

AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY¹

Kenyatta Nyirenda J²

Introduction

The right to equality is very important. Firstly, it requires that all persons be treated equally before the law, without discrimination; every person must be treated fairly and justly within the legal system. Secondly, the principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice. Without the right to equality, people would be unable to participate meaningfully in political activities, access resources, or enjoy many other rights.

This paper discusses the right to equality under the Constitution of the Republic of Malawi.³ The paper also examines a number of Malawian cases that show how the courts have developed and interpreted the right to equality.

There are two important points to note regarding cases discussed in this paper. Firstly, because human rights are indivisible, inter-dependent, and interrelated, the cases invariably cover issues relating to two or more constitutional provisions on the right to equality. Secondly, most of the leading cases on the right to equality were delivered within a few years of the adoption of the Constitution in 1994. It is therefore important to read these cases subject to the 2010 amendments to the Constitution.

Definitions of 'discrimination'

Neither 'equality' nor 'discrimination' is defined by the Constitution. The United Nations Human Rights Committee (HRC), in its General Comment No. 18 entitled "Non-Discrimination", defined discrimination as:

Any distinction, exclusion or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

In contrast, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), in

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 6 and 7 March 2014.

2 Judge of the High Court of Malawi; LLB (Hons) (University of Malawi), Advanced Diploma in Legislative Drafting and LLM (University of Malta).

3 Relevant provisions in the Constitution include sections 4 (Protection of the people of Malawi); 11 (Interpretation); 12 (Constitutional principles); 13 (Principles of national policy); 14 (Application of the principles of national policy); 20 (Equality); 23 (Rights of children); 24 (Rights of women); 30 (Right to development); 44 (Limitations on rights); and 45 (Derogation and public emergency).

its General Comment No. 20, adopted a more expansive definition of discrimination.⁴ The CESCR has however been accused of over-reaching by inferring rights that are not obviously present in the International Covenant on Economic, Social and Cultural Rights.⁵

Some legal commentators have urged Malawian courts to adopt the definition in General Comment No. 18, as opposed to General Comment No. 20, as the definition in General Comment No. 20 is much more expansive. It has been submitted that, unlike General Comment No. 20, General Comment No. 18 was already in existence at the time the Constitution was being negotiated and adopted. It is thus contended that the framers of the Constitution took into account the definition in General Comment No. 18, as opposed to that in General Comment No. 20.

Equality before the law does not necessarily mean ‘same treatment’. Discrimination can arise just as readily from an act that treats as equals those who are different, as it can from an act that treats differently persons whose circumstances are not materially different. Further to this, not every distinction in treatment will amount to discrimination.

In general international law, a violation of the principle of non-discrimination arises if:

- a) Equal cases are treated in a different manner;
- b) A difference in treatment does not have an objective and reasonable justification; or
- c) If there is no proportionality between the aim sought and the means employed.

Discrimination can be direct or indirect. It is direct when a person is discriminated against expressly based on enumerated – or, in some jurisdictions, analogous – grounds. It is indirect when state conduct or law appears to be neutral on the face of it, but has the effect of discriminating against a person on a prohibited ground. With indirect discrimination, it is important to look beneath the surface and to consider the consequences of the state’s conduct and laws – to ensure there is no discrimination lurking beneath.

I will now discuss sections of the Constitution, which are relevant to any equality or discrimination inquiry and how courts have interpreted those sections to the extent that they have.

Section 4 of the Constitution

Section 4 contains a strong general commitment to equality for all the peoples of Malawi. It provides that “all the peoples of Malawi are entitled to the equal protection of this Constitution and laws made under it”.

4 The Committee on Economic, Social and Cultural Rights in General Comment No. 20 at para. 29 notes that the “nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of ‘other status’ is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in article 2, paragraph 2. These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation.” The CESCR lists a number of grounds that could fall within the scope of ‘other status’, including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. This General Comment is also discussed in MD Mambulasa “The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation” in this publication.

5 J Kelly “UN Treaty Body Expands Definition of Discrimination to Invent Human Rights” *Global Governance Watch* (2009).

Section 11 of the Constitution

Section 11(2) requires a court to take full account of the provisions of Chapters III and IV of the Constitution. These Chapters contain the core provisions on the right to equality.

Section 12 of the Constitution

Section 12 elaborates on the fundamental principles upon which the Constitution is founded. Section 12(1)(e) provides that all persons have equal status before the law and section 12(2) imposes duties on every individual towards other individuals, and his or her family. The duties include “the duty to respect his or her fellow beings without discrimination”.

Section 13 of the Constitution

Section 13 sets out principles of national policy concerning, *inter alia*, gender equality, persons with disabilities, children, and the elderly. The section enjoins the state to “actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation”, which are aimed at achieving a number of goals.

Section 13(a) aims to ensure gender equality for women with men through, *inter alia*, “full participation of women in all spheres of Malawian society on the basis of equal opportunities with men” and “the implementation of the principles of non-discrimination and such other measures as may be required”.

With regard to persons with disabilities, section 13(g) requires the state to enhance the dignity and quality of life of persons with disabilities by providing “adequate and suitable access to public places; fair opportunities in employment; and the fullest participation in all spheres of Malawian society”.

In terms of section 14 of the Constitution, principles of national policy are “directory in nature”. Despite this, courts in Malawi may have recourse to them as a basis for arriving at a particular decision. Furthermore, principles of national policy may be used by concerned groups to lobby government to address particular issues.

Section 30 of the Constitution

Section 30 addresses the right to development and requires that women, children, and persons with disabilities, in particular, are given special consideration in the application of this right. The section also calls for equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment, and infrastructure. Under section 30(3), the state is also enjoined to take measures to introduce reforms aimed at eradicating social injustice and inequality.

Section 45 of the Constitution

Section 45(2) prohibits derogation with respect to some specified rights, such as the right to equality and recognition before the law, the right to life, and the right to *habeas corpus*.

There are a number of sections which are relevant to the rights to equality and non-discrimination

where courts in Malawi have provided guidance on their scope and content. Each section and relevant case law are detailed below.

Section 20 of the Constitution

The main provision in the Constitution on the right to equality is section 20:

- (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.
- (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

Section 20 embodies three basic concepts: non-discrimination, equal protection of the law, and positive measures to combat and eliminate inequality.

Discrimination against persons in any form is prohibited, be it discrimination in law, discrimination in fact, direct discrimination, indirect discrimination, formal discrimination, or substantive discrimination.

Section 20(1) also guarantees all persons equal and effective protection against discrimination on a number of prohibited grounds of discrimination, namely, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth, or other status or condition. One of the hotly debated questions is whether or not Malawi has adopted an ‘open list’ or ‘closed list’ approach to the list of grounds on which discrimination is prohibited.⁶

Most jurisdictions have adopted a variant of one of two broad approaches when setting the personal scope of the prohibition of discrimination. The first approach is termed a ‘closed list’ approach. It narrowly construes the right to equality, so it applies to a limited range of personal characteristics, such as race, sex, or disability, on the basis that these characteristics have historically resulted in discrimination and victimisation against certain classes of individuals. While the closed list approach permits greater legal certainty, it is often too restrictive and inflexible in its application. The other approach is known as the ‘open list’ approach. It allows for new grounds to be added by the courts should they deem it necessary to consider discrimination on grounds analogous to the grounds listed explicitly.

It should be noted that, in *Malawi Congress Party and Others v Attorney General and Another*,⁷ the Supreme Court of Appeal held that the “right to equality before the law”, provided in section 41 of the Constitution, was distinct from the right to “equal protection under the law”. The “right to equality before the law” guarantees the right to recognition before the law, the right of access to courts, and the right to effective remedy.

⁶ D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 147; SALC *Equal Rights for All: Litigating Cases of HIV-Related Discrimination* Litigation Manual Series (2011) 50.

⁷ [1996] MLR 244.

Affirmative Action

The principle of equality can, in certain circumstances, require a state to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination. In this regard, section 20(2) requires the state to pass legislation “addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices”.

Section 20(2) envisages three forms of affirmative action. The first encompasses law revision and reform efforts to extend existing benefits, privileges, or rights to a particular group that was previously denied these entitlements on any of the prohibited grounds. No one would then be prejudiced by such a law because the existing benefits would simply extend to a previously excluded group. The second form provides rights, privileges, and benefits to a particular group of people in acknowledgement of their unique characteristics and life experiences – e.g., maternity leave. The third form gives preferential treatment to members of a particular group because of its history as a victim of past systematic discrimination.

The section also requires affirmative action to be backed up by legislation. The requirement of legislation is meant to avoid the introduction of arbitrary measures and measures that have not been properly and fully debated publicly.

Case Law on Section 20:

*Marinho v SGS Blantyre (Pvt) Ltd*⁸

The plaintiff brought an action against her employer claiming, *inter alia*, damages for discrimination and/or unfair treatment. The High Court held, *inter alia*, that the defendant had violated the plaintiff’s right not to be discriminated against:

Discrimination is now proscribed by the Constitution. *There can be no doubt that some rights under the Constitution apply to relations between individuals.* There are others which relate to matters between the State and its citizens.

The rights under this provision (section 20) are intended to apply between citizens. Where there has been a violation of them, the court is supposed to give an effective remedy ... Resignation, revulsion and rejection are the usual feelings of a man who has been discriminated. The law should therefore take injury to feelings as a component of the damages awarded. *It must also be borne in mind that any type of discrimination is forbidden.* Its practice must really have been detested by framers of the Constitution that right in the Constitution they provided for two things that underline the attitude that this Court must have when faced with this sort of matter. First, *the Constitution makes the right non-derogable.* Secondly, *the Constitution allows affirmative action by legislators to punish violators* and to pass laws that promote respect for equality.⁹

Notably, the Court used the terms “individual” and “citizen”. These terms are not expressly mentioned in section 20. Was the intention then to qualify the word “person” as used in that section?

8 [1998] MLR 208.

9 *Id* 225-26 [Own emphasis in italics].

*Malawi Congress Party and Others v Attorney General and Another*¹⁰

The plaintiffs sought to have the Press Trust Reconstruction Act declared void for being unconstitutional in substance, and for being passed in contravention of the Constitution. The High Court held that the right to equality prohibits an “impermissible criterion or classification arbitrarily used to burden a group of individuals.” The High Court considered at length the right to equality:

Equality before the law is a fundamental right. It is provided under our Constitution in section 20(1).

It is one of the fundamental principles of our Constitution.

... A law which results in unequal treatment between the citizens of the land will be arbitrary ...

... The purpose of equality before the law provisions is that, those who are similarly placed in society will be dealt with similarly by Government action. This is far from suggesting that, in its formulation or application of the laws, Government cannot classify persons. The equality before the law provisions in our Constitution prohibit impermissible criterion for classification or a classification arbitrarily used to burden a group of individuals ...

... It is an arbitrary deprivation of property to pass legislation, the effect of which is to treat an individual's property rights in a different manner that is accorded from others similarly placed. This is an extension of the equality before the law principle. Courts will intervene on a statute that is overtly discriminatory (*Asian American Business Group v City of Pomona* 716 F Supp 1328) ... Under the equality before the law provisions of our Constitution, laws that are promulgated by our national Parliament must be directed to all in class. Short of that, they will be attacked for discrimination. Laws which are promulgated against one individual are likely to be disqualified as vindictive and implying unequal treatment under the law and an arbitrary deprivation of property. While enforcement of a law on one individual is not unequal treatment under the law because Government wants to set an example (*Falls v Town of Dyer* 875 F 2d 146) laws cannot be enacted which single out an individual as a target. Our equal protection provision in the Constitution directs that all persons similarly circumstanced shall be treated alike ...

*Salaka v Registered Trustees of the Designated Schools Board*¹¹

The High Court held that the defendant, a private school, had discriminated against the plaintiff by paying her termination benefits using a different method to that applied to her fellow employees. The case is often cited as authority for the proposition that section 20(1) also applies to non-state actors.

*Banda v Lekha*¹²

The applicant went for voluntary counselling and HIV testing. She tested HIV-positive. When she reported for duty after the test, the respondent immediately and without any formality dismissed the applicant. The Industrial Relations Court found, *inter alia*, that the respondent dismissed the applicant on prohibited grounds and that the respondent violated the applicant's right to fair

10 [1996] MLR 244.

11 MWHC Civil Cause No. 2652 of 1999.

12 [2008] MLLR 338, [2005] MWIRC 44. This case is also discussed in MD Mambulasa “The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation” in this publication.

labour practices. The Court, in finding for the appellant, made the following observations:

Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one's HIV status, it is to be implied that it is covered under the general statement of anti-discrimination in any form. This is why the South African Constitutional Court held in *Hoffman v South African Airways* [2000] 21 ILJ 2357 (CC) that: 'The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligations. South Africa has ratified a range of anti-discrimination Conventions ...'

The position on anti-discrimination enunciated in the *Hoffman* case fits squarely with the situation in Malawi. Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified ILO Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.¹³

Chirwa,¹⁴ among other authors, has noted how the flexibility provided by section 20(1) can be used to expand the list of prohibited grounds of discrimination, as with the above case.

The preponderant scientific view is that HIV is not a status, but a condition. In this regard, amendments effected to the Constitution in 2010 included changes to section 20 whereby the words "birth or other status" were replaced by the words "birth or other status or condition".

Section 23 of the Constitution

Section 23(1) provides that all children are entitled to equal treatment before the law. Section 23(1) must be read together with section 20(1), which prohibits discrimination against persons in any form and guarantees all persons equal and effective protection against discrimination, on grounds listed therein.

The Convention on the Rights of the Child (CRC)¹⁵ might be relevant when trying to determine the ambit of section 23. The CRC protects children's right to life, right to protection from all forms of violence and abuse, and right to freedom from torture or other cruel, inhuman, or degrading treatment. It also requires states to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members".¹⁶

13 *Id.*

14 D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 147.

15 Convention on the Rights of the Child (1989).

16 *Id.* article 2(2).

Case Law on Section 23:*Kaseka and Others v Republic*¹⁷

The police had arrested and prosecuted women suspected of being prostitutes, while allowing their male companions to go free. The High Court found that there was sex-based discrimination in this regard. The Court, accordingly, refused to hold the respondents guilty of any criminal offence on the ground that the criminal prosecution in this case amounted to selective enforcement of the law, as the police had arrested and charged only women and not their male companions.

*In the Matter of the Wills and Inheritance Act and in the Estate of Charles Exon Muyenza (Deceased)*¹⁸

The High Court held that a child born out of wedlock cannot be precluded from inheriting a share of his or her parent's deceased estate, simply because of the child's birth status.¹⁹

Section 24 of the Constitution

Section 24 provides for the rights of women. It complements section 20 on the right to equality with respect to women. Section 24 lists two grounds, namely, gender and marital status, which are not mentioned in section 20.

In a nutshell, section 24(1) provides that women have equal capacity and the same rights as men in civil law. As such, women can "acquire and maintain rights in property, independently or in association with others, regardless of their marital status".²⁰ Furthermore, the sub-section requires that women be accorded the same protection as men by the law. In short, the law must protect women and men equally.

Section 24(2) in effect prohibits discrimination against women on the basis of gender or marital status. It specifically provides for the passing of legislation to eliminate customs and practices that discriminate against women in areas such as sexual abuse, harassment and violence, discrimination at work and in public affairs, and deprivation of property, including inherited property.

Case Law on Section 24:*Namatika v Namatika*²¹

The plaintiff sought an order for the appointment of the administrator-general as the administrator of her deceased husband's intestate estate, in the interests of the child born of the marriage and of herself. The defendant claimed that he was the most able person, fit to be appointed administrator of the intestacy. This was because the deceased was his brother and because some of the property in the deceased estate was jointly owned by the defendant and the deceased. He further asked the court to consider that the plaintiff was not a Malawian and that she had not been married to the deceased under Malawian customary laws.

17 [1999] MLR 116. This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" and C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

18 MWHC Probate Cause No. 451 of 2003.

19 See E Macharia Mokobi "Lingering Inequality in Inheritance Law: The Child Born Out of Wedlock in Botswana" in this publication.

20 Section 24(1)(ii) of the Constitution of Malawi.

21 [1999] MLR 287.

The High Court decided the case in favour of the plaintiff, and reiterated the rights detailed in section 24(1) of the Constitution:

- a) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of gender or marital status, which includes the right to be accorded the same rights as men in civil law;
- b) Women have the right and capacity to acquire and retain custody, guardianship and care of children and to have an equal right in making decisions that affect their upbringing;
- c) Women have the right to acquire and retain citizenship and nationality;
- d) Even on the dissolution of marriage, women have the right to a fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children;
- e) Any law that discriminates against women on the basis of gender or marital status shall be invalid, and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly deprivation of property, including property obtained by inheritance.

Section 44 of the Constitution

Section 44 provides that no restriction or limitation may be placed on the exercise of any rights and freedoms provided for in the Constitution, unless the restriction or limitation: (a) is prescribed by a law; (b) is reasonable; (c) is recognised by international human rights standards; (d) is necessary in an open and democratic society; and (e) does not negate the essential content of the right.

Case Law on Section 44:

*Somanje v Somanje and Others*²²

This was an application by the plaintiff for an order that the defendants unlock the matrimonial home and allow her and her seven children to stay in the house. The plaintiff's husband had died intestate and the defendants, who were the deceased's brothers and sisters, thereupon locked up the matrimonial home, together with the property of the family, and including household effects. The plaintiff and her seven children were forced out of the home and were not allowed to enter the house until the defendants had applied for letters of administration.

The High Court held, *inter alia*, that the rights of a widow and her children are protected by the Constitution, which provides for the right to equality and full protection by the law, fair disposition of property, and fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and needs of any children, Ndovi J observed:

The right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1)(g)²³ specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law.²⁴

22 [1999] MLR 400.

23 Now section 45(1)(g) of the Constitution, as amended in 2010.

24 *Somanje v Somanje and Others* [1999] MLR 400, 403-04.

*The State v the President of Malawi and Others and Ex Parte Malawi Law Society and Others*²⁵

The applicants sought alike orders of certiorari and mandamus to quash directives by the President banning all forms of demonstrations in relation to intended constitutional amendments that sought to allow the President to serve unlimited terms in office.

The High Court held, *inter alia*, that:

- Section 44 requires limitation on human rights to be only as prescribed by law and the directives by the President were not law and therefore they were unacceptable limitations to the rights enshrined in the Constitution; and
- Human rights can be derogated from only during a state of emergency and no state of emergency had been declared in terms of the procedure provided by the Constitution.

Case Law on the Right to Equality:

By the very nature that human rights are indivisible, inter-dependent, and interrelated, most cases on the right to equality cover issues relating to two or more constitutional provisions.

*Republic v Chinthiti and Others*²⁶

The accused were charged and the trial was to be heard before a single judge of the High Court. The accused raised preliminary objections to, *inter alia*, the mode of the trial. The High Court upheld the objections in part. Nyirenda J, as he then was, considered sections 20, 42(f), and 44 of the Constitution, and made the following pertinent observations thereon:

Counsel submit that the accused persons have a right to jury trial. It is argued that section 294(2) inhibits that right and, therefore, that it is unconstitutional. *Counsel have argued this point with reference to section 20 of the Constitution of the Republic of Malawi, which promulgates non-discrimination and equality before the law.* I have also been referred to section 42(f) of the Constitution on the right to a fair trial. *Section 44(g) of the Constitution says there shall be no derogation, restriction or limitation with regard to the right to equality and recognition before the law.* Counsel have drawn this Court's attention to several other considerations. It is said that section 294(2) has no safeguards and, therefore, there is nothing to stop the Minister from exercising his powers impromptu, discriminately and even maliciously against a certain sector of our community ...

... Section 44(1) of the Constitution prohibits derogation, restriction or limitation of rights in the Constitution. Section 44(2) says, without prejudice to subsection (1), that certain restrictions and limitations prescribed by law may be placed on any right and freedom provided in the Constitution, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society ...

It has been said that it is not every distinction or differentiation in treatment at law which will violate the equality guarantee. In order to govern effectively, legislatures must treat different individuals and groups in different ways. To achieve true equality, it will frequently be necessary to make distinctions: see *Andrews v Law Society of British Columbia* (1989) 2 WWR 289.

25 [2002–2003] MLR 409.

26 [1997] 1 MLR 59.

*The principle of equality of individuals under law does not require mere formal or mathematical equality, but a substantial and genuine equality in fact. This is what section 294(2) strives to achieve and, therefore, could not be said to flout any provision of the Constitution.*²⁷

The above-mentioned dicta have to be read subject to the 2010 amendments to the Constitution.

Conclusion

Constitutional jurisprudence on the right to equality in Malawi suggest that the judiciary is adequately empowered to uphold the supremacy of the Constitution, to enforce respect for human rights, and to declare null and void legislation and other governmental action that is contrary to the rights to non-discrimination and equality guaranteed under the Constitution. To effectively carry out this mandate, courts have to be vigilant and bold.

²⁷ *Id* 63, 66 [Own emphasis in italics].