

DM Chirwa *Human rights under the Malawian Constitution*

Juta (2011) 555 pages

Esther Gumboh

Doctoral Candidate; Teaching and Research Assistant, Department of Public Law, University of Cape Town, South Africa

1 Introduction

What is the nature and significance of the 1994 Malawian Bill of Rights? What changes has it brought about? How have the courts through their jurisprudence and parliament through legislation interpreted the Bill of Rights? Have they promoted or undermined it? Have the courts developed consistent jurisprudence that gives appropriate regard to the Bill? How can any inconsistencies be rectified? These are the main issues that Chirwa addresses. The aim of the book is to provide ‘a comprehensive and systematic analysis of the provisions of the Malawian Bill of Rights’,¹ thereby enhancing ‘our understanding of [their] meaning, significance and implications’.² Ultimately, the book is aimed at contributing to the development of local human rights jurisprudence. It sets out to achieve this goal by critically examining case law and legislation that have been generated by the Bill of Rights.

The adoption of the Constitution of the Republic of Malawi,³ on 18 May 1994, marked the dawn of a new era in Malawi. In particular, the Bill of Rights contained in chapter IV of the Constitution envisages fundamental changes to all aspects of the legal system. Considerable case law has been generated, dealing with various provisions of the Bill. Similarly, there has been a lot of law reform taking place, largely due to the work of the Malawi Law Commission, which has led to the amendment, repeal and passing of various statutes. It is these developments that Chirwa aptly describes as ‘a rich reservoir of an “unexamined” legal knowledge’.⁴ *Human rights under the Malawian Constitution* seeks to pioneer a systematic examination of this knowledge.

It is impossible to deal in detail with the contents of the book here. The note attempts to provide a brief overview of the book and to mark its significance. It focuses on a few concepts that are put forward in

1 DM Chirwa *Human rights under the Malawian Constitution* (2011) 2.

2 As above.

3 Act 20 of 1994.

4 Chirwa (n 1 above) 2.

the book which has 19 chapters, 16 of which are devoted to analyses of specific rights in the Bill.

2 Overview of the book

In chapter 1, the book presents an overview of the Bill of Rights and the application of the rights contained therein. The chapter discusses the beneficiaries of rights and demonstrates that the Bill of Rights binds the state and non-state actors. It is pointed out that the Bill of Rights is unique in its explicit application to non-state actors.⁵ Chapter 2 deals with section 11 of the Constitution, which stipulates how it must be interpreted. It is pointed out that courts must embrace the use of foreign case law and the role of international law as an 'interpretative aid' and a 'source of law' when interpreting the Constitution. This is particularly important in light of Malawi's short record of human rights litigation.⁶

The limitations and derogations from the rights in the Constitution are dealt with in chapter 3. An interesting argument put forward in this chapter is that, contrary to what the courts have decided, none of the rights in the Constitution is illimitable.⁷ Thus, although section 44(1) of the Constitution lists a number of rights that cannot be derogated from, restricted or limited, Chirwa argues that it is incorrect to interpret this provision literally to conclude that the rights in section 44(1) cannot be limited in peace time.⁸ This is because some of the rights included in section 44(1) are already limitable under other sections of the Constitution.⁹ For instance, the right to life, which is included in section 44(1), can be limited by application of the death penalty as provided in section 16 of the Constitution. It is further argued that some of the 'supposedly illimitable rights'¹⁰ are not truly absolute. The right to equality, for example, can be limited on the basis of mental capacity or age.¹¹ Similarly, the right to *habeas corpus* can be limited in the interests of justice.¹²

Chirwa further buttresses the view that all rights are not absolute by invoking 'the notion of interdependence, indivisibility and interrelatedness of all human rights'.¹³ He notes that the prohibition

⁵ 17-22.

⁶ 27.

⁷ 40-43.

⁸ 40. Chirwa cites as an example the case of *Attorney-General & Another v Malawi Congress Party & Others* (1997) 2 MLR 181, 223 (SCA).

⁹ 40.

¹⁰ 41.

¹¹ 40.

¹² As above. See sec 42(2)(e) of the Constitution.

¹³ 41.

of torture and cruel, inhuman or degrading treatment or punishment is inextricably connected to the right to human dignity and yet, the latter is not included in section 44(1) while the former is.¹⁴ It is further pointed out that the reference to derogation, restrictions and limitation in section 44(1) is 'more of a drafting error than deliberate choice' since, by comparing the lists under section 45(3)(a) of the Constitution which deals with derogable rights, it becomes clear that the non-derogable rights, as can be deduced from those not included in section 45(3)(a), would include rights not included in section 44(1). This creates uncertainty as to the intention of the drafters.¹⁵ Derogations and limitations are distinct concepts in international law.¹⁶

These considerations lead Chirwa to conclude that section 44(1) of the Constitution 'should be interpreted as meaning that the rights listed thereunder, while not subject to derogations, are subject to limitations or restrictions in accordance with [sections] 44(2) and (3) of the Constitution'. More specifically, the words 'limitations and restrictions' are superfluous and, as a consequence, the rights enumerated in that section should be regarded as non-derogable for purposes of [section] 45. In turn, this means that [sections] 44(1) and 45(3)(a) of the Constitution should be read together to determine rights from which derogations may not be permitted.¹⁷ This conclusion, that all rights are subject to the general limitations clause in sections 44(2) and (3) of the Constitution, 'does not undermine the integrity of the Bill of Rights' since these provisions do not allow for restrictions lightly.¹⁸

These observations on the proper interpretation of section 44(1) of the Constitution are particularly important since some scholars have argued that it creates internal conflict within the Constitution itself. For instance, it has been said that 'there is an apparent conflict between' the proviso to section 16, allowing for the death penalty, and section 44(1), which makes the right to life illimitable and prohibits cruel and inhuman punishment.¹⁹ However, Chirwa's analysis makes a strong argument that the right to life is not absolute to begin with, hence there is no internal inconsistency in the provisions. The reference in section 16 to arbitrary deprivation of life implies that there are situations that can 'justify certain deprivations of the right to life'.²⁰

Starting with a discussion of section 41, which protects the right to recognition as a person before the law, access to court and an effective

14 As above.

15 41-42.

16 42-43.

17 43.

18 As above.

19 See eg M Chigawa 'The death penalty under the laws of Malawi and the law of human rights' (2009) 3 *Malawi Law Journal* 70 82.

20 95. See further 92-94.

remedy, the next 16 chapters of the book analyse the substantive provisions of the Bill of Rights. The book emphasises the central role of human dignity in the new constitutional order. The right to human dignity is the 'new blueprint of administrative justice' which informs all sectors.²¹ This marks a decisive break from the historical context where criminals were treated with contempt.²² A 'person must ... be treated with respect during investigations, trial, sentencing, appeal or parole procedures'.²³ This demands a reassessment of procedural rules and evidence which demean accused persons. More importantly, the forms of punishment must also be revised. Indeed, the right to human dignity can be used to challenge mandatory punishments. The automatic commutation of the death sentence to life imprisonment can also be challenged on this ground as it amounts to a mandatory penalty.²⁴ The objectification of prisoners sentenced to such punishments is an affront to human dignity. In fact, the objectives of punishment must be carefully applied to avoid violating human dignity by using prisoners 'solely as a means to an end in the administration of justice'.²⁵

Apart from being a justiciable right,²⁶ the right to human dignity is an interpretative aid which must infuse several if not all the rights.²⁷ The book also states that the role of *ubuntu* should not be sidelined in our understanding of human dignity, despite criticism that *ubuntu* as a concept is vague.²⁸ *Ubuntu* can 'deepen our understanding of the constitutionalised concept of human dignity and other human rights in general, by challenging dogmatic conceptions of the self, identity, justice, rights and responsibilities'.²⁹ Human dignity also acts as a 'residual right' when no other right is 'primarily implicated by the case at hand or when the right implicated by the facts is not expressly recognised'.³⁰ The courts should therefore not adopt a parsimonious use of human dignity as this will undermine the importance attached to it by the Constitution.³¹ The residual function of human dignity can be used as a tool to support socio-economic rights.³²

A major concern with the Constitution is the fact that it does not adequately provide for socio-economic rights. The Constitution does not provide for adequate housing, food, sufficient water, social security,

21 126.

22 As above.

23 127.

24 134.

25 127.

26 Sec 19(1) of the Constitution.

27 125.

28 124.

29 As above.

30 125 (emphasis in original).

31 125-126.

32 126.

an adequate standard of living and the highest attainable standard of health. Most of the rights have been stated as 'principles of national policy'.³³ The book deals with this apparent deficiency in great length. It states that, while some of the principles are mirrored in the Bill of Rights,³⁴ the courts will 'most likely imply socio-economic rights in the right to life'.³⁵ The case of *Gable Masangano v Attorney-General*,³⁶ where the High Court held that the right to human dignity requires the state to provide food, adequate clothing and medical services to prisoners, is cited in support of this view. In addition, the principles of national policy cannot be wholly non-justiciable, since the right to development enshrined in section 30 of the Constitution is provided for 'in such broad terms as to encompass all the economic, social and cultural rights that have not been expressly recognised'.³⁷

Another significant argument put forth in the book is in the area of administrative justice. For a long time, the courts have tended to rely on the Rules of the Supreme Court of England as the legal basis for judicial review, indeed, even post the Constitution.³⁸ Chirwa stresses that this practice is no longer justifiable, since section 43 of the Constitution provides for the right to administrative justice and hence creates a new constitutional basis for judicial review.³⁹ It creates new grounds for judicial review, namely, lawfulness, procedural fairness, the giving of reasons and justifiability. This replaces the narrower common law grounds of illegality, irrationality and the principles of natural justice. This provision thus relegates the significance of the common law in administrative law to that of an interpretative aid.⁴⁰ This 'revolutionary'⁴¹ impact of the Bill of Rights in respect of administrative law is yet to be grasped by the courts.⁴²

3 Conclusion

This brief review serves to show that Chirwa's book provides insight into the Malawian Bill of Rights and thus contributes significantly to constitutional law in Malawi. It has come at a time when Malawian courts are dealing with more human rights cases than before. Being the first of its kind in Malawian literature, it is geared to become an

³³ See ch III of the Constitution.

³⁴ 259.

³⁵ 97.

³⁶ Constitutional Case 15 of 1997.

³⁷ 259. The right to development is specifically discussed at 265-268.

³⁸ 459-460.

³⁹ 459-461.

⁴⁰ 460.

⁴¹ 461.

⁴² 458.

authority on Malawian constitutional law, more so as it explores new ideas on controversial aspects of the Bill of Rights and brings together a wide range of case law, including that which is yet to be reported in the official law reports. Its significance is amplified by the fact that it deals with practically each provision in the Bill of Rights, offering new discourse and provoking further discussion on the Bill of Rights in general. Therefore, the book is undoubtedly a necessity for scholars, lawyers, judges and other persons interested in constitutional law in general and human rights issues in particular. It has rightly been claimed that the relevance of the book extends to African constitutional law in general and is thus essential reading for a wider readership than Malawi.⁴³

⁴³ See comments on the book by Dennis Davis, Judge of the High Court of South Africa and Honorary Professor of Law at the University of Malawi and Professor Boyce Wanda, University of Fort Hare (both appear as blurbs at the back of Chirwa's book).