

"Malawi: Progress towards multi party democracy."

Australian Law Journal

International Legal Notes.

001116

AUSTRALIAN LAW JOURNAL

INTERNATIONAL LEGAL NOTES

Malawi: Progress towards multi-party democracy

The Republic of Malawi is a landlocked country bordering Lake Malawi in Eastern Africa. It was formerly known as Nyasaland. At the last census in 1988, it had a population of 8.2 million. For most of the time since it gained its independence from Britain, in 1964, Malawi has been ruled as a One Party State. It became a republic in 1966. Remarkably enough, its first President, Ngwazi Dr H Kamuzu Banda, still holds office.

In 1970, the Malawi *Constitution* s 9 was amended to provide that Dr Banda

... "[S]hall hold the office of President for his lifetime."

As a result of internal pressure and that of foreign donors, a referendum was held in Malawi in June 1993. Sixty three per cent of the participants voted in favour of a change to a multi-party system of politics. Both before and after the referendum, Dr Banda indicated an intention to observe the wishes of the people. In June 1993, two weeks after the referendum, the Malawi Parliament amended the *Constitution* to remove the barriers to the formation of political parties other than the Malawi Congress Party (MCP) led by Dr Banda. Elections are called for 17 May 1994. Ten political parties have adopted candidates for the election. The MCP adopted President Banda as its candidate.

The moves to constitutional and political reform in Malawi have tended to be overlooked because of the dramatic changes happening contemporaneously in the Republic of South Africa, close by. The history of democratic government in post-independent African States has been sufficiently discouraging to require attention to the developments that are

happening in Malawi. Malawi appears to be moving, by peaceful and legal means, towards a multi-party democracy. These moves have occurred under the aegis of a National Consultative Council (NCC) established by the *National Consultative Council Act 1993*, enacted soon after the referendum. The chairmanship of the Council rotates on a monthly basis between nominees of the major political parties which have registered for the coming elections. In July 1993, a round table conference was held in Lilongwe, Malawi. This represented the first opportunity for meetings between representatives of the government (MCP) party and representatives of the opposition parties. Many of the latter, who had opposed Dr Banda and the MCP, had been imprisoned or exiled over many years.

In February 1994, the Legal Resources Centre of Malawi organised a constitutional symposium in Blantyre. This was attended by 200 delegates including members of the NCC and the Constitutional Committee of the NCC. This conference isolated a number of constitutional questions upon which it made recommendations.

Seemingly stimulated by this meeting, the NCC determined to convene its own constitutional conference to assist it in the performance of its functions. By the *National Consultative Council Act 1993* those functions include (s 5):

- (e) *To prepare the draft of a new Constitution suitable for a multi-party political system which should become effective immediately after the first multi-party general election; and*
- (f) *To prepare a draft Bill of Rights either as part of the new Constitution or as a separate Act of Parliament."*

The Constitutional Conference was also convened to take place in Blantyre, between 21-24 February 1994. Following his participation in the

round table in July 1993, all of the political parties expressed the wish that Justice Michael Kirby (Australia) should serve as independent Chairman of the Malawi Constitutional Conference. This was done. Justice Kirby's Co-chairman was Professor Boyce Wanda, a professor of law from Malawi now teaching law in South Africa.

Except for Justice Kirby, the only participants in the Conference were Malawian citizens. Technical support and assistance was provided by the United Nations Development Programme (UNDP) and the United Nations Electoral Assistance Unit (UNEAU) and the Commission of the European Union. External advice was available from officers engaged by the UN agencies. The International Commission of Jurists (ICJ) sent two invited observers, Ms Prisca Nyambe, an expert on human rights law from Zambia, and Professor Peter Takirambudde, an expert on constitutional law from Uganda now teaching law in Botswana. But the Malawian delegates, who numbered more than 180 (including many members of the NCC itself and representatives of all of the major political parties), zealously reserved the debates to themselves. Many of the debates were broadcast by radio, some of them live, to all parts of Malawi. In large part, this represented the most open, intensive and public discussion of fundamental issues touching the Malawi system of government that had taken place since at least 1966. Reports were received at the conference of villagers in remote townships of Malawi gathering around radios to listen to the debates. Following the conclusion of the Conference, an extended radio programme was conducted in which listeners were encouraged to call in and put comments and questions concerning the future Constitution of Malawi. Nothing like this had previously occurred in Malawi.

The purpose of this note is to illustrate the process of change adopted in Malawi by reference to some of the debates which took place during the constitutional conference.

Organisation and opening of the Conference

Because of the speed with which constitutional reform is occurring in Malawi, it did not prove possible to place before the delegates a final draft of the proposed Constitution which the NCC proposes to recommend to be adopted to become effective immediately after the general elections. In place of this, an outline of the Constitution was prepared and distributed to delegates. This indicated the matters upon which there was consensus in the NCC. It also indicated specified areas of difference. Towards the end of the conference, a number of participants complained about the lack of a completed draft and the shortage of time.

In the opening session, the then current chairman of the NCC, Mr Frank Jiya, a member of the United Front for Multi-Party Democracy (UFMD), emphasised the need for public debate of the Constitution in order to ensure its legitimacy and to give the people of Malawi a voice in the governmental system which they would adopt. The UNDP resident, Mr Michael Heyn, outlined the desire of the United Nations, in all of its manifestations, to support the steps being taken by the Malawian people themselves towards multi-party democracy, the rule of law, the defence of basic rights and the assurance of judicial independence.

Each of the major political parties then presented their concerns about the major issues which should be discussed during the conference. There were recurring themes. They included views about the presidency, whether there should be a bi-cameral or unicameral system, the appointment of ministers, the independence of the judiciary and the principles that should underlie the Constitution to be adopted.

After these opening statements, the conference turned to a detailed examination of ten major issues which were addressed in turn. Upon each of these, there was extended debate. Most of the participants spoke in English. However, some (particularly the Chiefs, many of them addressing

the concerns of people living according to traditional customs) spoke to the conference in Chichewa, the national language of Malawi.

Ten constitutional issues

Given the background of the history of Malawi, it was unsurprising that the powers of the presidency should attract a vigorous debate. The issues addressed included the rôle and functions of the President, the position of a Vice-President and whether conviction of a criminal offence should be a lifetime disqualification from election as President of Malawi. The last-mentioned point attracted a most intensive debate. Its outcome is not irrelevant to one of the candidates for election as President. The conflicting viewpoints were expressed with sincerity and conviction. On the one hand it was urged that the President should be a person without the slightest blemish. On the other hand it was pointed out that it could be left to the people to decide the significance of an old, past conviction. In the end, an indicative vote was taken upon the issue after the chairman summarised the competing arguments. A majority favoured the view that a past conviction should not be an absolute disqualification from election. More important, perhaps than the majority itself was the fact that the delegates voted according to their consciences. Within political groupings there was no unanimity upon how this issue should be decided.

On the powers of the legislature, there was lengthy discussion concerning whether ministers could continue to sit in Parliament after their appointment. If, as the majority favoured, a presidential system of government were established, did separation of powers require the resignation of ministers from parliament? There was an even division upon this point.

The majority of delegates favoured the creation of a bi-cameral legislature to replace the unicameral legislature which Malawi has had to

this time. However, there was no definition of the respective powers of the second chamber or how its members should be elected or appointed.

A majority of members favoured a requirement that a person elected upon one party's ticket should have to resign if he or she changed party allegiance during the life of a Parliament. A majority also favoured reserving to parliamentarians the right to vote according to their conscience upon particular issues so that they were not obliged, by law, to vote according to their party's decision. It could then be left to the political process to work out the consequences of any "defections".

All parties were strongly supportive of the independence of the judiciary. There was much debate concerning the rôle of traditional courts in Malawi. These courts, which disallow legal representation, have been entrusted with serious capital offences which will now be handed back to the Supreme Court of Malawi. Views were expressed in favour of a separate Court of Appeal to shoulder the burden of interpreting the new proposed Bill of Rights and to ensure true intellectual independence in the determination of appeals.

One of the most intensive debates concerned the independence of constitutional office-holders. It was agreed that the Constitution should guarantee judicial independence. But many delegates expressed the view that similar security of tenure should be given to other important office-holders, including the Director of Public Prosecutions, the Inspector-General of Police, the Auditor General and the Ombudsman.

Perhaps the most sensitive topic discussed during the Conference concerned the need for redress for the alleged wrongs which had occurred during the period of One Party Rule. Without apparent rancour, many of the delegates told stories of personal oppression and loss. Several of the Chiefs complained about the confiscation of traditional land. It was urged that a constitutional fund should be established to compensate those who

had suffered a loss of their human rights or deprivation of land since 1964. Many delegates made the point that, even if Malawi's economic condition required that such a fund would be very small, its establishment would be symbolic of the determination of the nation to build a new constitutional order based upon justice and truth. The need for a constitutional commission of inquiry, headed by a judge, to investigate and report upon the wrongs of the past, was carried overwhelmingly.

There followed lengthy discussion of the powers and functions of local government. A number of particular issues (such as capital punishment, the rights and duties of journalists and the special disadvantages suffered by women in the past in Malawi) enlivened energetic debates.

Various controversies concerning the proposed Bill of Rights were aired. There was general consensus that the derogations from the rights stated in the Bills of Rights should be closely defined and limited. All delegates supported the teaching of human rights through the general media and in schools.

A meeting useful for a democratic culture

At the close of the four day conference, the party leaders again expressed their confidence in the process of democratisation in which Malawi was engaged. Many issues remained to be resolved. It would still be for the NCC to determine finally what use would be made of the discussions. However, all of the leaders pronounced themselves satisfied with the conference. In a sense, it had its own utility, quite apart from the resolution of particular issues. It amounted to an opportunity for dialogue between the leaders of a future multi-party democracy in Malawi and of the Malawian community. Typical were the closing remarks of Mr Bakili Muluzi of the United Democratic Front (UDF):

"We are very happy with the very high quality of the deliberations that have taken place over the last four days. The delegates listened to each other very patiently and attentively and spoke very freely and in a polished manner. Whenever they disagreed they did so with grace and integrity. That ... certainly augurs well for the future of democracy in this country. For it clearly puts to shame those who have vainly argued in days gone by that Malawians are too immature to be given freedom of political thought. But more importantly, it rekindles out determination to continue the struggle for democracy ... For the first time in the history of our nation, Malawians of all races have come together to discuss the affairs of their country."

Similar comments were made by the other political leaders.

The process of preparing for the general elections continues. The preparation of a new Constitution also goes on. At the closing ceremony, the United Nations Co-ordinator, Mr Michael Heyn, expressed confidence in the outcome of the constitutional reforms. He described the Constitutional Conference as having witnessed "a rich and passionate discourse of free people". In his closing comments, Justice Kirby emphasised the broad consensus on the essentials of the new Constitution for Malawi. He expressed the belief that the Conference had contributed to "a democratic culture" in the country and that the dialogue had involved the participants in "a noble exercise".