

Evaluating access to education for Rastafarian children and Muslim girls in Malawi

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Summary: *Over the years, there has been a challenge for Rastafarian and female Muslim children to access education in public schools as well as Christian-aided or assisted schools in Malawi. This challenge has been due to a policy requiring all students or learners in public schools to have short and combed hair. There is a belief that the policy, dating back to Malawi's one-party era, targeted Rastafarian children and female Muslim children due to their maintaining dreadlocks or long hair and wearing of the hijab, respectively. In challenging this infringement of access to education by Rastafarian and female Muslim students in Malawi, the country has witnessed litigation, circulars and memoranda of understanding. This article examines the effectiveness of the adopted approaches in addressing access to education for Rastafarian and female Muslim children. In so doing, the author presents the applicable legal and policy framework. The article subsequently looks at how access to education challenges have been addressed in relation to female Muslim students and Rastafarian children, respectively. Before the conclusion, there is a brief discussion of the justiciability of the right to education in Malawi and related issues of the role of the courts and other stakeholders. Based on this analysis and examination, the article concludes that much as the adopted approaches have played a crucial role in ensuring access to education for Rastafarian and female Muslim children, there is a need*

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for more action in terms of legislative reform as well as dissemination and public awareness, in particular regarding the recent High Court decision concerning Rastafarian children and their access to education. The article recommends further study on the issue of access to education in Malawi, especially on other aspects of education accessibility as well as dealing with other religious groups.

Key words: *education; right to education; access; accessibility; strategic litigation; circulars; memorandum of understanding; Muslim children; Rastafarian children*

1 Introduction

Due to a policy requiring all students in public schools to have short and combed hair, Rastafarian and female Muslim students have faced protracted challenges to access education in government and Christian-aided schools¹ in the country. It is believed that the policy targeted Rastafarian and female Muslim children. Concerning Rastafarian children, one of the core tenets of the Rastafarian faith is that they must observe the Nazerite prescription that requires that they must not cut their hair but let it grow.² Through their adherence to the Nazerite requirement, by keeping long hair or dreadlocks, Rastafarian children have been adjudged as contravening the policy and, thus, have been denied access to education in public schools, including Christian-aided schools. Regarding female Muslim children, their wearing of the hijab, a headscarf worn by many Muslim women and girls as a way of demonstrating modest behaviour,³ has equally been deemed as violating the policy and, hence, they have been denied access to education in public schools.

This policy, though it is not known when it was officially adopted, originates from Malawi's one-party era, particularly with reference to the repealed section 180(g) of the Penal Code⁴ and the Decency in Dress Act of 1974 which regulated how people should dress and

1 Christian-aided/assisted schools are schools that are under the Malawi government subvention but are constructed by different churches in the country.

2 *State v The Attorney General & Others; Ex Parte MM & Others* (Judicial Review Case 55/2019 & Judicial Review Case 48/2017) (High Court) (Zomba District Registry) (unreported) para 4.23 (MM).

3 A Piela 'Muslim women and the politics of the headscarf' *JSTOR Daily* (New York) 6 April 2022, <https://daily.jstor.org/muslim-women-and-the-politics-of-the-headscarf/> (accessed 15 November 2023).

4 Penal Code (Amendment) Act 11 of 1973.

look.⁵ The ideology behind the regulation of peoples' dress and appearance, notably, restricting or stopping persons, especially men or students, from keeping long hair, was to ensure that it was neat looking and well kept.⁶ Thus, the Decency in Dress Act, among others, prohibited males from keeping long hair and prescribed the style and legal length of hair for males in Malawi.⁷ In the same manner as it was provided in the Decency in Dress Act, section 180(g) of the Penal Code regulated the keeping of hair by male individuals.⁸ While the Decency in Dress Act was repealed in 1993, section 180(g) of the Penal Code was repealed by the Penal Code (Amendment) Act 1 of 2011.

Unfortunately, the policy survived the repeal of section 180(g) of the Penal Code and the Decency in Dress Act as well as the dawn of the human rights-centred 1994 Republic of Malawi Constitution.⁹ There have been numerous incidences of Rastafarian children being denied admission into government schools because of their dreadlocks. For instance, in 2006 a 14 year-old Rastafari secondary school student was denied enrolment at a public school in Blantyre due to his dreadlocks.¹⁰ Then, in September 2012, three Rastafarian children were sent home from Makwapa Primary School due to their dreadlocks.¹¹ Intriguingly, the public relations officer of the Ministry of Education supported the removal of the children on the basis that there was a policy that prohibited dreadlocks and encouraged uniform appearance.¹² In March 2017 a similar incident arose and the Ministry of Education publication relations officer reiterated that dreadlocks and hijabs remained banned in government schools.¹³ Similarly, there has been evidence of misunderstandings regarding a policy disallowing female Muslim students from wearing the hijab, particularly in Christian-owned schools based in Muslim-dominated

5 *MM* (n 2) para 4.11.

6 As above.

7 Southern African Litigation Centre 'Malawi: Challenging refusal of admission to school' (21 December 2017), <https://www.southernafricanlitigationcentre.org/2017/12/21/malawi-challenging-refusal-of-admission-to-school/> (accessed 15 November 2023).

8 Law Commission 'Report of the Law Commission on criminal justice reform on the review of the Penal Code (Cap 7:01)' (31 March 2000) 52, <https://www.lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Penal%20Code.pdf> (accessed 15 November 2023).

9 *MM* (n 2) para 4.11.

10 MO Mhango 'The constitutional protection of minority religious rights in Malawi: The case of Rastafari students' (2008) 52 *Journal of African Law* 219, http://journals.cambridge.org/abstract_S0021855308000107 (accessed 17 November 2023).

11 DN Boaz *Banning black gods: Law and religions of the African diaspora* (2021) 242, as cited in *MM* (n 2).

12 As above.

13 As above.

parts of Malawi. For instance, in 2013 the Ministry of Education closed a primary school in Mangochi¹⁴ on the grounds that the community was insisting on students attending classes in hijab.¹⁵

This policy has mainly been challenged through strategic litigation, and also through circulars in respect of Rastafarian children and negotiations, leading to a memorandum of understanding (MoU) concerning female Muslim students. The adoption of various approaches implies the need for a holistic approach to successfully iron out the tensions between the right to education and the right to freedom of religion in relation to Rastafarian and female Muslim students. The starting point for that endeavour is to probe the various approaches so far adopted. Against this background, this article aims to review the effectiveness of the approaches so far adopted in ensuring education accessibility for Rastafarian and female Muslim children in Malawi. In doing so, through a desk-based research and interviews, the study draws lessons from and scrutinises the impact of the litigations in comparison to the MoU and circulars in addressing access to education for Rastafarian and female Muslim children. Eventually, before presenting the conclusion of the article, the author briefly reviews the justiciability of the right to education in Malawi and the role of the courts and other stakeholders in ensuring access to education for Rastafarian and female Muslim students. Before that, the article provides an overview of the relevant legal and policy framework in relation to education accessibility in Malawi.

2 Education accessibility in Malawi: An overview of the applicable legal and policy framework

To properly review the effectiveness of the approaches adopted to ensure education accessibility for Rastafarian and Muslim children in Malawi, it is important that the right to education, especially education accessibility in the country, be briefly presented. This necessitates laying out the relevant legal and policy framework. As such, this part examines the relevant international and regional treaties, specifically looking at the International Covenant on Economic, Social and Cultural Rights (ICESCR); the UN Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights (African Charter); and the African Charter on the Rights and Welfare of the Child (African Children's Charter). The

14 Mangochi is one of the few districts in Malawi with a predominant Muslim population.

15 Telephonic interview with counsel Chidothe of Chidothe, Chidothe & Company 27 October 2023.

part then construes education accessibility under the typology '4-A scheme' guided by the Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 13 on the right to education (article 13) as well as the Abidjan Principles.¹⁶ Finally, the part details the applicable domestic legal and policy framework, focusing on the Constitution, the Education Act¹⁷ and the National Education Policy of 2016.¹⁸

The mentioned international and regional treaties, apart from containing specific provisions on education rights, are all binding on and applicable to the state party of Malawi. Malawi ratified ICESCR in 1993;¹⁹ the African Charter in 1989;²⁰ and CRC in 1991²¹ The state having ratified ICESCR, the African Charter and CRC before the entry into force of the Constitution, per section 211(2) Constitution, the treaties are binding on and applicable in Malawi. The African Children's Charter was ratified by Malawi in 1999.²² Hence, having been adopted after the commencement of the Constitution, it is also binding on and applicable in Malawi in accordance with section 211(1) Constitution as read with the Third Schedule of the Child Care, Protection and Justice Act.²³

2.1 Applicable international and regional treaties

From an international perspective, articles 13 and 14 of ICESCR expansively provide for education rights. According to article 13(1) of ICESCR, state parties to the Covenant recognise the right of everyone to education. A further provision of article 13(1) of ICESCR specifies the aims of education. Article 13(2) expounds on various aspects of access to education for all persons.

16 The Abidjan Principles, <https://www.abidjanprinciples.org/en/principles/overview> (accessed 15 November 2023).

17 Education Act (Cap 30:01 Laws of Malawi).

18 Government of the Republic of Malawi 'National education policy' (October 2016), https://planipolis.iiep.unesco.org/sites/default/files/ressources/national_education_policy.pdf (accessed 15 November 2023).

19 UN Treaty Body Database 'Ratification status for CESC – International Covenant on Economic, Social and Cultural Rights', https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx?treaty=cescr&lang=en (accessed 15 November 2023).

20 African Union 'Ratification Table: African Charter on Human and Peoples' Rights', <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights> (accessed 15 November 2023).

21 UN Treaty Body Database 'Ratification Status for CRC - Convention on the Rights of the Child' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (accessed 15 November 2023).

22 ACERWC 'Ratifications Table: List of Countries which have signed, ratified/ acceded to the African Charter on the Rights and Welfare of the Child', <https://www.acerwc.africa/ratifications-table/> (accessed 15 November 2023).

23 Child Care, Protection and Justice Act (Cap 26:03 Laws of Malawi).

Although education is not a right exclusively available to children, it is widely acknowledged that education is mainly experienced by children and that it is fundamental to their development and capacity to enable them to enjoy their other rights.²⁴ At the international level, CRC comes into play to provide a child-specific version of the right to education. CRC does so by containing two dedicated provisions, namely, articles 28 and 29, the former focusing on access to education issues, and the latter focusing on the aims of education.²⁵

At the regional level, article 17(1) of the African Charter stipulates that every individual shall have the right to education. Just like CRC, the African Charter provides a child-specific version of the right to education. Article 11(1) of the African Children's Charter provides that every child shall have the right to education. In a similar manner to CRC, while article 11(2) of the African Children's Charter focuses on what the education of the child must be directed to, article 11(3) of the Children's Charter focuses on access to education issues. Given that Malawi has ratified these legal instruments, it is obligated to fulfil the rights provided in these instruments, specifically the right to education as it concerns this study.

As to what access to education, under the applicable international and regional treaties, entails, the next part expounds on education accessibility under the typology 4-A scheme.

2.2 Education accessibility under the typology 4-A scheme

Developed by the former United Nations (UN) Special Rapporteur, Katarina Tomaševski, on the right to education, the '4-A' scheme is a widely-applied approach used to analyse the extent to which states fulfil their obligations towards the right to education.²⁶ Using this typology, obligations imposed on states and duty bearers in relation to education rights are classified under the headings of 'availability, accessibility, acceptability, and adaptability'.²⁷ This typology basically entails that 'education should be *available* and *accessible* to all and that the form of education on offer should be of an *acceptable standard* that is also *adaptable* to the needs of each individual learner'.²⁸

24 L Lundy & P O'Lynn 'The education rights of children' in U Kilkelly & T Liefwaard (eds) *International human rights of children* (2019) 260.

25 As above.

26 Lundy & O'Lynn (n 24) 261.

27 As above.

28 As above (my emphasis).

As underscored by the ESCR Committee in its General Comment 13 on the right to education (article 13), accessibility, under the '4-A scheme', entails that institutions and programmes of education are accessible to everyone without discrimination, within the state party's jurisdiction.²⁹ Further, accessibility requires that education is accessible to all, particularly the most marginalised groups, without discrimination on any of the prohibited grounds.³⁰ This means that the government of Malawi is under an obligation to make education accessible to every child, including Rastafarian and female Muslim children, within its jurisdiction.

Similarly, overarching principle 1 of the Abidjan Principles requires states to respect, protect and fulfil the right to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination.³¹ According to article 14(b) of the Abidjan Principles on accessibility, educational institutions and programmes must, among others, be physically accessible to everyone within the jurisdiction of the state without discrimination of any kind.

This article proceeds with its discussion on education accessibility for Rastafarian and Muslim children based on the above interpretation of accessibility under the '4-A' scheme. Focusing on physical accessibility, Malawi has an obligation to ensure that educational institutions and programmes are accessible to everyone, including Rastafarian and Muslim children, without discrimination. This understanding is in line with the provisions of the above highlighted domestic legal and written policy framework as well as the international and regional standards.

2.3 Domestic legal and policy framework

Section 25 of the Constitution provides for the right to education. Section 13(f)(iv) of the Constitution, under the principles of national policy, provides that the state must actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving education by providing adequate resources to the education sector and devising programmes to promote national goals, such as unity and the elimination of, among others, religious intolerance. In general,

29 ESCR Committee General Comment 13: The Right to Education (Art 13) 6(b).

30 As above.

31 Abidjan Principles (n 16) 10. See also art 10 of the Abidjan Principles.

sections 25 and 13 of the Constitution underscore the importance of education in Malawi.³²

In relation to religion, section 33 of the Constitution stipulates that every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom. Thus, section 20(1) of the Constitution prohibits discrimination on, among others, the grounds of religion. In essence, these provisions enshrine every person's right to freedom of religion within their right to education.

The Education Act and the 2016 National Education Policy are two notable pieces of legislation and policy, respectively, supporting the stipulation of the right to education under the above provisions of the Constitution. Section 4(1)(a) of the Education Act mandates the Minister responsible for education to 'promote education *for all people* in Malawi; *irrespective of race, ethnicity, gender, religion, disability or any other discriminatory characteristics*'.³³ In the exercise of such duty, the Minister should have regard to, among others, the general guiding principles of access.³⁴ Sections 5 and 76 of the Education Act outline the goals of education in Malawi, and what should be contained in the national curriculum for schools and colleges, respectively. One of the objectives of the National Education Policy, which spells out the education aspirations of the Malawian government,³⁵ is to 'create an enabling environment for the expansion of equitable access to education for all Malawians'.³⁶ Consequently, education accessibility is central to five out of seven identified priority areas of the Policy.³⁷

Overall, based on the highlighted domestic legal and policy framework, there seems to be a compatibility between the right to education and the freedom to exercise one's religion. The relevant provisions clearly advocate the right to education in harmony with the right to freedom of religion. However, tensions arise because of the 'unwritten', yet vehemently practised, policy requiring all students in government schools in Malawi to keep short-combed hair.³⁸ This unwritten policy goes against the spirit of not only the

32 *ON & 13 Others v Child Protection Team* Miscellaneous Application 116 of 2016 (High Court) (Mzuzu Registry) (unreported) [6.1], <https://www.afyanahaki.org/download/olika-nkhoma-and-13-others-v-child-protection-team-miscellaneous-application-no-116-of-2016/> (accessed 15 November 2023).

33 Education Act (my emphasis).

34 Sec 4(2)(a) Education Act.

35 National Education Policy (n 18) 10.

36 National Education Policy 13.

37 National Education Policy 14.

38 *MM* (n 2) para 4.11.

written policy framework but also the applicable provisions in the Constitution and the Education Act.

3 Addressing education accessibility for female Muslim children in Malawi through litigations, circular and memoranda of understanding

3.1 2013 litigation against hijab prohibition at a primary school in Mangochi

The fight for a religious dress code in schools on the part of Muslims in Malawi can be traced to the year 2013 when the Ministry of Education closed a primary school in Mangochi due to the community's insistence that students should be attending classes in hijab.³⁹ A legal action against the Ministry of Education was instituted in the High Court by the community members through Chidothe, Chidothe and Company.⁴⁰ The Court granted an injunction against both the closure and prohibition of hijab.⁴¹ Arguably, the litigation positively led to a subsequent government circular on the religious dress code in public schools in Malawi. At the same time, however, as can be seen from other emerging litigations on similar issues, the 2013 apparent successful litigation did not provide an all-encompassing solution to the tensions between the right to education and the right to freedom of religion in relation to Rastafarian and female Muslim students.

3.2 Ministry of Education, Science and Technology circular, 7 May 2019

On 7 May 2019 the Malawian government through the Ministry of Education, Science and Technology issued a circular allowing religious dress codes in public schools. The circular directed all schools, including assisted schools, not to exclude any child from school for dressing according to their religious rights or engaging in acts that violate or threaten the students' rights to education, freedom of conscience, religion, belief and thought in the schools.⁴²

39 Chidothe (n 15).

40 As above.

41 As above.

42 *Sakina Nembo & 6 Others v Fr Mphatso Bango & 2 Others* (Civil Cause 3/2020) (High Court) (Principal Registry).

3.3 Some resentment to the circular leading to litigation and MoU

3.3.1 *Litigation in Nembo & 6 Others v Bango & 2 Others*

Even though the 7 May 2019 circular effectively allowed female Muslim students to wear hijab in public schools, including Christian-aided schools, there was resentment from some religious groups, among which was the Anglican church. This resentment led to litigation in the case of *Sakina Nembo & 2 Others v Fr Mphatso Bango & 2 Others*,⁴³ which was later amended to *Sakina Nembo & 6 Others v Fr Mphatso Bango and 2 Others*.⁴⁴

In *Nembo & 2 Others v Bango & 2 Others*,⁴⁵ through an order of interlocutory injunction issued by the High Court on 4 January 2020, it was ordered that

the Defendants either by themselves, their servants, agents or howsoever otherwise from preventing or continuing to prevent the operations of Mmanga Primary School or stopping or continuing to stop or preventing or continuing to prevent Muslim female students from attending classes at Mmanga Primary School and Mmanga Community Day Secondary School whilst dressed in hijab (Islamic dress code) or otherwise engaging in any conduct that frustrates or is contrary to the circular issued by the Ministry of Education, Science and Technology dated thh day of May, 2019 ... and/or an order requiring the Defendants to permit Mmanga Primary School to resume operations until the determination of the matter herein or a further order of the court.⁴⁶

The resentment by the Anglican church as regards Mmanga Primary School and Mmanga Community Day Secondary School can be clearly deduced from the continuation of *Nembo & 2 Others v Fr Mphatso Bango & 2 Others*. According to Amended Summons issued by the High Court on 7 March 2023,⁴⁷ the claimants, all Muslims by religion, brought the action on their own behalf and on behalf of all the parents of and female Muslim students pursuing their studies at Mmanga Community Day Secondary School and Mmanga Primary School situated in Mmanga village in Traditional Authority Nsamala in Balaka district.

43 *Sakina Nembo & 2 Others v Fr Mphatso Bango & 2 Others* (Civil Cause 3/2020) (High Court) (Principal Registry).

44 As above.

45 As above.

46 *Nembo* (n 42) 2.

47 *Nembo* (n 42).

In compliance with the 7 May 2019 Ministry of Education, Science and Technology circular, all female Muslim students in Mmanga Primary School and Mmanga Community Day Secondary School were allowed to attend classes while in hijab for the rest of the 2018/2019 academic year that ended in July 2019. However, within the first term of the 2019/2020 academic year, on 17 September 2019, female Muslim students were prohibited from attending classes at the schools while dressed in hijab. Due to continued disagreements over the issue, the schools were closed on or about 1 October 2019.

Following several meetings attended by the defendants, the leadership of the Muslim Association of Malawi and officials from the Ministry of Education, Science and Technology, it was resolved that the schools should allow female Muslim students to attend classes while wearing hijab. However, when the schools opened on 4 November 2019, members of the Anglican church, on instruction from the first and second defendants, stood in the corners of the school premises and forcibly removed the hijab from female Muslim students who had gone there to attend classes. Those that managed to resist the removal of the hijab from their heads were not allowed to attend classes and were sent back. Reacting to this, the Ministry of Education, Science and Technology directed that teaching should stop in the schools.

Based on the above claims, the claimants sought several reliefs from the Court. Among others, the claimants prayed for a declaration that the defendants' prohibition of female Muslim students from attending classes in the schools while wearing hijab contravened the female Muslim student's right to freedom of conscience, religion, belief and thought and to equality as provided for under sections 33 and 20 of the Constitution, respectively, as well as the rights to education and development as enshrined in sections 25 and 30 of the Constitution.

Counsel for the claimants in an interview revealed that the judge maintained the injunction after an inter-parties hearing on the basis that stopping Muslim girls from dressing in accordance with their religion was a violation of their right to education.⁴⁸ Nevertheless, the case file shows that the matter last came for conference scheduling and the lawyers are yet to file anything.

48 Chidothe (n 15).

3.3.2 17 June 2021 MoU enabling female Muslim learners to dress in hijab in Christian-aided schools

Apart from the litigation, following protracted misunderstandings, especially in Christian-owned schools located in Muslim-dominated communities which prohibited female Muslim students from wearing hijab, on 17 June 2021 the Public Affairs Committee (PAC) facilitated the signing of a MoU to allow female Muslim learners to wear hijab in Christian-aided schools.⁴⁹ The MoU was signed by leaders or representatives of the following faith based organisations: Episcopal Conference of Malawi (ECM); Malawi Council of Churches; Muslim Association of Malawi; and Evangelical Association of Malawi. The ceremony was witnessed by the Minister of Education, the National Unity Minister, and the UN Senior Human Rights Advisor to Malawi, Sabina Lauber, and representatives of civil society organisations (CSOs).⁵⁰ The wearing of the hijab was allowed on condition that it must match the school uniform of the school concerned.⁵¹

Emphasising access to education through adherence to non-discrimination in Christian-aided schools in relation to religious dress code by female Muslim students, part of the MoU reads as follows:⁵²

It is hereby agreed that a Muslim girl child shall not be discriminated against on the ground of religion and shall, in addition to other rights, be allowed to dress modestly which include wearing hijab in Assisted Christian Schools. The wearing of hijab shall not deter in any way the learners' active participation in other school extra-curricular activities which do not infringe on their right to religion such as sports among others.

Observing the linkage between the right to education and the right to freedom of religion, the MoU further reads:⁵³

Parties hereto mutually agree that learners' right to education and freedom of religion particularly that of the girl child, ought to be recognized and respected in Assisted Christian schools. The principal practice of religion is not only confined to belief but may include ceremonial acts, customs such as the observance of dietary regulations,

49 J Pasungwi 'Faith leaders sign MoU to allow hijab in schools' *The Nation* (Blantyre) 18 June 2021, <https://mwnation.com/faith-leaders-sign-mou-to-allow-hijab-in-schools/> (accessed 17 November 2023).

50 C Kambale Muslims 'Christians end hijab rangles as they sign MoU' *Face of Malawi* (Lilongwe) 17 June 2021, <https://www.faceofmalawi.com/2021/06/17/muslims-christians-end-hijab-rangles-as-they-sign-mou/> (accessed 21 June 2023).

51 As above.

52 B Mlenga 'Minister Mtambo hails Muslim, Christians on hijab deal' *Malawi Muslims Official Website* 2021, <https://malawimuslims.com/news/minister-mtambo-hails-muslim-christians-on-hijab-deal/> (accessed 17 November 2023).

53 As above.

the wearing of distinctive clothing or head coverings, participating in rituals associated with certain stages of life, among others.

In terms of its implementation, according to one of the leaders of the Muslim Association of Malawi, there has been general adherence to the 2021 MoU.⁵⁴ The MoU currently is in three language versions of English, Chichewa and Yao with plans to further translate it to the Tumbuka language.⁵⁵ This illustrates a willingness to ensure wide dissemination of the MoU.

4 Tackling education accessibility for Rastafarian children in Malawi through strategic litigation and circulars

The 2021 MoU recommended that the Public Affairs Committee (PAC) should address the concerns of Rastafarians, Bible believers, as well as other concerned faith groups.⁵⁶ Nevertheless, no similar MoU emerged in relation to the concerned faith groups including Rastafarian children to enable them to access education while keeping dreadlocks or long hair. Instead, access to education for Rastafarian children has been addressed through strategic litigation in the consolidated case of *Ex Parte MM & Others*⁵⁷ and a subsequent circular issued by the Ministry of Education in conformity with the High Court's directive in the *MM* case.

4.1 Vindicating access to education for Rastafarian children through strategic litigation: *Ex Parte MM & Others*

In 2017 a minor girl (regarded in the case as MM), suing through her father, filed an application for judicial review against a decision of not being enrolled and registered at Blantyre Girls Primary School on the ground that she had dreadlocked hair.⁵⁸ Then, in 2020, a minor boy (regarded as IN in the case), suing through his father, applied for judicial review challenging a decision of being denied registration and enrolment at Malindi Secondary School on the ground that he had dreadlocked hair.⁵⁹ Judicial review leave was duly granted by the High Court, separately, on 27 November 2017 and 13 January

54 Telephonic interview with one of the leaders of the Muslim Association of Malawi on 1 November 2023.

55 As above.

56 Kambale (n 50).

57 *MM* (n 2).

58 *MM* (n 2) para 1.1.

59 As above.

2020, respectively.⁶⁰ In so granting them leave, the High Court also granted the applicants injunctions allowing them to be registered and enrolled into the schools. Subsequently, the two matters were consolidated and continued before one judge of the High Court.

The applicants prayed for several reliefs, including a declaration that the policy of the Ministry of Education (second respondent) requiring them and all other Rastafarian children to have short hair contravened sections 4(1)(a)(b) and 5(2)(i) of the Education Act;⁶¹ and a declaration that the Policy of the Ministry of Education requiring that MM and IN and all Rastafarian children to cut their hair for them to be allowed in government schools as being unlawful and unconstitutional on the ground that it violated their rights to religion, education and not to be discriminated against on the grounds of religious affiliation as stipulated in sections 120, 25 and 33 of the Constitution.⁶²

In the High Court's judgment delivered on 8 May 2023, in analysing and determining the substantive issues before the Court, Zione Ntaba J, the presiding judge, was guided by, among others, the provisions of the Constitution, the Education Act, the African Children's Charter and CRC, as well the ESCR Committee's General Comment 13, and comparable court decisions from Kenya, Zimbabwe, Ghana and South Africa. To be specific, from the legal framework, Ntaba J cited and interpreted the right to education in section 25 of the Constitution; the Constitution's prohibition of discrimination under section 20; sections 4(1)(a) and (2), 5(1) and (5(2) and 76 of the Education Act; article 11(1)(e) of the African Children's Charter; article 29(1)c) of CRC; and article 18(4) of the International Covenant on Civil and Political Rights (ICCPR). On the foreign case law, the judge cited and applied *JWM (alias P) v Board of Management of High School & 2 Others*⁶³ (Kenya); *Farai Dzvova v Minister of Education, Sports and Culture & Others*⁶⁴ (Zimbabwe); *Tyron Iras Marhuguy v Board of Governors Achimota Senior High School & Another*⁶⁵ (Ghana); and *MEC for Education: KwaZulu-Natal & Others v Pillay Sunali*⁶⁶ (South Africa).

60 As above.

61 *MM* (n 2) para 1.2.1.

62 *MM* (n 2) para 1.2.2.

63 *JWM (alias P) v Board of Management of High School & 2 Others* [2019] eKLR.

64 *Farai Dzvova v Minister of Education, Sports and Culture & Others* SC 26/07 (2007) ZNSC 26.

65 *Tyron Iras Marhuguy v Board of Governors Achimota Senior High School and the Attorney General* (2021) JELR 107192 (HC).

66 *MEC for Education: KwaZulu-Natal & Others v Sunali* 2007 (2) SA 106 (CC).

In its reasoning the Court placed emphasis on access, equity, equality, diversity, inclusion and liberalisation. It was the Court's view that school codes of conduct as well as national policies on education must incorporate diversity 'and be conscious of their potential to exclude, particularly in relation to hair, but also be more comprehensively inclusive'.⁶⁷ In reviewing the evidence before it, the Court concluded that the totality of the evidence proved that the Ministry of Education breached its own overall duty of ensuring educational promotion for all people in Malawi regardless of their religion, race, disability or any other discriminatory ground.⁶⁸

Finding in favour of the applicants, the High Court determined that the decision not to allow MM and IN to register and enrol into the schools on the ground that they had dreadlocked hair was illegal and unconstitutional.⁶⁹ Further, the Court determined that the policy was unlawful and unconstitutional on the ground that it violated the Rastafarian children's rights to religion, education, equality and not to be discriminated against on the grounds of religious affiliation as stipulated in sections 20, 25 and 33 of the Constitution.⁷⁰ Hence, the High Court granted the reliefs sought by the applicants.

Under its additional declarations, the Court ordered the executive through the Ministry of Education to immediately remove the policy that bans the registration and enrolment of Rastafarian children unless they cut their dreadlocks.⁷¹ In relation to that, the Court further ordered the Ministry of Education to issue a directive, not later than 30 June 2023, to all government schools, that Rastafarian children should not be stopped from registration and enrolment.⁷²

4.2 June 2023 circular from the Secretary for Education, Ministry of Education and compliance therewith

On 26 June 2023, before the expiry of the period given by the High Court in *Ex Parte MM & Others*,⁷³ the Ministry of Education through the Secretary for Education issued a circular titled Admission of students of various religious beliefs into public schools. The circular reads as follows:⁷⁴

67 *MM* (n 2) para 4.15.

68 *MM* (n 2) para 4.24.

69 *MM* (n 2) paras 5.3.1 & 5.3.2.

70 *MM* (n 2) para 5.3.3.

71 *MM* (n 2) para 5.6.1.

72 *MM* (n 2) para 5.6.2.

73 As above.

74 Secretary for Education 'Ministry of Education admission of students of various religious beliefs into public schools' 26 June 2023.

Pursuant to the High Court's decision in Judicial Review Cause No 55 of 2019 as consolidated with Judicial Review Cause No 48 of 2017, I would like to advise that no public school should stop a student from being registered and enrolled at a school on the grounds of religious affiliation or practice including Rastafarian children in dreadlocks. A student should not be prevented from attending school because of their religious belief.

From the wording of the above circular, despite a mention of Rastafarian children, the Ministry of Education's statement is positively broader than what was ordered by the High Court. Whereas the Court ordered the Ministry to issue a directive that those Rastafarian children should not be stopped from registration and enrolment in government schools, the circular promotes access to education for not only Rastafarian children but, broadly, students of various religious faiths. The circular underlines that students must not be denied access to education in public schools due to their religious beliefs.

On the effectiveness of the circular so far, according to the Rastafari for Education Committee, there have been reports that some government schools are still denying class attendance by students with dreadlocks.⁷⁵ On a positive note, Blantyre Synod of the Church of Central Africa Presbyterian (CCAP) resolved that, in line with the circular, Rastafarian children with dreadlocks must be allowed to attend its schools.⁷⁶

The MoU that resulted from the litigation, despite its limited implementation, demonstrates how the courts can be relied upon to play a role in promoting the right to education in Malawi.

5 A review of justiciability of the right to education in Malawi and the role of the courts and other stakeholders

In order to review the justiciability of the right to education in Malawi, it is important to position socio-economic rights generally within the legal framework in Malawi. As observed by one scholar, considering

75 E Phompho *Zodiak Online* 30 September 2023, <https://www.zodiakmalawi.com/> also see <https://www.southernafricalitigationcentre.org/2023/02/15/media-advisory-rastafari-children-challenging-refusal-of-admission-to-malawi-government-schools/> (accessed 18 November 2023).

76 Nation Online 'Blantyre synod schools nod to Rastafarian children' *The Nation* (Blantyre) 1 September 2023, <https://mwnation.com/blantyre-synod-schools-nod-to-rastafarian-children/> (accessed 1 November 2023).

that 'socio-economic rights are empowering rights',⁷⁷ they are central to the country's constitutional design, Malawi being a developmental state.⁷⁸ In adopting the Constitution, the people of Malawi sought to guarantee the welfare and development of all the people of Malawi.⁷⁹ Consequently, socio-economic rights are guaranteed in either chapter IV of the Constitution providing for human rights, or chapter III which stipulates the fundamental principles, otherwise known as directive principles, of national policy. The Malawian constitutional model, as regards socio-economic rights, falls into the scheme of bifurcation of protection of socio-economic rights into, on the one hand, those rights entrenched in the human rights chapter and, on the other, those merely recognised as principles of national policy.⁸⁰ Nevertheless, the country must adopt a progressive mindset toward the justiciability of socio-economic rights with a more innovative and robust interpretation of these rights, which will ensure that this bifurcation has a minimal effect on the judicial enforcement of socio-economic rights in Malawi.⁸¹

The right to education is one of the few socio-economic rights expressly enshrined in Malawi's human rights chapter.⁸² The right to education is stipulated as a right under the human rights chapter and at the same time recognised as a principle of national policy under the fundamental principles chapter. While there is no logical explanation for the inclusion of the right to education as a justiciable right under the human rights chapter and, at the same time, as merely a principle of national policy under the fundamental principles chapter,⁸³ there should be no doubt that the right to education is justiciable in Malawi, especially in consideration of the High Court decision in *Ex Parte MM & Others*.⁸⁴

From the strategic litigation point of view, it is commendable that several stakeholders have actively challenged the violation of Rastafarian and female Muslim children's rights to education due

77 RE Kapindu 'Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities' (2013) 13 *African Human Rights Law Journal* 126, http://www.scielo.org.za/scielo.php?script=sci_art_text&pid=S1996-20962013000100007 (accessed 17 November 2023).

78 Kapindu (n 77) 127.

79 Preamble to the Republic of Malawi (Constitution) Act 1994.

80 DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 212, http://journals.cambridge.org/abstract_S0021855305000148 (accessed 17 November 2023).

81 Kapindu (n 77) 128.

82 C Mbazira 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution (2007) *Malawi Law Journal* 224, <https://journals.co.za/doi/pdf/10.10520/EJC76187> (accessed 17 November 2023).

83 Chirwa (n 80) 2018.

84 *MM* (n 2).

to their religious faith. For example, the Centre for Human Rights Education Advice and Assistance (CHREA), a human rights non-governmental organization (NGO), has been at the forefront of ensuring that every child in Malawi has access to education.⁸⁵ Similar to CHREA, the Lost History Foundation has also been active in ensuring that all children are provided access to education in the country. The Lost History Foundation appeared as the second *amicus curiae* in the case discussed above, and submitted evidence in support of the applicants and extensively guided the Court on the historical background of the Rastafarian faith and the keeping of dreadlocks.⁸⁶

Equally commendable is the role played by the courts by issuing injunctions to ensure that Rastafarian and female Muslim children are not denied access to education because of their dreadlocks and the wearing of the hijab, respectively. On a positive note, there is a clear position taken by the Court in relation to Rastafarian children as espoused in *Ex Parte MM & Others*.⁸⁷ Regrettably, the *Nembo* case concerning female Muslim students' access to education in the Mmanga schools is still pending. There is, therefore, a gap as regards Malawian courts' jurisprudence on the wearing of hijab by female Muslim students in relation to their access to education.

6 Conclusion

The stock of approaches adopted to ensure access to education for Rastafarian and female Muslim children in public schools in Malawi turns out to be a significant contribution to the right to education in the country.

All the approaches, be it litigations, circulars or MoUs, have jointly played a crucial role in ensuring access to education for Rastafarian and female Muslim children. Nonetheless, as it was rightly pointed out by the judge in *Ex Parte MM & Others*, it is not advisable that the issue of religious faith and access to education be purely regulated by policy statements or be left to the courts.⁸⁸ To achieve comprehensive access to education for Rastafarian children and female Muslim children as well as other students belonging to concerned religious beliefs, there is a need for legislative reform, particularly targeting the Education Act. The legislative reform must aim at providing extensive

85 *MM* (n 2) para 1.3.

86 *MM* (n 2) paras 3.1 & 3.2-3.9.

87 *MM* (n 2) (n 2).

88 *MM* (n 2) para 4.22.

education accessibility not only for Rastafarian children and female Muslim children, but also other students belonging to concerned or minority religious beliefs. Additionally, like the MoU, which currently is in three languages with plans to have it in a fourth language, there is a need for a proper dissemination of the High Court decision in *Ex Parte MM & Others*⁸⁹ by interpreting in several local languages and presenting it in a simplified manner.

Although this article focused on the physical aspect of education accessibility, further research must be undertaken in relation to the other aspects of access to education. For example, there are issues of content access to education in relation to Muslim organisations' requests to the Ministry of Education to discontinue the use of the optional Bible knowledge course and instead use the broad based 'moral and religious education' curriculum in primary schools, particularly in areas inhabited predominantly by Muslims.⁹⁰ Furthermore, the issue of access to education in Malawi goes beyond Rastafarian and female Muslim children. As hinted at in the 2021 MoU, there is a need to also deal with and analyse concerns of Bible believers and other concerned faith groups⁹¹ as regards access to education in Malawi.

89 *MM* (n 2).

90 US Department of State 2022 Report on International Religious Freedom: Malawi, <https://www.state.gov/reports/2022-report-on-international-religious-freedom/malawi> (accessed 10 November 2023).

91 *Kambale* (n 50).