

"What has been Achieved?"

Malawi Constitutional Conference

Closing Remarks by the Conference Chairman

Blantyre, 24 February 1994.

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MALAWI CONSTITUTIONAL CONFERENCE
KWACHA INTERNATIONAL CONFERENCE CENTRE
BLANTYRE MALAWI 21-24 FEBRUARY 1994
CLOSING CEREMONY

WHAT HAS BEEN ACHIEVED?

CLOSING REMARKS BY THE CONFERENCE CHAIRMAN

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THE PURPOSE OF THE CONFERENCE

As we approach the closing moments of this conference, it is as well to pause and reflect upon the achievements of these past four days. The good news is that there has been a true meeting of minds, an exchange of ideas and a furtherance of understanding. Even the disagreement of the participants, strongly expressed, amounts to good news. The essence of democracy is the rights to differ and to compete for the people's good opinion upon views peacefully and passionately expressed. The bad news is that time - that unbending tyrant - has run away from us. We have not been able to explore every issue and examine every constitutional question of importance to the new Malawi. For all that, we have achieved much.

It is important to remind ourselves of the formal purpose of the conference. It is a step in an orderly and lawful transition of this country. It is transforming itself not by armed struggle and cruel bloodshed - although that has happened in the past. Instead, Malawi has chosen a peaceful path of lawful change at the ballot box. The process is one of continuity and of lawful prescription. That, it seems, is to be the Malawian way.

Thus, the Parliament of this country enacted the National Consultative Council Act 1993. It was that statute which established the National Consultative Council (NCC), comprising representatives of all political parties. The NCC has statutory

duties conferred upon it by law. They include the duties stated in section 5 of the Act, where the functions of the NCC are spelt out by Parliament:

- 5 (1) The functions of the National Consultative Council are:
- (e) To prepare the draft of a new constitution suitable for a multiparty system which shall become effective immediately after the first multiparty general elections; and
 - (f) To prepare the draft of a Bill of Rights, either as a part of the new constitution or as a separate Act of Parliament.

The NCC cannot ignore its statutory mandate. It must strive to fulfil it according to its duties to Parliament. It has sought to do so. For that purpose, it has established a Constitutional Committee to work up the drafts referred to in the Act. Formally speaking, then, this Constitutional Conference is a body convened to advise the NCC upon the performance of its statutory responsibilities. We, who have participated, are thus privileged to have the opportunity to affect the future shape and contents of the Constitution and Bill of Rights of the new Malawi. The words spoken, and the ideas voiced, will be part of the thinking of the NCC and its committee as they proceed towards the May 17th general elections.

Yet this is but the formal and legal position of our conference. The conference has had a utility which goes beyond the formal reasons for its meeting:

- It is, in itself, part of the process of reconciliation which has been going on in Malawi, with renewed energy since the referendum on constitutional change expressed the people's verdict;
- It has been an illustration of the assertion of the brave but peaceful differences of political views. It

has been an illustration of political competition at work amidst a free people;

- It has provided a forum for opponents to listen to each other and to realize the points in common as well as the points of difference;
- It has been a time for learning and - as many debates showed - an occasion for the changing of minds by rational, civilized argument which recognizes that upon many controversies there is no absolutely correct answer - but different points of view: each legitimate in themselves;
- It has allowed political leaders and representative citizens to reach out far beyond this Conference Centre to the people of Malawi in their myriad variety: through the Chiefs to their peoples in the villages; through the non governmental organizations to their members and the public; and through the press and radio to the ordinary people of Malawi: following these proceeding with unprecedented interest;
- It has reminded all of us of the minorities who must be respected and protected in a true democracy - of the disadvantaged in Malawi: the disabled, the young, the illiterates, the ethnic minorities and women

As one delegate put it: "Malawi is at the cross roads". This conference has helped to identify the paths to take to a just society in this country.

THE KEY ISSUES

During the conference, the participants have examined a number of the key issues for the future Constitution of Malawi. Let me remind you of some of the key debates before their detail is lost in the mists of memory and their product is written in the new charter.

The Presidency, naturally enough, attracted a vigorous discussion on the President's powers, on the procedures for removal, on the Vice Presidency and as to the qualifications - and disqualifications - for office. Who will forget the energetic and sincere clash of opinion on whether a prior criminal conviction should forever disqualify a Malawian citizen from offering for election as President? That debate was articulate and closely fought. But, at the end, a small but clear majority favoured the proposal of the constitutional drafting committee as stated in the abstract of the proposed Constitution. A candidate should not be disqualified, if the criminal conviction is more than seven years old. Then, it should be left to the people of Malawi to decide the significance, if any, of such conviction for the suitability for office of the candidate. All participants agreed that the President, as the father or mother of the nation, should be a person of the highest character. But upon this issue of disqualification, the preference of the participants was to leave it to the good sense of the electors to judge such a matter. Trust the people, was the opinion that appears to have eventually won the day upon this issue.

The legislature and its powers and functions secured a most vigorous debate. Do you recall the very close indication of opinion concerning the question of whether members of the National Assembly, appointed to the Ministry by the President, should sit in the legislature? The committee had proposed - for the separation of powers - that any Members of Parliament, appointed to the Ministry, would have to resign - with the consequence that there would need to be a by-election. The delegates were evenly divided upon whether this should be required by the Constitution.

Then there was the issue of whether the legislature should contain a second chamber. After a most thoughtful debate, the participants favoured a bi-commercial legislature. The majority clearly inclined towards a second House. But whether such a

chamber should be confined to the Chiefs, should contain other special interest groups and should be elected or appointed was left undetermined. Those issues must now be considered by the NCC.

Also debated in this area of concern was the code of conduct which would govern Members of Parliament. Shepherded by my distinguished co-chairman. Dr. Boyce Wanda, the participants considered the thorny issues whether a Member of Parliament, elected upon one party's ticket, should be required to resign from Parliament upon accepting membership of a different political party. And whether a Member should be bound by law to conform to the party's decision on parliamentary votes. A clear majority of participants favoured reserving to Members of Parliament the right to follow their consciences upon particular issues, even if this led to a vote contrary to party instruction. It could be left to political, rather than legal, sanctions to ensure that this did not happen too often.

When the participants turned to discuss the proposals concerning the Judiciary there was virtual unanimity. All participants recognized the vital importance of an independent, courageous and uncorrupted judiciary for the future just operation of the Malawi Constitution. An independent judiciary - as guardian of the Constitution - represents the fulcrum of the document and the assurance that its requirements will be fulfilled by all. There was consensus that the highest judiciary should be independent and strong. That its members should not pursue other incompatible activities or employment. That its salaries should be adequate and that budgetary independence of a high order should be secured.

The Traditional Courts attracted much debate. There appeared to be consensus that their jurisdiction should be redefined to exclude serious (capital) offences and to exclude at least some powers over divorce. A proposal was tabled which suggested that the Traditional Courts should be brought under the umbrella of

the general court system and that no special courts outside that umbrella should in future be created.

The need for a separate Appeal Court - and possibly a Constitutional Court - was voiced. Malawi will as no doubt observe the developments in South Africa where the new interim constitution envisages a Constitutional Court, above the famed Appellate Division, to interpret the new Bill Rights and to uphold the new constitutional order. If this system is seen to work on South Africa, it might bear reconsideration on Malawi.

One of the most intense debates concerned the constitutional office holders in the Executive Government, whose functions are so important that their independence should be guaranteed by a clear constitutional mandate.

Opinions differed concerning the list. The Governor of the Reserve Bank of Malawi was mentioned. So was the Director of Public Prosecutions. The Inspector General of Police. The Inspectors of Prisons and Security were suggested. There was a difference about including the Secretary to the President and Cabinet; just as there were differences as to whether the Head of the Armed Forces should be included. Separate debates touched upon the inclusion of the Auditor-General and the Ombudsman, if appointed. Several delegates voiced the opinion that these two office-holders should be directly answerable to, and appointed by, Parliament.

The issue of accountability was carefully discussed. How can a proper measure of accountability to the people of Malawi be secured from these high officials while at the same time safeguarding their office-holders from unlawful political interference and direction? It was agreed that his topic deserved serious thought to ensure that such key officials should not become alternative sources of power in the country, unanswerable to the democratically expressed will of the people. Various overseas models were mentioned, as deserving of further study.

Part of the debate of this issue centred upon the period of service of such constitutional officers. And it was agreed that particular attention was needed to ensuring effective institutional remedies to combat corruption and to ensure the appointment of a good cross section of Malawian citizens to such high offices. The appointment of more women and of the disabled was especially mentioned.

A particularly vigorous debate examined redress for the alleged wrongs of the past. One delegates urged the establishment of a Constitutional Commission of Inquiry, headed by a judge, to investigate, and report upon, the alleged wrongs done to the people of Malawi by the Government, and individuals and agents acting for Government, since 1964; or at least during the period of one party rule. This call appeared to have won widespread support. Other delegates addressed the urgent need, as it was put, to establish a Constitutional Fund for compensation to those who had suffered loss of their human rights, or deprivation of their land, since 1964. It was urged that this Fund should be allocated by a Tribunal, headed by a judge, upon proof of clear wrongs. This idea was ultimately placed before the conference for an expression of inclination of the participants. It had their overwhelming support. Some supporters emphasized that the Fund might not, in Malawi's economic condition, be large: certainly not as large as it should be. But it would be symbolic of the determination to build the new constitutional order in Malawi upon a basis of justice and truth. And it would provide a form of collective apology, on the part of the nation, for the wrongs alleged and proved, over the past thirty years.

Local Government attracted much debate on the last day of the conference. There was agreement on the need to re-define the relationship of the powers of the central and local governments in Malawi. This, it was urged, would become an instrument for the devolution of power to the people's representatives at a point closer to the people. There was no final resolution of this issue. But it is certainly placed firmly upon the agenda of the

NCC for its consideration.

The Bill of Rights was the subject of a long debate as was the issue of entrenchment of constitutional guarantees. I detected no participant who was opposed to a Bill of Rights, or to including such a Bill in the new Constitution. Some even suggested that, as a symbol of the new dispensation, the Bill of Rights should stand at the very outset of the Constitution as the basis of the charter of the new Malawi. The controversies on this issues centred around the questions of what the Bill of Rights should contain, who should enforce it, and how the balance would be struck between the rights of one individual, the rights of other individuals and the needs of society. These are universal controversies. Malawi can doubtless learn from the human rights provisions of the international and regional covenants which Malawi has ratified and the example of other democratic societies. Upon the Bill of Rights Malawi would do well to consult respected international expert bodies, such as the International Commission of Jurists (ICJ) whose Secretary-General is a distinguished African jurist with a deep knowledge of these issues. The conference was advantaged by the presence in Blantyre of two representatives of the ICJ. Their expertise should not be overlooked in the development of the Malawi Bill of Rights.

Particular attention will need to be given to economic, social and cultural rights. Human rights extend more broadly than to civil and political rights. In Malawi, the right to education and the right to life and health require particular and urgent attention. The scourge of HIV/AIDS and the problems of over - population threaten to present urgent challenges to the new multiparty democracy in Malawi. They will require concerted and, one might hope, cross party responses for the sake of the whole nation and its people.

The derogations from the protections of the Bill of Rights were discussed in one session. There appeared to be agreement on the need carefully to limit the derogations for states of

emergency and national security. One proposal, which appeared to gain universal approbation, was the suggestion of one delegate that human rights should be taught in schools and in the media. In a real sense, respect for human rights begins at our parents' knee - but we can re-enforce the messages of human rights by school and public education campaigns much as have been attempted in many countries. It is preferable that human rights be upheld by the knowledgeable citizen and official spontaneously, and conscientiously, rather than enforced by courts of law or even by the proposed Ombudsman.

A number of special issues were raised during the conference. All of them deserve the attention of the NCC and Parliament. They include the need for particular protections for the free press and independent broadcasting, a code of rights and duties of journalists and the limits of, and needs for, censorship to uphold basic values without suppression of legitimate free expression and minority viewpoints. Many delegates spoke of the need for land law reform. Many too spoke of the need to redress, by law, of the disadvantages suffered by women, by the disabled and other minorities. The issue of capital punishment, and its proposed abolition, was debated at length; but without ultimate resolution. Diametrically opposing viewpoints were expressed. Many delegates observed that the list of topics requiring attention, outside the context of the new Constitution, indicated the need for a permanent law reform or law revision commission to process proposals for the modernization of the laws of Malawi in an efficient and systematic way.

Throughout all the contributions was woven the insistence that the new Malawi Constitution should reflect the values of Malawi and not just be a pale reflection of the constitutions of different societies, with different cultures and traditions. The spiritual values of Malawi should be reflected and those values were rarely far from the surface (and often out in the open) during the debates. Malawi is a religious society. Freedom of

religion requires that the conscience of all Malawian be respected. Necessarily, that includes non Christian believers - particularly the followers of Islam who have played an important role in the process of reform and in the conference. And it also includes non believers - for freedom of religion must include freedom not to subscribe to any religion; or to embrace humanist and secular values. These citizens too - and their beliefs - must find reflection in the new Constitution.

So must the traditional role of the Chiefs, whose voice was heard so clearly throughout the conference. They speak with an authentic voice for the villagers who rarely, if ever, wear coat and tie or come to city conferences. The Chiefs provided a strong voice for the villagers of Malawi, whose traditional values are an important and continuing feature of this society.

The spirit of reconciliation which is such an element in the current and recent history of Malawi cannot be overlooked. It must find a reflection in the new Constitution, given the recent history of Malawi and the undoubted wrongs which have occurred which the new Constitution must now help to redress. Many participants insisted that, whilst reconciliation was important, it had to be reconciliation upon the basis not just of love and forgiveness but also truth and justice. Getting the right mixture of these values would be important to set the tone for the new polity of Malawi for the decades ahead. At least this conference has shown the remarkable willingness of Malawian citizens to search for that new polity and to fashion the right balance.

TO SEE OURSELVES AS OTHERS SEE US

The famous Scottish poet, Robbie Burns, once wrote a poem about objectivity. He would have said it the rich brogue of Dr. Livingston and Dr. Laws, the early Scottish missionaries to this country. I cannot capture their accents. But the idea is worth recalling to mind (with spelling anglicized.):

"I wish that God the gift would give us,
to see ourselves as others see us"

It has been a great privilege for me, a citizen of another country, to be invited to chair this constitutional conference, with Dr. Wanda, at a critical movement in the life of this beautiful country. Indeed it is a humbling event in my life. For strength to perform it I repaired, before the conference began, to my church to seek God's blessing that I would be worthy of, and equal to, the task.

One advantage of having an outsider as your chairman is that he can hold, as it were, a mirror up to yourselves and show you aspects of yourselves which you know not of, or cannot see so clearly without a mirror held by a stranger.

Permit me to record what I see in the mirror which reflects the happenings of the past four days at the conference:

- I see a people speaking bravely and vigorously about their country and its governance. As many as 133 of the 188 participants spoke. Many spoke several times. Priority was given by the chair to those who had not spoken before. This ensured that all who wanted to speak were given at least one opportunity to do so. And speak they did without fear or hesitation. The Chiefs were at first a little diffident. But, when bidden by the chair, they broke their silence and spoke with strength and elegance, mostly in their own mother tongue. Their voice was heard;

- I see a people courageous and energetic in robust political interventions and persuasion. If, occasionally, a speaker lapsed into frank politicking for his party or even his own candidature in the coming elections, the chair was indulgent. For this was democracy at work and generally the privileges of

the conference were courteously observed by all;

- I see a people who are ready to listen carefully to each other, even when they clearly disagree;
- I see a people determined to act charitably to each other; to observe the conventions of democracy to proceed to the future without undue rancour for the past; and to endeavour to seize the opportunities which, unexpectedly, have come to Malawi;
- I see open minded people - who will subscribe to party discipline, as is necessary in a modern democracy. But who reserve to themselves the privilege, apt for a highly religious people, to answer ultimately to their consciences. For example, in the indication of opinion on the disqualification of presidential candidates for past criminal corrections (and on other issues) it was most notable that the party groupings were split. Participants, having heard debate, voted as they thought right and proper for the guidance of those drafting of the new Constitution of Malawi. It was a remarkable demonstration of the integrity of our assembly;
- I also see a people who pay most respectful attention to the opinions of the villagers of their country, expressed for the most part to the conference by the Chiefs. Who do not consider themselves better for their chances of education and career than the humblest farmer and busiest mother of this land. Who listened earnestly, lest they miss the voices of their fellow citizens in the remote villages - speaking to

the conference of their values and aspirations;

- I see a people of spirituality and piety, with a high level of religious concern, out of which should come lessons of reconciliation, peace and justice; and

- I see a people of good humour and warm fellowship. Who will forget the tale of one of the Chiefs, complaining of the crocodile hunter sent to help in the taming of man-eaters who was diverted, instead, into seducing the women of the region whilst the crocodiles went on with their lives unmolested? Who will forget the suggestion that leading members of one political party might "see the light" and opt to join their rivals? - A possibility rejected out of hand, I should say, but one which created much laughter at the prospect.

This, then, is the people of Malawi, as assembled in this conference as reflected in the mirror and observations of its chairman.

There was a broad consensus about the essentials:

- . That a new Constitution must be fashioned without delay;

- . That, in his document, it should be made clear to

all future temporary rulers that they serve the people and are ever accountable to the people;

. That all power emanates from the people whose servants the politicians, ministers, judges and officials ultimately are; and

. That the new Malawi will have a triple crown - of democratic governance; of an independent judiciary upholding the Rule of Law; and of basic human rights protection, put beyond derogation by those who temporarily wield power on behalf of the people of this land.

A NOBLE EXERCISE

As I leave Malawi, various phrases from the speeches of the delegates will be ringing in my ears. In a plane above Africa, in Geneva next week as I report on the needs of Cambodia, and on my return to my own land, I will hear those phrases repeated in my mind:

. "The Malawi Constitutional Conference has seen a rich and passionate discourse of free people".

. "We have contributed, by this conference, to a democratic culture in Malawi";

. "The Constitution we are fashioning must be a

mirror of the nation, reflecting its diversity";

. "It must be a beacon for the ship of state of Malawi"; and

. "We have never spoken with each other like this about our Constitution. This has been a noble exercise".

Let the Constitution, towards which we have laboured in these past four days at Blantyre - in the words of the First Psalm read to us by the Lord Bishop - be planted by streams of life-giving water and yield its fruits in due season. So that, whatever is done under the new Constitution, prospers for the good of the land and people of Malawi. Amen.

Mulungu Adalitse Malawi!