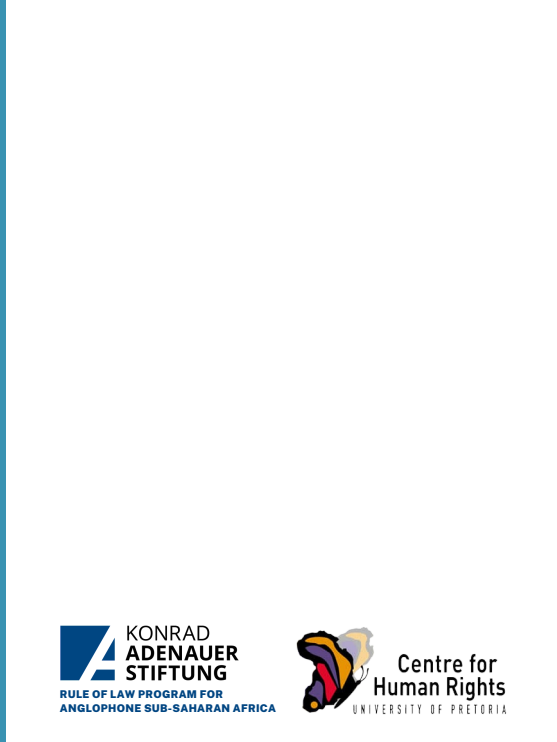




A GUIDE TO YOUR RIGHTS

The Malawi Bill of Rights



A Guide to Your Rights: The Malawi Bill of Rights

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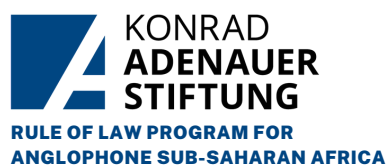
Centre for Human Rights, University of Pretoria

Designed by Judava Worx



The Centre for Human Rights, Faculty of Law, University of Pretoria, is an internationally recognised university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing human rights, through education, research and advocacy.

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Konrad Adenauer Foundation (KAS) is a German Political Foundation that is committed to achieving and maintaining peace, freedom and justice through political education on a national level as well as on an international level with 111 offices worldwide. The KAS Rule of Law Program for Anglophone Sub-Saharan Africa based in Nairobi has been actively promoting the rule of law, democracy and human rights in the region since 2006. Strengthening constitutionalism as well as the enforcement of basic human rights enshrined in the constitutions of Sub-Saharan Africa has always been among the main focus of the Program's work.



FOREWORD

We live in a world where we often hear talk about human rights, often hear about how rights will help people to live lives that are dignified and free. In many countries, including in Malawi, rights are protected in a constitution. This has the potential to give people in Malawi great protection, as they can vindicate their constitutional rights in a range of different ways, including through the courts. Sadly, far too often, people have to struggle to enforce their rights. Sometimes this is the case because they have not been informed about all their rights, and sometimes it might be because they are not sure about what steps they can take to enforce their rights. This booklet is designed to help overcome these obstacles.

This booklet provides an easy-to-use introduction to understand what human rights are, where they come from, and what they mean for citizens and other people living in Malawi. Through this booklet, the Centre for Human Rights (Centre) and the Konrad-Adenauer-Stiftung (KAS) hope to help every citizen, and everyone living in Malawi – hope to help you – know your rights and better understand how they protect you against actions that violate rights, whether by the government, by private entities, like companies, or by other people, and how you can make these rights real.


The Centre and KAS are committed to supporting people's attempts to live in dignity and freedom. Both the Centre and KAS are convinced that providing people with information and help in understanding how to turn this information to action will help people enforce their rights, and ultimately live with more dignity. We are proud to be able to have worked together on this booklet, and we hope that it proves to be a useful tool in helping people enforce the rights that are protected in their Constitution.

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INTRODUCTION

Everyone in Malawi has rights that protect them and are meant to help them live dignified and meaningful lives. These rights are found in the Bill of Rights, which is part of Malawi's Constitution.



(CREDIT: Swathi Sridharan (ICRISAT))

Using this booklet

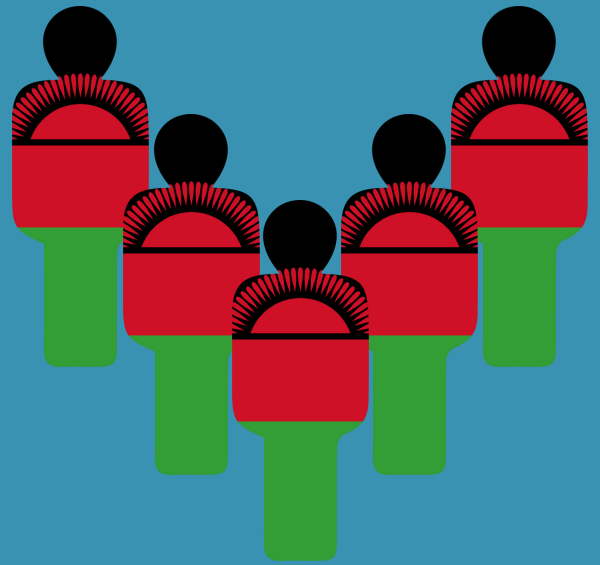
This booklet is intended to provide you with an introduction to the Constitution of Malawi, to tell you what your rights are and what this means for you. It uses cases that have appeared before the courts, where people have claimed their rights, and held others, including the government, to account for their actions.

This booklet only provides you with a summary of the rights in the Bill of Rights. If you want to read the Constitution as it is written, in full, you can find the full Constitution online by entering "Malawi Constitution" into a search engine, or by visiting this website: <https://malawilii.org/akn/mw/act/1994/20/eng@2014-12-31>.

If you would like to find out more about a particular case, you can insert the name of the case into a search engine, and you should be able to find the case that has been under discussion.

CONSTITUTIONS: WHAT ARE THEY?

Most countries in the world have a constitution. A constitution is, in many countries, the highest law in the land. Every law in a country governed by a constitution, and every action taken by the government of that country, must be in accordance with that country's constitution. Constitutions tell us how a country's government should function, about the rights that people in that country have, and about how different government institutions, like the police, should function.



Most countries in the world have written constitutions, but there are some countries with unwritten constitutions. Where a constitution is unwritten, the fundamental rules of society are formed by customs and by practices that have become common in society. Constitutions often make clear the kind of society that a country wants to be. They reflect problems that a country has had in the past, and its hopes for the future.



(CREDIT: judiciary.mw)

The role of the past in Malawi's Constitution

In 1994, Malawi was emerging from many years of autocratic rule, where Malawians lived under repressive regimes that undermined many of their rights. The 1994 Constitution sought to create a future for Malawians that differed from the past by protecting the rights of the people of Malawi in ways that they had never been protected before. These hopes and desires can be seen in the way that the Constitution includes, at Chapter 3, a number of principles as the 'Constitutional principles' of Malawi. These principles include:

- Everyone is bound by the Constitution;
- All legal and political authority comes from the people of Malawi;
- Legal and political authority must be exercised in accordance with the Constitution;
- No one exercising the power of the State should abuse that powers;
- The authority to exercise State power is conditional on the trust of the people of Malawi, and must be based on open, responsive and answerable Government, and the right to make democratic choices;
- That every human has dignity;
- That because of the dignity of each person the State should protect human rights, regardless of whether they can vote or not;
- Everyone is equal before the law;
- Everyone has duties to other people, to their family, to society and to the State. This requires people to treat others with respect and not to discriminate.



(CREDIT: Achipungu)

THE HISTORY OF MALAWI'S CONSTITUTION

In 1993, Malawi held a national referendum to determine its political future, requiring citizens to decide whether Malawi would become a country which allowed multi-party politics, as opposed to a one-party State. A resounding majority of the voters voted in favour of multi-party politics. The votes in this referendum laid the foundation for a State that was very different to the State that had followed independence, and to the government that had been in power for decades. An important early step was to adopt a new constitution, and this happened in 1994.



(CREDIT: Parliament of Malawi)

Malawi's 1994 Constitution replaced a constitution that had entered Malawian law in 1966. This new Constitution marked an important moment in Malawi's history. Unlike other, earlier, constitutions, it placed the rights of the people of Malawi at its heart, and tried to create the framework for responsive and honest government, which people in Malawi could hold answerable for its actions. This booklet will tell you how the Bill of Rights contributes to this 'new era' in Malawi, and how the rights in the Bill of Rights protect you and your community.

To ensure that constitutional change happened quickly, a group of people, including politicians from numerous parties, Malawian and international constitutional experts, representatives of different women's groups, and traditional leaders, met to draw up a temporary constitution. The temporary constitution introduced a Bill of Rights, which included the rights to life, equality, dignity, access to justice and a fair trial, and freedom from torture and other cruel and inhuman punishment.

Although many people were involved in writing the temporary constitution, some thought that it was a significant problem that the wider Malawian population had not been consulted – ordinary Malawians were not involved in the process or asked what they thought. Partly because of this, this temporary constitution was to last only one year, until 1995, and a Constitutional Committee was to convene a national conference on the Constitution, and to consult the Malawian population. A Constitutional Review Conference was held, involving a wider range of people, and some changes were made to the temporary Constitution. In 1995, a democratically elected Parliament accepted the amendments to the temporary Constitution that the Conference proposed. The undertaking that Malawi took in accepting the Constitution is demonstrated in the Preamble to the Constitution, a section that appears at the beginning of the document:



PREAMBLE

The people of Malawi,

Recognising the sanctity of human life and the unity of all mankind;

Guided by their private consciences and collective wisdom;

Seeking to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations;

Desirous of creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government:

HEREBY adopt the following as the Constitution of the Republic of Malawi.

Why did the 1994 Constitution represent a 'new era'?

The events of the early 1990s had a lasting impact on the rights of the Malawian people. By protecting the rights of every individual in law, the power that the government had was diluted. The centralisation of power, and the difficulty of holding officials to account when power was abused, would be more difficult to achieve in the constitutional, democratic State, where the dignity of every person in Malawi was recognised, in contrast to the past. Under the Constitution, everyone is protected, and the government cannot ignore the rights that people in Malawi have been given by the Constitution.



(CREDIT: ICRISAT)

CASE STUDY: STATE ACCOUNTABILITY AND THE CONSTITUTION

Holding the State to account for abuses of power

The Constitution helps the people of Malawi hold the State answerable for its actions, a significant break from the past.

The way that the Constitution can help ordinary Malawians hold the State to account for the actions of the State officials was demonstrated in an important case called *The State and Others v MM and Others*. In this case, after widespread sexual abuse and violence against women, the High Court of Malawi found that the Malawi Police Service (MPS) failed to fulfil its constitutional duties. The Constitution places an obligation on the State, stating that the “human rights and freedoms enshrined in this chapter [the Bill of Rights] shall be respected and upheld by the executive, legislature, judiciary and all organs of the government and its agencies.” The Constitution also placed a particular duty on the MPS, to “provide for the protection of public safety and the rights of persons in Malawi.”

In 2019, many women and girls were raped or sexually assaulted by MPS officers during the violence that followed the election, the officers of the MPS used sexual assault, rape and physical violence to avenge the death of a police officer. 18 of these women and girls took the MPS to court. The court held that these abuses were a violation of the rights of the women and the girls, undermining their rights to dignity and not to be subjected to inhuman and degrading treatment and punishment. The actions by the MPS also violated the State’s obligations. The MPS violated their rights further by failing to investigate the matter, not holding any officer responsible, and not offering the women compensation. The violation of these human rights is bad in any situation, but it is particularly bad when the rights are undermined by the State, and the Constitution allows the State to be held liable when it does so.

From this case, we can see how people can hold the government responsible for its actions and prevent future abuses of rights.

WHAT IS IN THE CONSTITUTION?

The Constitution of Malawi is the highest law in the land. Everyone in Malawi is bound by the Constitution and the Bill of Rights, including the government and everyone representing the government, up to and including the President. Everyone, no matter how rich, how influential, has to act in accordance with the Constitution and must respect the rights of others. The Constitution says:

“All institutions and persons shall observe and uphold this Constitution and the rule of law and no institution shall stand above the law.”

The Constitution consists of 23 Chapters. Each chapter deals with a different element of life and government in Malawi.



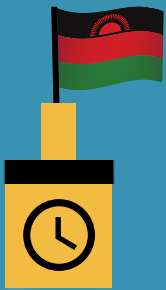
THE CONSTITUTION OF MALAWI: CHAPTERS

- Preamble
- Chapter 1 – The Republic of Malawi
- Chapter 2 – Application and interpretation
- Chapter 3 – Fundamental principles
- Chapter 4 – Human rights
- Chapter 5 – Citizenship
- Chapter 6 – The Legislature
- Chapter 7 – Elections
- Chapter 8 – The Executive
- Chapter 9 – The Judicature
- Chapter 10 – The Ombudsman
- Chapter 11 – Human Rights Commission
- Chapter 12 – Law Commission
- Chapter 13 – National Compensation Tribunal
- Chapter 14 – Local Government
- Chapter 15 – The Police
- Chapter 16 – The Defence Force
- Chapter 17 – Prisons
- Chapter 18 – Finance
- Chapter 19 – The Reserve Bank of Malawi
- Chapter 20 – Civil Service
- Chapter 21 – Amendment of this Constitution
- Chapter 22 – Transitional Issues
- Chapter 23 – Miscellaneous

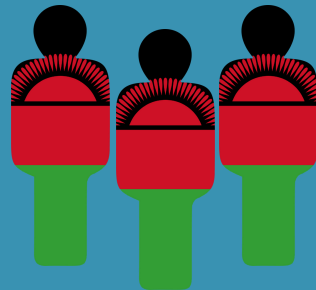
As you can see from the titles of the different chapters of the Constitution, it has an impact on all elements of life in Malawi.

SEPARATION OF POWERS AND THE THREE ARMS OF GOVERNMENT

Malawi's Constitution recognises that countries often face a problem when one person or one institution has all of the power. It is easy for people in such situations to abuse their power, and to undermine the rights of people in that country. One of the ways that the Constitution protects against anyone in government abusing their power, or the government as a whole abusing its power, is by dividing power amongst different branches of government, each of which is meant to exercise some powers of the State, while simultaneously making sure that the other branches of government exercise their powers properly. There are three different branches:



The Legislature, which consists of members of parliament, makes the laws.



The Executive, made up of the cabinet (all of the ministers) and the president, puts the laws into effect and ensures the laws are upheld.



The Judiciary, which consists of the courts, judges, and magistrates, interprets the laws.

The powers each of the branches of government has is enshrined in the Constitution, at Chapters 7, 8 and 9. Each of the three branches of government is independent of the others, and are all equally important. They act as a check on each other – no one person or branch of government can do whatever it wants, which means that it is much harder for people to abuse their power. This separation of powers is vital for protecting rights – as we will see in our case examples, there are often very important reasons to hold people with power, to hold the government, to account.

CASE STUDY

How the separation of powers holds the branches of government to account

The COVID-19 crisis led to many countries around the world introducing lockdown measures. Malawi was one of these countries. However, even in situations like this public health emergency, the actions of the State still have to meet the requirements of the Constitution. In *Kathumba and Others v President of Malawi*, the High Court demonstrated how separating power among three branches of government protects against abuses of power, and protects the rights of the people of Malawi.

The Government of Malawi issued a number of lockdown rules. It is important to note that the rules were issued by the Minister of Health, who is a member of the Executive. The Constitution clearly states that 'only the legislature enacts laws,' and, so the fact that the Executive had made the rules without Parliament being involved was a violation of the separation of powers. The Minister of Health's rules also tried to dictate the way in which court proceedings were to happen. This power is a power that the Chief Justice has, and the Executive cannot assume it for itself. Because of the violation of the separation of powers, the way that the Executive attempted to take powers that the Constitution gave to the legislature and to the judiciary, the lockdown rules were not constitutional, and were deemed to be unlawful.

The separation of powers is designed to make sure that no one in government has too much power. Although urgent measures needed to be taken in relation to COVID-19, Parliament and the Judiciary have an important role to play in ensuring that constitutional standards are upheld, and the needs and demands of the people of Malawi are taken into consideration.



THE STRUCTURE OF THE COURT SYSTEM IN MALAWI

There are a number of courts in the Malawian judiciary. Each court has a different role to play in the justice system. Taken together, the courts in Malawi attempt to ensure that everyone can have their disputes settled quickly and fairly.

Obligations that every judge or magistrate must fulfil, whichever court they sit in:

- Be independent and impartial
- Interpret and apply the law
- Promote and protect the rule of law, democracy, human rights and the Constitution

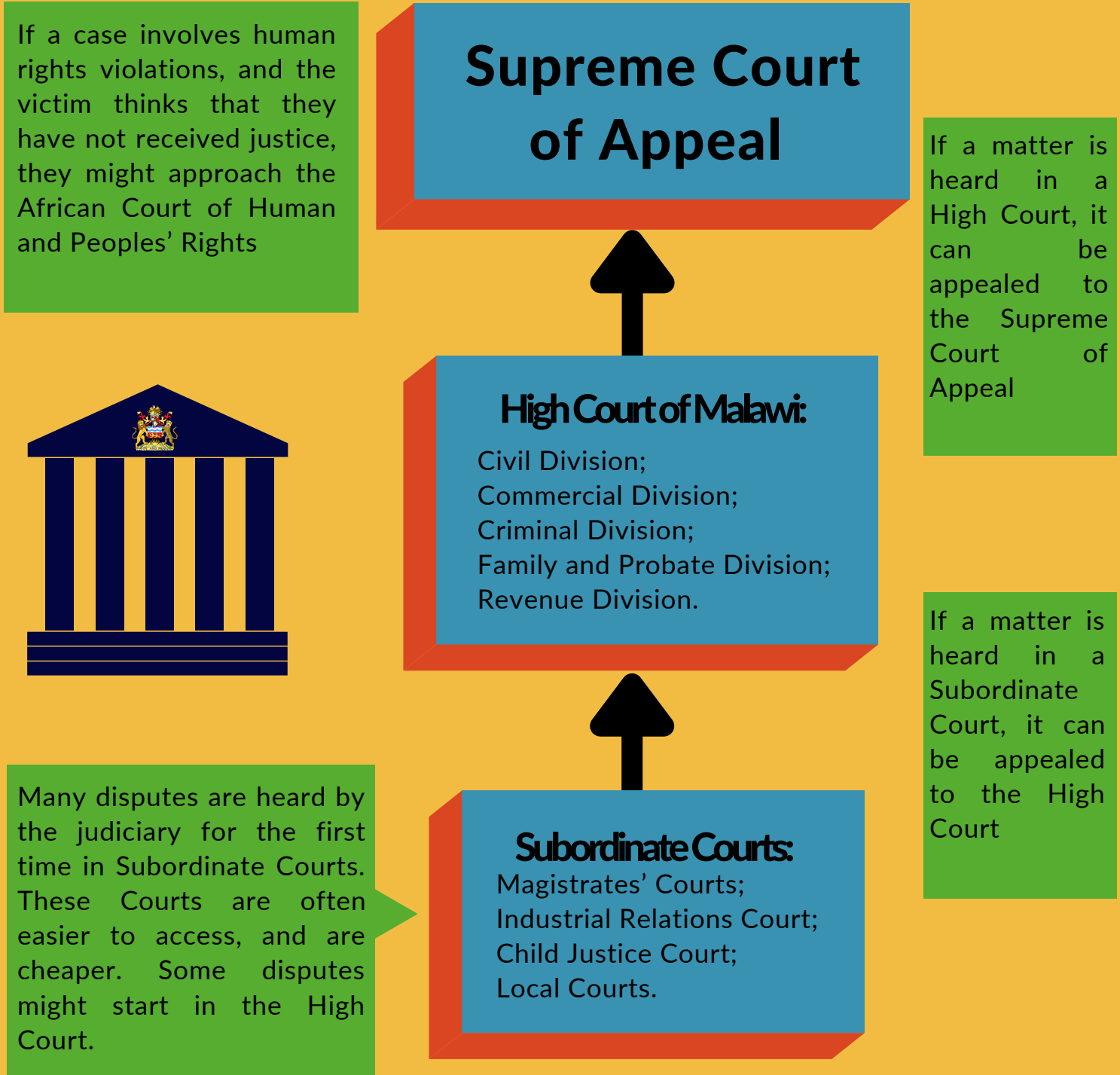
There are three categories within the Malawian judiciary:

The Supreme Court of Appeal – this is the highest court in Malawi, and can hear appeals from the High Court and other tribunals. Appeals take place when someone believes that a case decided in a lower court was not properly decided. There is only one Supreme Court of Appeal, and it is in Blantyre.

The High Court of Malawi – the High Court can hear any civil or criminal matter, and can review legislation and government action to ensure that all laws and actions of government are in accordance with the Constitution. There are many different kinds of High Court – the Civil Division, the Commercial Division, the Criminal Division, the Family and Probate Division and the Revenue Division. There are High Courts located around Malawi.

Subordinate Courts – there are four different types of subordinate courts: the Industrial Relations Court – which is where labour disputes should be heard; the Magistrates' Courts, which can hear civil and criminal matters; the Child Justice Court, which can hear all matters relating to children, civil and criminal; and Local Courts, which are designed to help people access justice more easily. Local Courts are authorised by the Local Courts Act, and will be found in all 27 districts in Malawi. The process of establishing Local Courts is still underway.

The court structure



In addition to courts in Malawi, there is an additional court that people in Malawi can approach if they think that their human rights have been violated and, justice has not been served in Malawian courts. This court is called the African Court on Human and Peoples' Rights based in Arusha, Tanzania. Malawi is one of the few countries that allows individuals and organisations to approach the African Court directly.

WHAT ARE RIGHTS AND WHAT DO THEY MEAN TO YOU?

The rights of every individual are an important part of the Malawian Constitution. Many of these rights are found in the Bill of Rights, which you can find at chapter 4 of the Constitution.

What is a right?

A right is a 'legal entitlement' – something that someone can claim from the State. It could be an entitlement to be free from State interference – for example, by demanding that the State not violate that person's privacy – or it could be an entitlement to demand something from the State, like access to healthcare.

EXAMPLE

A right can be something that requires the State to do something:

“I have the right to a fair trial”

If someone has a right to a fair trial, it requires the government to provide all of the things that make a legal process fair, which includes the right to be presumed innocent, the right to remain silent, the right to have a trial start reasonably quickly, and to have a legal representative, amongst many other things. The State needs to ensure that all of the requirements are provided to everyone who has a trial

Or it may require the State to not do something:

“I have a right not to be tortured”

The State cannot torture anyone, and must make sure that no one else in the country tortures anyone else.



(CREDIT: Commonwealth Secretariat)

By protecting rights in a constitution, a country shows its commitment to its people and to being held responsible for its actions. The protection of rights helps show that individuals and communities in a country have the ability to protect themselves from the actions of others, whether they are threatened by the government or by other people.

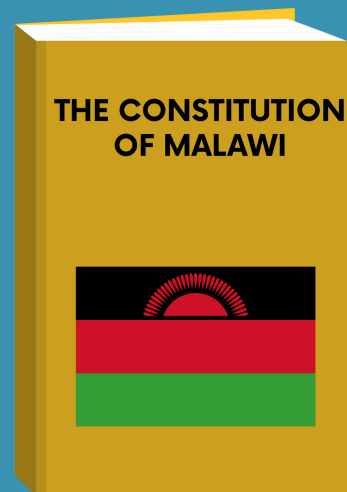
The indivisibility of rights

There are a range of different rights in the Bill of Rights, including, amongst many others, the right to life, the right to privacy, the right to freedom of expression. None of these rights are more important than any of the others. Every right is essential in order for people to be able to live dignified lives, so every right is equally important.

The rights fit together like a puzzle. They rely on each other, otherwise they would not be fully realised. The rights in the Bill of Rights are designed to create the foundation for everyone in Malawi to live with dignity, and to have all of the freedoms necessary to live lives that are dignified and meaningful, and that they have the potential to realise their potential.

Claiming your rights

The rights in the Bill of Rights are designed to ensure that everyone in the country is protected against abuse and mistreatment. Any person whose rights are threatened can take action to enforce their rights – or can even take action to protect the rights of others.



There are a range of different ways to ensure that the rights in the Bill of Rights are protected, but the most common way is to approach the Courts. Courts can order the State to take measures to protect rights, can order compensation, or can order another solution that helps people whose rights and freedoms are threatened or violated. The courts are the ultimate protectors of rights, but people can also obtain rights through other organisations.

There are also a number of organisations created by the Constitution, like **Malawi Human Rights Commission (MHRC)** and the **Office of the Ombudsman**. These bodies have been created to assist people whose rights are violated – for example, the MHRC can investigate suspected abuses, and has a number of powers which it can exercise to make sure that violations of rights end. Anyone can apply to the MHRC if they think that their rights are threatened, or they can apply as part of a community.



Other organisations, like non-governmental organisations, can help people claim their rights. The organisations frequently engage with the government in order to protect the rights of people in Malawi, and may have resources to take cases to court or to resolve the matter outside court.

Limiting rights

Although the rights in the Bill of Rights are important, as discussed, there are some circumstances where they can be limited. Such limitations should happen as infrequently as possible, but sometimes such limitations are unavoidable. For example, everyone has the right



right to protest, and to attend demonstrations. Sometimes, because of reasons like public safety, or national security, their right might be limited, which means that the person might not be able to claim the full extent of their right.

The COVID-19 pandemic has provided examples of when rights can be limited on the grounds of public health. For example, after the outbreak of COVID-19, people could not assemble or move freely due to public health and safety reasons – one such limitation has been that people could not gather inside in groups of more than 250. When a right is limited like this, it must be clearly determined why it is important for the limitation to occur, and it is also important that no other rights are limited without good reason.

The *Kathumba and Others v President of Malawi* case, discussed earlier in this booklet, makes clear that when limitations on rights are imposed, the State does so in the right way, in accordance with the Constitution.



AN INTRODUCTION TO THE BILL OF RIGHTS

The Bill of Rights tells us about the rights that every person in Malawi has, about how they can claim these rights, and about the situations where the government can limit rights. Because everyone in the country, including the State, is bound by the Bill of Rights, these rights protect people from having their rights abused by the State and by other people.

Why does Malawi protect human rights?

The Bill of Rights tells us why Malawi protects human rights: "the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights." Human rights are part of the Constitution because they are a central part of being human – they are not created by law, but their protection by the law, by the Constitution, enables people to have their rights protected, because they can hold people to account. The Constitution also recognises that human rights are important to the goal of "promot[ing] and develop[ing] the people of Malawi."

The Constitution commits Malawi to building an open and democratic society, one that is based upon human dignity, equality, and the rule of law. All of these require that rights be realised and protected.

What rights are in the Bill of Rights?

There are a number of rights in the Bill of Rights, all of which are designed to make sure that everyone in Malawi has their dignity protected and feels valued as a human being. Some rights require the State to take action and provide people with help, others, for the State to not interfere with people's lives.



(CREDIT: Rob McConaghy)

THE BILL OF RIGHTS AT A GLANCE

- 16 - The right to life
- 17 - Prevention of genocide
- 18 - The right to personal liberty
- 19 - The right to human dignity and personal freedoms
- 20 - The right to equality
- 21 - The right to privacy
- 22 - The protection of family and marriage, including:
 - Every member of the family shall enjoy full and equal respect
 - No one can be forced to marry
- 23 - Rights of children
- 24 - The rights of women, including
 - The right to full and equal protection of the law
 - To acquire rights in property, independently or in association

- with others
- To retain custody of children and to have an equal right to make decisions that affect them
 - To a fair share of property upon divorce, which may include maintenance
 - To have laws passed that protect women against sexual abuse, harassment, and violence, discrimination, and to protect from deprivation of property
- 25 - The right to education



- 26 - The right to use the language and to participate in the cultural life of their choice
- 27 - The right to be free from slavery, servitude and forced labour
- 28 - The right to be able to acquire property, and not to have it arbitrarily taken away
- 29 - Freedom to engage in economic activity
- 30 - The right to economic, social, cultural and political development, with particular attention to women, children, and persons with disabilities
- 31 - The right to fair and safe labour practices and fair remuneration
- 32 - Freedom of association
- 33 - Freedom of conscience,

- religion, belief and thought, and to academic freedom
- 34 - Freedom of opinion
- 35 - Freedom of expression
- 36 - Freedom of the press
- 37 - Access to information
- 38 - Freedom of Assembly and to demonstrate peacefully and unarmed
- 39 - Freedom of movement and residence within Malawi
- 40 - Political rights
- 41 - Access to justice and legal remedies
- 42 - The rights of arrested and detained people, and the right to a fair trial
- 43 - The right fair administrative justice

THE BILL OF RIGHTS: A SUMMARY

Below is a summarised version of the rights in the Bill of Rights. To read these rights in full, you can find them in Chapter 4 of the Constitution. Every number below relates to a section of the Constitution.

Chapter 4 – Human Rights

15 – **All of the arms of government** - the executive, the legislature, and the judiciary – and every person in Malawi must uphold the rights that are in the Bill of Rights. Every person and every organisation in Malawi can go to court if a right is threatened, to ensure that the right is protected. They also have the right to approach the Ombudsman, the Human Rights Commission or another organ of Government.

16 – **Life** – Every person has the right to life. No one should have their life taken away without their being a good reason for it (such as self-defence).

CASE STUDY: EVERYONE HAS THE RIGHT TO LIFE

The right to life has to be protected or all of the other rights cannot be enjoyed

In 2021, in a case called *Khoviwa v The Republic*, a judge on the Supreme Court of Appeal said that the death penalty was unconstitutional, as it would violate the right to life. The Court said that “the right to life is the mother of all rights. Without the right to life, other rights do not exist. The death penalty not only negates, it abolishes the right.” Because of this, the judge stated that the death penalty could not be kept as a punishment in a country upholding the right to life. However, his colleagues in the Supreme Court of Appeal disagreed. This means that the death penalty is still permissible in Malawi. However, some people think that this could change in the future.

Although most people in Malawi would support the death penalty being retained, the Supreme Court had to consider what the Constitution demanded, not what public opinion wants. The rights protected by the Constitution may not always be favoured by public opinion, but they protect even the most vulnerable members of society.

17 - **Genocide** - Genocide is the deliberate elimination of a large number of people from a particular nation or ethnic group. It is illegal in Malawi, and must be prevented and punished.

18 - **Liberty** - Everyone has the right to freedom in all areas of life. This includes preventing people being detained or imprisoned without good reason, and being able to make the decisions that determine the course of their lives.

CASE STUDY: THE RIGHT TO LIBERTY HELPS PROTECT PEOPLE'S DIGNITY

The police have good, well-thought-out reasons for detaining someone, and this protects dignity

In the 2016 case of *Republic v Pempho Banda*, the High Court said that people can only be arrested or detained if there is a good reason to think that they have committed a crime. In this case, there was not sufficient evidence to support the police's claim that 19 women who had been arrested had been engaged in sex work. The police had used biased reasoning to come to their conclusion that the women had committed a crime. This case shows that liberty is so important that any move by the police to arrest people must be for a good, well-thought out, reason.

19 - **Human dignity and personal freedoms** - Every person has dignity, and this dignity must be respected by everyone else in Malawi, including the State. There are many different ways that dignity should be protected, including when someone appears in court, and when they are punished. The State cannot give anyone corporal punishment. Dignity is an important part of everyone's right not to have their freedom of movement curtailed or to have any violence or harm done to them. The right to dignity also means that no one can be forced to take part in a medical or a scientific experiment.

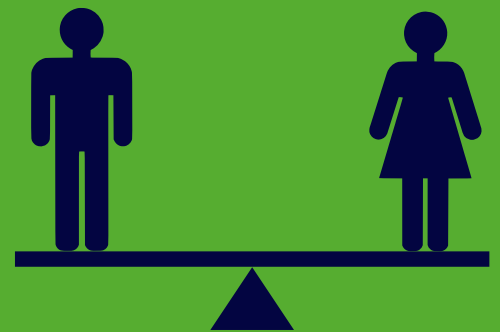


CASE STUDY: DIGNITY MUST BE PROTECTED BY THE STATE

The right to dignity protects people from abuse and maltreatment by the State

In *The State and Others v MM and Others* case, which was discussed earlier in this booklet, the police violated the dignity of the women who were raped and subjected to sexual abuse, in several ways. First of all, the right to dignity means that this violence should never have been inflicted on the women. Subsequently, the failure of the police to take action against the police officers who perpetrated the assaults and rapes also violated the dignity of the women, who had a right to expect that they would have the violence that they suffered treated with the importance it deserved.

20 - **Equality** - No one can be discriminated against, and everyone is entitled to the same protection against discrimination. Some of the ways that people risk being discriminated against are because of their race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, or birth, but there are also other ways that discrimination can take place. Laws can be passed that address inequality in society.



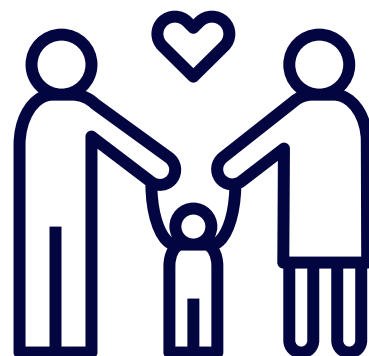
CASE STUDY: NO ONE SHOULD BE DISCRIMINATED AGAINST

No one should suffer unequal treatment unless there is a sound, legal reason

In 2008, in a case called *Banda v Lekha*, the Malawian Industrial Relations Court had to consider a case where someone was dismissed from work after she tested positive for HIV. Even though section 20 does not specifically cite that discrimination against HIV positive people is prohibited, the Court made clear that HIV-status was a ground on which no discrimination is allowed. This means that people who are HIV positive must be equally protected by the law.

21 – **Privacy** – Everyone has the right to privacy, which includes not to be searched, to have their home searched, to have their possessions taken away, or to have personal communication interfered with.

22 – **Family and marriage** – Families must be protected by the State. Every member of a family has the right to be treated with equal respect, and to be protected from abuse, cruelty or exploitation. All men and women have the right to marry, provided they agree to be married, and to start a family. No one over the age of 18 can be stopped from marrying someone they want to.



23 – **Children** – Every child – a person under the age of 18 – has the right to be treated equally, whatever circumstances they are born into. In every matter involving a child, the best interests of that child are of the greatest importance. Every child has the right to a name and to a nationality, to know their parents and to be raised by them, and to be provided for by these parents, regardless of whether their parents are married, unmarried or divorced, or by a guardian. All children have the right to live in safety, including the most vulnerable children, such as those with disabilities, orphans, or other children living in disadvantaged circumstances. Where it is necessary, the State must assist children to live in safety. Every child must be protected from being economically exploited, and from being forced to do any work that is hazardous, interferes with their education, or will harm their physical, mental, spiritual or social development.

CASE STUDY: The ‘BEST INTERESTS OF THE CHILD’ MUST BE PROTECTED

The ‘best interests of the child’ includes making sure that a caregiver is available, if possible

The High Court of Malawi has made clear that a court must be sure to act in the best interests of a child in all matters. Sometimes, this will have ramifications for what can be done to parents, as it is generally considered to be in the best interests of the child that they have a caregiver.

Some courts have said that the best interests of the child are so important that it is a factor that can be considered when a court is deciding whether a primary caregiver can get bail. This occurred in *Alasoni v Republic*, where a person who had been arrested was given bail. The child accompanied the mother to jail when she was arrested, because no other caregivers were available. The judge said that it was not in the best interests of the child to be in jail, and this should be taken into consideration when considering whether to grant bail.

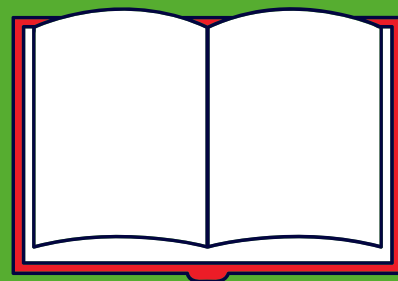
24 - **Women** - All women have the right to the full and equal treatment of the law, and cannot be discriminated against because they are women, or on the grounds of whether they are married or not. They have the same rights as men. No laws can discriminate against women, and any customs or practices that discriminate against women are unconstitutional, including practices like sexual abuse, harassment and violence, discrimination in the workplace or business, and deprivation of property, including property obtained through inheritance.

CASE STUDY: WOMEN OBTAIN THE SAME RIGHTS AS THEIR SPOUSE IN PROPERTY

Men and women obtain equal rights to property, even if the woman is not economically active

In a case called *Rose Magombo v Luka Magombo*, a Malawian court held that the Constitution recognises that both spouses contribute to the functioning of their family, and the property of the marriage should be regarded as jointly held. This means that property should not be assumed to be the property of the man, which is important at divorce and if the man dies, as it means that the woman may be able to claim the house and other property held by the couple.

25 - **Education** - Everyone has the right to an education. Private schools are permitted, but must be registered with the State and must have standards that are at least equal to the standard offered in State schools.



CASE STUDY: EVERYONE HAS THE RIGHT TO EDUCATION

The State has made it the law that education be provided free and be compulsory to all children below 18

The Constitution makes clear that everyone has the right to education. To make sure that this right is not denied, the **Education Act**, at section 13, makes clear that every child in Malawi has a right to free education in a government school. The Education Act also states that it is compulsory for children under the age of 18 to be in school. It should be noted that private, fee-paying schools are permitted, but that everyone should be able to access free education in a government school if necessary.

26 – **Culture and language** – Everyone can use the language of their choice, and to participate in whatever cultural life they choose.

27 – **Slavery, servitude and forced labour** – No one can be made a slave or kept in servitude, and slavery and the slave trade are illegal. No one can be made to perform forced labour.

28 – **Property** – Everyone has the right to own property, and no one can have their property taken away without good, lawful reason.

29 – **Economic and social rights** – Everyone has the right to work and to earn a living that enables them to exist in society.



CASE STUDY: THE ABILITY TO EARN A LIVING IS PROTECTED

People must be allowed to make a living as they wish, unless the government has a good reason to stop them

In 1993, the government placed significant restrictions on who could appear in dramatic productions that took place at public institutions. This meant that many people lost their ability to earn a living. Challenged in court in *Du Chisiza v Minister of Education and Culture*, The High Court said that the State had limited people's right to earn a living, without having a good reason to do so. The right to earn a living means that the State must not interfere with the way that people earn their living, unless the State has a good reason to do so.

30 – **Right to development** – Everyone has the right to development, to economic, social, cultural and political development, and women, children and persons with disabilities will be given special consideration. The State has to take measures to help everyone enjoy their right to develop, and has to ensure that everyone has an equal opportunity to access basic resources, education, health services, food, shelter, employment and infrastructure. The State has a duty to get rid of social injustices and inequalities, and to adopt policies that respect this right.

CASE STUDY: SOCIO-ECONOMIC RIGHTS

Protecting the basic necessities of life helps people to develop and to fulfil their potential

Everyone in Malawi has socio-economic rights, contained within the right to development. These rights are particularly important for vulnerable members of society, who might struggle to get the basic necessities of life that they need to sustain themselves and to develop, unless they are helped by the State. One vulnerable group are people who are imprisoned. They are vulnerable because they are reliant on the State for their food, their shelter, any further education, and for their access to health services.

In the case of *Masangano and Others v Attorney-General and Another*, a number of prisoners felt that their rights were not being upheld while they were in prison. They claimed that they were not being given enough food or clothing, that overcrowding meant that they had inadequate shelter, and they were not receiving medical treatment.

The Court emphasised that Malawi had a new constitutional culture, in which human rights were to be respected by all organs of State. Although prisoners have some rights curtailed, like their freedom, all other rights are retained. The Court emphasised that the socio-economic rights of imprisoned people must be protected by the State, in the process emphasising that the socio-economic rights of all people are protected, and that anyone can approach the Courts if these rights are violated.

31 – **Labour** – Everyone has the right to fair and safe labour practices, not to be subjected to any discrimination, particularly on the grounds of gender, race or disability, and to be paid fairly. This right includes the right to form or join a trade union, and to go on strike.



CASE STUDY: EVERYONE SHOULD BE TREATED FAIRLY IN THE WORKPLACE

When an employer wants to end someone's employment, they must do so fairly

In *Granger Nkhwazi v Commercial Bank of Malawi Ltd*, the High Court said that the right to fair labour practices means that people should have a fair hearing before they are dismissed, or the dismissal would be unfair. This helps people to know why they have lost their jobs and to present arguments as to why they should not be fired.

32 – **Freedom of association** – Every person has the right to choose who they want to spend time with, and to form associations and organisations. No one can be forced to join an association or an organisation.

33 – **Freedom of conscience** – Each person has the right to believe what they want to believe, and to academic freedom, which means that the government cannot dictate what people teach, study or write about.

34 – **Freedom of opinion** – Everybody has the right to have any opinion that they like, and also has the freedom to receive other people's opinions, and to share their own opinion without anyone stopping them.

35 – **Freedom of expression** – Everyone has the right to express themselves freely.

36 – **Freedom of the press** – The press will have the right to report and publish freely, within Malawi and internationally, and shall be provided with as much access as possible to public information.



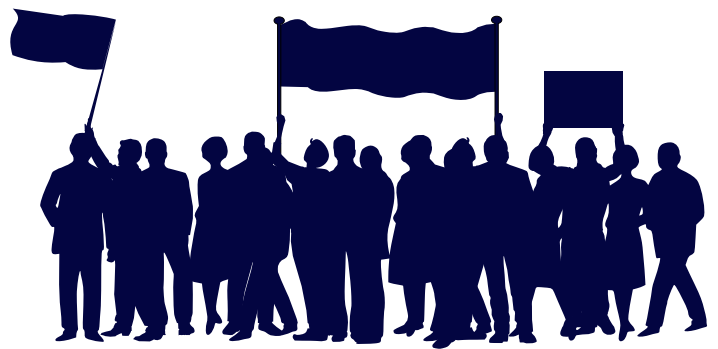
CASE STUDY: FREEDOM OF THE PRESS, EXPRESSION AND OPINION ARE OFTEN LINKED

The State cannot control how people give their opinion or what they say

In the aftermath of the May 2019 election, many citizens expressed their views and opinions on the electoral process via phone-in radio shows. However, the State banned these shows, a ban that was challenged in *Malawi Communications Authority v National Media Institute of Southern Africa and Others*. The Court said that the ban was too broad, and amounted to illegal censorship. The freedom of expression and freedom to hold and share opinions are important rights, and any limitation must be careful to limit the rights concerned as little as possible.

37 – **Access to information** – Everyone has the right to information held by the State if it is needed for the exercise of a right.

38 – **Assembly** – Everybody has the right to assemble and to demonstrate with other people, but they must do all of these peacefully and may not be armed.



CASE STUDY: EVERYONE CAN DEMONSTRATE

The State cannot restrict demonstrations merely because it does not like the reasons for the demonstration

In 2002, the President banned all demonstrations against a proposal to amend the Constitution. In *Malawi Law Society and Others v The State and Others*, the High Court said that this ban violated the right that people in Malawi had to demonstrate. The President cannot declare that demonstrations that she or he does not like are outlawed – instead, demonstrations can only be restricted where there is a risk of violence, danger, or where there is a legitimate reason to limit the gathering.

39 – **Freedom of movement and residence** – Everyone has the right to go wherever they want to and to live wherever they choose within Malawi. Malawian citizens also have the right to leave Malawi and to return.

40 – **Political rights** – Everyone has the right to form a political party, to join a political party, to recruit people to join a political party, and to participate in the activities of a political party. Everyone has the right to make the political choices that they want to. Everyone has the right to vote, and to have their vote kept secret, and to stand for election to office.

CASE STUDY: EVERYONE HAS THE RIGHT TO VOTE

The right to vote in Malawi should be protected for everyone eligible

It is only in the last thirty years that the people of Malawi have had the ability to be involved in free and fair elections. The 2019 election, the sixth democratic election since the introduction of multiparty elections, posed a threat to the right to free and fair elections, as many claims of irregularities were raised. The results of the elections were challenged in the High Court, in a case called *Chilima and Chakwera v Mutharika and Electoral Commission*.

The Constitution makes clear that the Government of Malawi rests on the trust of the people of Malawi, stating that “the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.” After analysing all of the alleged events surrounding the election, the Court found that the declared results of the 2019 election could not be trusted to be a proper reflection of the will of the voters of Malawi. Because the will of the people was not captured in free and fair elections, the election was nullified, and it was ordered that new elections had to be held.

The outcome of this case highlights how free and fair democratic elections are a vital part of Malawi’s constitutional order. Within this is the right of the people of Malawi to choose the government in which they place their trust.

41 – **Access to justice and legal remedies** – Everybody has the right to have their case considered by a court. If anybody has their rights violated unfairly, they have the right to a legal solution that will help them.

42 – **Arrest, detention and fair trial** - If someone is arrested, they must be told why they have been arrested. While being held, a person in detention must be held in good conditions that protect their dignity, and they must receive reading and writing materials if they want them, must receive enough food, and the medical treatment that they need – and all of this should be paid for by the State. Every person in detention should be able to talk to a legal practitioner about their case, and should be told that they have this right quickly after they are detained. If they cannot afford a legal representative, and it would be fair for them to have one, the State must provide one. Everyone who is detained must have the chance to speak to their husband or wife, to their next-of-kin, to their relatives, to a religious counsellor and to a medical practitioner that they have chosen. Everyone should be able to challenge their detention in court, and must be released if their detention is unlawful. After someone is arrested, they must be told that they have the right to remain silent, and to appear before a court within 48 hours of their arrest, or as quickly as possible. No one should be forced to confess or make any admission that could be used as evidence against them. People who are accused of a crime, and are waiting for their trial should be kept separately from people who have already been convicted of a crime. Everyone is entitled to a fair trial, and this includes the right to a public trial, before an independent and unbiased court, to be told what they are being charged with, to be presumed innocent and to remain silent, to have a legal representative, not to be convicted of the same crime twice, and to have their trial conducted in a language they understand, or to have the trial translated for them by translators paid for by the State. People under the age of 18 – children – have special rights, including the right not to be sentenced to a life sentence without the possibility of parole, to be imprisoned separately to adults, and to be treated in a way that reflects their age and the importance of ensuring that they can reintegrate into society in the future.



(CREDIT: Lizel Louw)

CASE STUDY: THE RIGHT TO LIBERTY HELPS PROTECT PEOPLE'S DIGNITY

Limitations of liberty must only take place when the criminal justice process has been fair and properly administered

In the *Pempho Banda* case discussed above, the High Court emphasised that everyone deserves a fair trial, that everyone should be treated fairly by the justice system. This means that every element of a trial should be fair. In this case, there were several elements that meant that the case was not fair, and no one could be found guilty.

43 – **Administrative action** – When decisions are made that affect people, the decisions must be fair and justifiable, and must consider the rights, freedoms and interests that someone has. Everyone should receive reasons for the decisions that affect them.



(CREDIT: IFPRI)

CONCLUSION

The point of knowing your rights, of knowing about the Constitution, is for you to be able to lead a dignified life, to have the opportunity to fulfil your potential as a human being. But this opportunity, these rights, come with responsibilities. Each of us needs to make sure that we hold the government to account. We need to make sure that the government fulfils the obligations that the Constitution imposes on it, and doesn't violate our rights or the rights of any other residents of Malawi. Each one of us has a responsibility to treat other people with the dignity and the respect they deserve. If we think our rights should be respected, we need to respect other people's rights.

The Constitution has a vision of the society that Malawi can be. Progress has been made in realising this vision. But there is still much to do, still so many steps that need to be taken in order for everyone in Malawi to enjoy their rights. By monitoring the government, and by exhibiting the constitutional values in our lives, each of us can bring this vision closer to coming to life.



(CREDIT: Swathi Sridharan (ICRISAT))

ORGANISATIONS THAT CAN HELP YOU CLAIM YOUR RIGHTS

The Anti-Corruption Bureau, Malawi

The Anti-Corruption Bureau is a government institution that is mandated to prevent corruption and to investigate any complaints of corruption. It can investigate private and public bodies.

Physical address: Mulanje House, Lilongwe

Postal address: P. O. Box 2437, Lilongwe

Telephone: +265 (0) 888 208 963 or +265 (0) 1 770 166

Email: reportcentre-ll@acbmw.org

Website: <https://acbmw.org/>

Twitter: @ACBMalawi

The Judiciary

The Judiciary is the ultimate protector of the Constitution and the rights within it.

Address: Judiciary Premises, Chichiri, near the Polytechnic College, Blantyre

Postal address: P. O. Box 30244, Chichiri, Blantyre

Telephone: +265 187 0255 or +265 187 3873)

Email: malawijudiciary@judiciary.mw or highcourt@judiciary.mw

Website: <https://www.judiciary.mw/>

Malawi Human Rights Commission

The Malawi Human Rights Commission is an independent national human rights institution, and is required to protect human rights, and investigate violations of human rights. Individuals can make submissions to the Commission if their rights are threatened. The Commission aims to help bring about a Malawian society where human rights are respected and enjoyed by everyone. An individual can submit a complaint about a human rights violation on the Commission's website, by email, or by calling.

Address: H.B. House, Off Paul Kagame Road, Lilongwe

Postal address: Private Bag 378, Lilongwe

Telephone: +265 1 750 900 (Lilongwe)/ +265 1 831 945 (Blantyre)

Email: info@mhrmw.org

Website: <https://www.mhrmw.org/>



The Office of the Ombudsman

The Ombudsman is mandated by the Constitution to investigate cases where someone has suffered an injustice and it does not appear that there is any remedy reasonably available by way of appeal from court or where there is no other practicable remedy.

Address: St Martin's House, near Teveta House, Lilongwe

Postal address: Private Bag 348, Capital City, Lilongwe

Telephone: +265 1 77 4899 or +265 1 77 4866

Email: ombudsman@ombudsmanmalawi.org

Website: <http://www.ombudsmanmalawi.org/>