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**SEMINAR ON DEMOCRACY IN MALAWI**

**MANGOCHI, MALAWI**

**21-23 FEBRUARY 1997**

**TOWARDS CIVIC FRIENDSHIP**

**OPENING AND CLOSING STATEMENTS OF THE CHAIRMAN**

**The Hon Justice Michael Kirby AC CMG**

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The Hon Justice Michael Kirby AC CMG\*

**OPENING STATEMENT - THREE LESSONS**

It is a great privilege for me to be invited to return to Malawi. This is my third visit. My first occurred prior to the great constitutional changes of 1994. I was invited in 1993 to take part in a seminar organised by the United Nations Development Programme. For the first time, I came to this beautiful country and met its leaders. My most vivid recollection of that time was of the questing spirit for democracy and the realisation of all participants - from government and opposition alike - that Malawi was on the brink of a great change.

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\* President of the International Commission of Jurists 1995-; Justice of the High Court of Australia 1996-; Independent Chairman of the Malawi Constitutional Conference 1994.

Then, in 1994, I was asked to return to be co-chairman of the Constitutional Conference. That conference in Blantyre, settled some of the difficult remaining constitutional questions which had to be solved before Malawi could change to a multi-party democracy. The conference was a great example of civic action. Working under considerable pressure, but with noted civility and courtesy, the delegates ironed out the compromise that was adopted and became the basis of constitutional reform. What a privilege it was for me, a foreigner, to be trusted with part of the obligation of chairing such a conference. I was told that the broadcasts of the debates went to the far corners of this country. In the smallest towns and villages, citizens of Malawi listened as their leaders debated, and solved, the constitutional disputes.

Now I return again. But this time to Mangochi on the shore of Lake Malawi. You who are citizens of this country probably do not appreciate fully the great beauty of this place. As my car brought me here from Lilongwe yesterday, my eyes danced upon the magnificence of the scenery. To my left I could see a wonderful African sunset. Mottled clouds of crimson lit a sky of evening blue. And then on the right, looming before us as an aquamarine treasure, was the Lake. How green and fertile the land looked after the rains. This is an idyllic place in which to renew Malawi's commitment to democracy.

I realise fully that, in the two and a half years that have passed since the constitutional changes, the referendum and the elections, problems have arisen in Malawi which must have seemed, at times, painful and even insoluble. Yet the message I bring is that every country which aspires to democracy has problems in its governance. Democracy is rarely a comfortable journey. But it is a noble one and the only one for free peoples.

In my own country, Australia, we live under the sixth oldest continuously operating written Constitution on earth. Like the Constitution of Malawi, it was a document of compromises. But it was accepted by the representatives of the people. It was not imposed from outside. In nearly a century of nationhood, Australia has faced many perils and challenges. But our democracy is constantly renewed by free elections when the people can choose their leaders. Last year, the people of Australia decided to change their federal government. It was accomplished with dignity and peacefulness. At little halls and schoolrooms across a continental nation, a free people cast their ballots and, overnight, the government changed. All this was accomplished with dignity and popular acceptance. My hope for Malawi is that it will build the same culture and tradition.

In Australia, challenges to our system of government are constant. There is, at the present, a lively debate about whether Australia should become a republic or remain a constitutional monarchy under the Crown. As the centenary of the

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Constitution approaches, there is a serious national reflection on the need for reform of our institutions. When I read the front page of the *Daily Times*<sup>1</sup> of Malawi yesterday, I felt at home. The report critical of the judiciary reflects similar criticisms in the daily press of Australia. In a country with a written Constitution, and especially one, as Malawi, with a Bill of Rights, it is inescapable that the judiciary will have to make difficult decisions. Some of those decisions may appear to be political, in the broadest sense of that word. Alas, the responsibility for decision cannot be refused by the judges. They must bear with tranquillity and forbearance the attacks upon them. But those who make such attacks, and those who publish them, should understand the difficult work which the judiciary must perform in a democracy. They must also realise that a judge, after our tradition, cannot answer publicly to criticism or complaint.

Since I was last in Malawi in 1994, I have had experience in three appointments which I wish to share with you. They teach me lessons which may be relevant to the conduct of this seminar. Perhaps they will be helpful to our reflections.

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1 *Daily Times*, 21 February 1997 at 1.

The first appointment was as President of the Court of Appeal of Solomon Islands. That island state, a member of the Commonwealth of Nations, enjoys a legal tradition similar to that of Malawi and Australia. But its appeal court has, until now, comprised foreign judges, from England, Australia, New Zealand and Papua New Guinea. On my first sitting in Honiara, I attended the service at the Cathedral Church of St Barnabas. The Service was such a powerful spiritual event. Not a single European face could be seen conducting the Service. Religion has been made the faith of the people. So it had to be with the law. Realising this, I set about ensuring that in every appeal a judge from Solomon Islands sat with the appeal judges. This experience taught me that, for a stranger to participate in the law and governance of another country, is today a mighty privilege. But to have true legitimacy, all government must come from the people who are governed. The role of strangers and foreigners must be temporary and strictly subordinate. So must be my role in this seminar. The problems of Malawi can, and should, only be solved by the citizens of Malawi.

Secondly, between 1995 and 1996, I served in Cambodia as Special Representative of the Secretary-General of the United Nations for Human Rights. My work there demonstrated that the conduct of elections is, in some ways, the easy part of the emergence of a country from autocracy to democracy. The difficult tasks lie ahead. Building a culture of democracy and the institutions which sustain it, present a real challenge requiring

great subtlety of mind and action. My experience in Cambodia taught me that Parliamentary democracy is a most complex thing. It involves respecting the conscience of individual members of Parliament but also ensuring that Parliament, as an institution, functions and flourishes. The terrible experience of Cambodia, with more than a million people murdered during the intolerant regime of the Khmers Rouges also taught me that reconciliation requires sacrifice and that democracy constantly imposes on all its players the obligation of compromise.

Then in 1996 I was appointed to my present position as a Justice on the High Court of Australia - the federal supreme court of my country. In that Court we have faced, during the past year as in nearly a century before, many important cases. They present great difficulties. Often there is no clear precedent to guide the way. Often the Constitution or the statute is ambiguous or obscure. In such cases it falls upon the judges to provide solutions in harmony with legal authority and principle. They must do so with independence and integrity. They must never bend in the wind of popular sentiment. Their service must be to the law and to their consciences.

In Australia in recent days, much vehemence has been directed at the High Court since its decision in the *Wik* case<sup>2</sup>. That decision held, by a majority of four Justices to three, that the native title of Australia's indigenous peoples (Aboriginals and Torres Strait Islanders) was not necessarily extinguished by the grant of pastoral leases by the Crown. Such leases, occupying nearly half of the area of the continent of Australia, have been granted since the earliest days of colonial settlement. The decision was an important one for pastoralists and indigenous people alike. Its outcome has led to sharp attacks upon the Court, even upon me personally. Calls have been made for changes to the manner of appointment of Justices of the Court<sup>3</sup>. Demands have been made that the judges should be elected<sup>4</sup> and that they should be able to be recalled. The Court has been denigrated and the Justices personally attacked. But it is a strict convention which judges follow that they do not answer back

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2 *The Wik Peoples v State of Queensland and Ors* (1996) 141 ALR 129 (HCA).

3 See eg "Borbidge Pushes to Overhaul High Court", *The Australian*, 11 February 1997 at 2; D Solomon, "Court Drama", *Courier Mail* (Brisbane), 15 February 1997 at 28.

4 "Let people pick judges, says Foss", *West Australian*, 20 February 1997 at 4.

such attacks. One great Australian judge, Sir Frank Kitto explained<sup>5</sup>:

"Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all."

So it must be in Malawi. But here with new and more fragile institutions, it is important that a culture of mutual respect and restraint should be developed so that those institutions will grow strong and sure with time. That is the reason we have come together in this seminar.

These then are the lessons which I bring. I will take a minor role in these proceedings for the solution to the difficulties (which should not surprise us) are yours alone. I bring a message of reassurance that Malawi is not alone in facing the stresses of a modern democracy. Your judges are not alone in being criticised. Your Parliament and Executive Government are certainly not alone in the strains of robust differences and

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<sup>5</sup> F W Kitto, "Why Write Judgments?" (1992) 66 *Aust LJ* 787 at 790. See also F G Brennan, "Courts for the People - Not People's Courts" (1995) 2 *Deakin L Rev* 1 at 9.

conflicting opinions which have emerged. Your media is not alone in the face of criticism. Your legal profession carries especially heavy responsibilities to help the courts and to bring the rule of law to all people, not just the wealthy or powerful.

Malawi has many objective problems which should bind together its leaders in a common effort to right wrongs and cure injustices. I welcome most warmly the participation in this seminar of representatives of all of the political parties elected to Malawi's National Assembly in a free election. I also welcome the fact that this is the first formal meeting, since the new political dispensation, when all three branches of government meet together to exchange views. I pray that, at the end of our dialogue, we will be personally enriched; but above all, that the people of Malawi will benefit from our deliberations and commitment to their further service.

#### **CLOSING STATEMENT - WHAT HAVE WE LEARNT?**

What have we learned in these past two days of dialogue? In many ways, I regret the fact that the exchanges which have occurred between us have been confined to this room. If the people of Malawi could have heard the debates, so extensive and intense, I feel sure that their faith in their leaders, and in the future of democracy in their country, would have been renewed. It is a pity that these debates have not been broadcast, as the Constitutional Conference was of 1994. Although there were

differences, sometimes strongly expressed, there was also much consensus. We should never forget that the right to differ is an important feature of a democratic society.

We have agreed upon an *Agenda for Progress*. It contains many recommendations which should engage the minds of Malawi's leaders in the years ahead. There is more than enough of a challenge before those leaders as the basic features of the challenges facing Malawi repeatedly demonstrate. Foreign investment has, in the past, been extremely low by comparison with other countries in Southern Africa<sup>6</sup>. Development indicators have also been discouraging, at least until recent times<sup>7</sup>. Adult literacy rates are low in Malawi when compared with other countries of the region<sup>8</sup>. Infant mortality rates are too high and

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6 World Bank, *World Debt Table*, 1996, vol 2, "Net direct foreign investment in SADAC countries (US \$million) being table 6.1 in Australian Parliament, *Australia's Relations with Southern Africa*, November 1996 at 61 (Table 6.1). Malawi's net investment was \$1 million compared with \$60 million Zambia; \$33 million Mozambique; \$20 million Mauritius; \$19 million Lesotho; and \$350 million Angola.

7 *Ibid* Table 8.1 Development Indicators - SADAC Countries. Malawi's percentage growth rates 1985-1993 average 0.4 with GNP per capita in 1994 \$170. This compared with growth rates of 3.8 (\$1100) Swaziland; 5.8 (\$3150) Mauritius; 2.3 (\$1970) Namibia; 5.7(\$2800) Botswana.

8 *Ibid* Table 9.2 adult literacy rates (%) in SADAC countries. Malawi, in the *World Development Report 1996* prepared for the World Bank has an adult literacy rate of 72% (M) and 42% (F). This compared with Botswana (80-60); Lesotho

Footnote continues

raw fertility rates are the highest in the region<sup>9</sup>. So there are plenty of matters to engage the attention of Malawi's political process. It is upon such matters that the political debates should fasten. Their importance should lift the sights of all who take part in government in Malawi so that they seek to solve its problems beyond personal ambition and self-interest.

The great achievement of this seminar is that it has brought together members of all political parties in the National Assembly. And it has brought together the three branches of government in a formal dialogue which has not taken place since the new Constitution was adopted. To some extent, the separation of the branches of government is an assurance of freedom and of the rule of law. It would not be desirable for judges to become too close to politicians. They should keep their distance from the political branches so that their neutrality is not in doubt. But occasional meetings such as this are useful.

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(81-62); Mauritius (87-79); South Africa (82-82); Zambia (86-71); Zimbabwe (90-80); but Mozambique (58-23).

9 *Ibid* Table 9.1 Population Statistics - SADAC countries taken from the World Bank World Development Report 1996. This shows infant mortality per 1000 live births in Malawi in 1994 of 134 compared with 34 (Botswana), 44 (Lesotho), 17 (Mauritius), 54 (Zimbabwe), 50 (South Africa). Malawi's infant mortality rate in 1994 was the highest in the region. Similarly, its total fertility rate in 1994 of 6.6 is the highest in the region compared with 4.0 (Zimbabwe), 3.9 (South Africa), 2.0 (Mauritius), 5.8 (Tanzania).

They allow the candid exchange of opinions and perspectives which can only be for the good of Malawi's institutions.

In busy lives, this encounter has also permitted a period of calm reflection on the future of this country. In the words of the Speaker of the National Assembly (the Hon R T C Munyenembe MP) it has allowed a renewal of the "civic friendship" which is the true mark of a democratic society. We may differ. We may disagree strongly. But we must respect each other and constantly explore the dialogue of honourable compromise.

I congratulate all who have participated in this seminar. I trust that the dialogue will continue. It has been a great privilege for me to be a listener and a participant.