Malawi's Constitutional Conference

"a rich and passionate discourse of free people"

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MALAWI'S CONSTITUTIONAL CONFERENCE

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As we go to press, the world anxiously watches developments in Africa.

Meanwhile, one African country prepares for its first – and peaceful – experience of democracy on 17 May.

Last year Malawians voted by referendum to end one-party rule and hold democratic elections. The new Constitution is an important opportunity to enshrine specific guarantees of human rights protection following years of abuses under Life-President Banda which were the subject of several Amnesty International campaigns. In preparation for these changes, a historic constitutional conference was held in Blantyre, Malawi, this February. At the invitation of the Government and opposition parties, JUSTICE MICHAEL KIRBY, President of the Court of Appeal of New South Wales and Chairman of the Executive of the International Commission of Jurists, acted as Chair along with Dr Boyce Wanda.

There were 188 participants, including Chiefs from the villages and representatives of non-government organisations, in the four-day conference. As many as 133 people spoke, many several times and many in their own mother tongue. The Chiefs spoke with an authentic voice for the villagers of Malawi, who rarely, if ever, wear coat and tie or come to city conferences yet whose traditional values are an important and continuing feature of the country.

While Malawi is keen to learn from the constitutions of other countries, a clear message throughout was that the new Malawi Constitution should reflect the values of Malawi and not be just a pale reflection of the constitutions of other societies. The spiritual values of Malawi should be expressed and those values were rarely far from the surface in the debates.

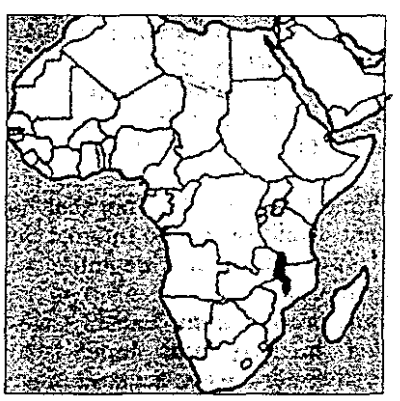
The topic of the Presidency attracted vigorous discussion of the President's powers, procedures for removal, the vice-Presidency and qualifications – and disqualifications – for office. Whether a prior criminal conviction should disqualify a Malawian citizen from offering for election as President provoked an intense and closely fought debate. In the end, it was decided that 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.

The legislature and its powers and functions also provoked vigorous debate. One issue was that of a second chamber which was favoured by a majority. But whether it should be confined to the Chiefs, contain other special interest groups and should be elected or appointed was left undetermined. These issues must now be considered by the National Consultative Council.

When the participants turned to discuss the proposals concerning the Judiciary there was virtual unanimity on the vital importance of an independent, courageous and uncorrupted judiciary for the future just operation of the Malawi Constitution.

Which constitutional office holders had functions so important that their independence should be guaranteed by a clear constitutional mandate was a major discussion. Opinions differed on the list. The Governor of the Reserve Bank of Malawi, the Director of Public Prosecutions, the Inspector General of Police, the Inspectors of Prisons and Security were suggested. There were differences about including the Secretary to the President and Cabinet and the Head of the Armed Forces. The Auditor-General and the Ombudsman were two office-holders which several delegates thought should be directly answerable to Parliament.

The issue of accountability was a major one. How can a proper measure of accountability to the people of Malawi be secured from these high officials while at the same time safeguarding office-holders from unlawful political interference and direction? It was agreed that this topic deserved serious thought to ensure that such key officials should not become alternative sources of power in the country.



Part of this debate centred on the period of service of such constitutional officers. It was agreed that effective constitutional and legal remedies were required to combat corruption and to ensure the appointment of a good cross-section of Malawian citizens to such high offices, especially of more women and of the disabled.

There was agreement on the need for a Bill of Rights to be included in the new Constitution. Controversies on the topic 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, other individuals and the needs of society.

Particular attention will need to be given to economic, social and cultural rights in Malawi.

threaten to present urgent challenges to the new multi-party democracy.

The Traditional Courts attracted a great deal of debate. Until mid-1992 virtually all criminal cases with any political element and all death penalty cases were heard in these, creating a parallel judicial system which respected none of the essential guarantees of fair trial. In these "tra-

International trade union official Chikufwa Chihana, who was convicted of sedition and sentenced to imprisonment with hard labour in December 1992 simply for calling for a multi-party system. He was adopted by Amnesty International as a prisoner of conscience and released on 12 June last year – just before the referendum but too late to participate in it. He took part in the Conference in Blantyre in February 1994.

diction of these courts should be redefined to exclude capital offences and at least some powers over divorce. A proposal was tabled 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 no doubt observe developments in South Africa where the new interim constitution envisages a Constitutional Court, above the famed Appellate Division, to interpret the new Bill of Rights and to uphold the new constitutional order. If this system is seen to work in South Africa, it might bear reconsideration in Malawi.

One proposal, which seemed to gain universal approval, was the suggestion of one delegate that human rights should be taught in schools and in the media, encouraging the upholding of human rights spontaneously by the knowledgeable citizen and official rather than requiring them to be enforced by the rule of law or even the proposed Ombudsman. The need for protection of a free press and independent broadcasting was also raised.

A particularly vigorous debate examined redress for the wrongs of the past. There was overwhelming support for the idea of a Constitutional Fund to provide compensation to those who had suffered loss of their human rights, or deprivation of their land, since 1964.

Vera Chirwa, a lawyer, who was condemned to death by a "traditional court" along with her husband Orton Chirwa, a former Minister of Justice, in 1983 after a blatantly unfair trial. Their sentence was commuted in 1984 to life imprisonment following international appeals. Both were adopted by Amnesty International as prisoners of conscience. Orton Chirwa died in prison in October 1992. Vera Chirwa was released in January 1993 after 11 years in prison.

Given Malawi's poverty, the fund might not be large 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 30 years.

May the new Constitution, towards which so many have laboured, be blessed so that the land and people of Malawi prosper.

– Justice Michael Kirby

BOOK REVIEW

Protection or Punishment: The Detention of Asylum Seekers in Australia.

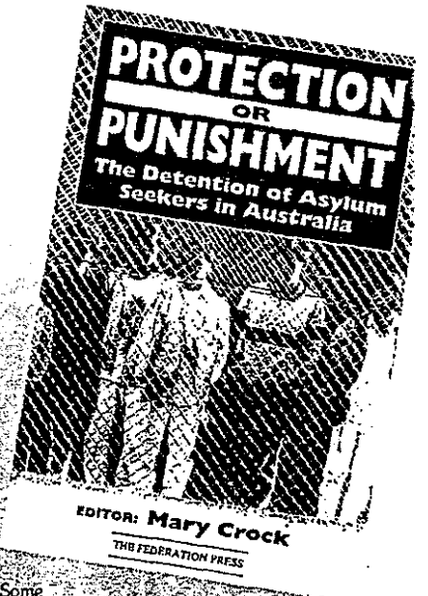
Published by Federation Press, 1993.
Price $19.50
Edited by Mary Crock. Review by Kerry Brogan.

So much has already been written and said about Australia's practice of detaining asylum seekers. *Protection or Punishment* is a stark reminder that on the issue of detention there remains a gulf between the Australian Government which considers that to arrive at Australia's borders and claim refugee status is somehow circumventing "normal" procedures for fleeing persecution and those who believe that Australia's international obligations require that detention of border claimants for refugee status be subject to review and limited to a maximum of two or three months.

Edited by Mary Crock, *Protection or Punishment* is a collection of papers presented at a seminar organised by the Coalition for Asylum Seekers during Refugee Week 1993. Contributors range from politicians defending the policy and bureaucrats who have to implement it, to lawyers and social workers who work with asylum seekers in immigration detention.

The book is comprehensive in its coverage of the current debate. Contributions discuss the legal framework of detention, rationale for maintaining a policy of detention, international human rights standards on detention and comparisons with practice in other countries. Margo Kingston's interesting article is a reminder that discussion of the policy of detention has suffered from ill-informed debate and an atmosphere of emotion and racism. In an area where the focus is often on domestic and international laws, policy and regulations, it is refreshing to read essays which remind us of the individuals detained. Part Three looks at the psychological impact that prolonged detention can have and has had on asylum seekers.

The book highlights clearly that Australia's continued policy of mandatory detention of border claimants is in contravention of international standards, out of step with practice in other countries, expensive and inhumane. Workable alternatives have been put forward, which would allow for continued control over who enters Australia but, more importantly, would bring a more humanitarian approach to those fleeing persecution. Sadly, the parliamentary committee appointed to investigate Australia's policy recommended, in March, continued mandatory detention for border claimants.



Some of those detained may be eligible for release after six months but they will have to fulfil several criteria to do so, the primary one being that the delay in processing their application has been caused by the government – not by the asylum seeker's attempts to further pursue his or her claim.