organisations having an office in Malawi involved in the monitoring of human rights or more generally concerned with the welfare of offenders as may be approved of by the Inspectorate of Prisons.



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The Paralegal Advisory Service comprises:

Youth Watch Society (YOWSO), Mzuzu
email: pas-yowso@sdpn.org.mw

Centre for Legal Assistance (CELA), Lilongwe
email: pas-cela@sdpn.org.mw

Malawi CARER, Zomba
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