



# Human Rights & The Making of Constitutions: Malawi, Kenya, Uganda

Edited by  
Joanna Lewis  
Peggy Owens  
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# **Human Rights & The Making of Constitutions: Malawi, Kenya, Uganda**

Report of a Workshop

Held at Trinity College, Cambridge

11 February 1995

**Edited by**

**Joanna Lewis, Peggy Owens,**

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Cambridge African Monographs, No 18  
African Studies Centre  
University of Cambridge

Published by University of Cambridge, African Studies Centre  
Free School Lane, Cambridge CB2 3RQ  
© University of Cambridge, African Studies Centre 1995  
First published 1995

*with funding from*

The Westminster Foundation for Democracy  
Clutha House, 19 Storey's Gate  
Westminster, London SW1P 3AY

British Library Cataloguing in Publication Data:  
1. Human Rights 2. Constitutions 3. East / Central Africa

ISBN 0 902993 31 3

Formatting Design by Patrick Verdon

Cover: Malawians celebrate multi-party elections, May 1994.  
Photograph supplied by Bishop Donald Arden

Printed in Britain by:

Rank Xerox, 42 Sidney Street, Cambridge, CB2 3HX

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## Acknowledgements

Thanks to:

The Westminster Foundation for Democracy

The British Council

Keith Hart for his support and guidance

John Lonsdale for arrangements with Trinity College

Patrick Verdon for his creativity and design skills

Donald Arden for editorial advice and photographs

Tape recording monitors: Ike Achebe, Andrew Wines, Nonica Datta

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Proof-reading: Ruth van Velsen

# **Introduction**

On a cold and wet February morning over ninety people met to discuss recent experiences in Malawi, Kenya and Uganda in making constitutions and entrenching and safeguarding human rights. Among the participants were lawyers, academics, politicians, NGO representatives, church leaders, journalists and students from Africa, Europe and North America. Collectively they spanned a remarkably diverse range of interests, nationality and ages, as well as occupation. A number were part of a unique, British-based network of individuals and organisations who, together with their counterparts in Malawi, had been active in that country's two-year transition from single-party to multi-party rule.

The whole of the proceedings was taped, and because of the high quality of the talks and subsequent open discussions, a transcription of the proceedings was sent to the Malawi Government's Constitutional Subcommittee which was in the process of amending its provisional constitution. In publishing this final version, our hope is that others will be able to share in this attempt to consider the issues which the recent experiences of countries like Malawi, Kenya and Uganda throw into relief — the building of just societies that entrench human rights. As editors, we have made minimal changes to the remarks made, except to convert the spoken word into a more readable written form where devices used naturally in speech might jar when transferred to the page. We hope we have found a balance between the desire to retain something of the immediacy of the spoken word while producing a narrative that is accessible to the reader. Instances of misquotations may have occurred in this process for which we apologise. We are grateful to the Westminster Foundation for Democracy for a grant which has made this publication possible.

When planning the workshop, we followed the precedent set by an earlier workshop in 1994 entitled *Why Angola Matters* (published under this title in association with James Currey, 1995). In both workshops the African Studies Centre has sought to bridge the gap between academe and the outside world, bringing together people from a wide range of back-grounds to discuss practical issues together in a near microcosm of the world in which these issues are played out. One of our aims has been to explore the common concerns of the peoples



in African and Western countries; to replace the division of 'us' and 'them' with the more inclusive concept of 'all of us'.

The Workshop's three sessions raised some basic questions. Can constitutions and clauses aiming at the protection of human rights ever be satisfactorily drafted by outsiders, particularly when some of those outsiders have no experience of written constitutions or a bill of rights? Who should define human rights and 'good governance'? Do multi-party elections necessarily lead to more just societies, especially in some of the world's poorest countries unable to provide basic clean water and education for their citizens, let alone the luxury of a costly infrastructure of justice? If that infrastructure is lacking who is to help pay for it?

Session One of the workshop provided a general brief on human rights, drawing attention to the often neglected African Charter on Human and Peoples' Rights, an important standard-setting document (the Preamble is reproduced at page 130). In this session, academic and practising lawyers considered the nature and range of human rights in international law, and the legal obligations upon states to recognise and protect human rights particularly through constitutional guarantees. In practice however, it is the state which is responsible for the many violations of the rights it is meant to protect.

The tension in this session came from two opposing views: a more orthodox view of constitution-making based on negotiation and social contract; and an innovative 'bottom up' approach based on a concept of social trust, in which vulnerable groups in society might be better represented. Immediately after this scholarly and philosophical session ended, we were transported into the reality of implementing human rights protections and constitutional guarantees in Africa, when Mr Kamdoni Nyasulu, the Director of Public Prosecutions in Malawi, addressed the meeting. Afterwards, he barely managed to fit in an interview with the BBC World Service, who had brought a recording team to Cambridge, before flying back to Malawi in order to resume the prosecution case in the trial of Malawi's former President, Dr Hastings Kamuzu Banda. (The BBC also interviewed some of the Malawian women participants at the Workshop).

After a break for lunch, Session Two began the afternoon with a lively comparison of Malawi's recent experiences in constitution-making and public awareness with Kenya and Uganda. We learned of the rush to democracy in Malawi, in which public debate and education on constitutional rights and forms of government were sacrificed to speedy elections, a contrast to the long, deliberative four-year consultation period in Uganda. Meanwhile in Kenya, a massive erosion of constitutional rights has been met with massive action led by lawyers, church leaders and journalists. This has resulted in the recovery of some of those rights, but has failed to restore full democracy.

In the session's discussion, the vital issue of the relationship of the state to human rights and constitutions emerged again, first in relation to its capacity for implementation. Demands are laid on governments by the international donor community which governments simply lack the resources to carry out. Demands and entitlements must, surely, be considered together, and the means provided to fulfil the demands. And does the very inherited pattern of nation-states in Africa predispose the region to unstable and unviable governments which in their weak state, lacking legitimacy of national assent, need more often to quash self-expression and deny the right of individual liberty. Would more federal types of rule or regional re-groupings make African polities more viable and accountable to their citizenry?

In Session Three, the role of the churches, other international organisations, and NGOs, both local and external, were examined, particularly the part they played in the run-up to Malawi's recent transition to multi-party government. Among the speakers were several who had been directly involved in events on the ground. What the role of external agencies had been in the recent history of Malawi, and what this role ought to have been were among the questions which were faced up to in an honest self-examination. Clearly, the capacity of external agencies to intervene and shape events was increased by the current revolution in electronic communication.

Inevitably the notion of a civil society was raised: could sections of a lively and informed civil society take the lead in protecting human rights? Can NGOs better educate and prime an active citizenry to do

this? The churches for example, often the only organisations with a nation-wide structure, have been major players in Malawi as elsewhere in Africa. Whatever their role might have been in reconciliation in Malawi, questions were raised about whether they had done enough to protect the vulnerable and the oppressed. And this brings in the question of the relationship of national organisations to the external or sister organisation. Clearly, there is a colonial legacy to overcome. Guilt over past racial abuses, coupled with a desire to let new organisations learn from their own mistakes, have in the past created a barrier to dialogue over human rights; leniency and silence have sometimes seemed the best way forward. The Presbyterian church in Malawi had been over-closely associated with the ruling party, and its international partners had felt constrained by their colonial past which manifested itself in a reluctance to appear to dictate the agenda once Malawi had become independent.

As this session brought out, there are fundamental issues concerning national sovereignty and local needs in relation to the role of the various international bodies which have to be explored. Equally searching questions were raised about the record of human rights organisations. Some international human rights organisations had only jumped on the bandwagon at the last moment; and the question was asked whether these organisations ought to go beyond monitoring abuse and involve themselves in positive programmes to protect improvements? This raises a question on the nature of the change that has taken place in Malawi. Did the rush to democratise with so much external prodding mean that only superficial changes have occurred? Were the international agencies which had helped to bring about change the embodiment of neo-imperialism, and their members a patronising army of expatriate busy-bodies? Or did they provide essential and welcome support for those working for change within the country? Finally, are internationally-monitored elections, programmes of voter education and the training of officials a waste of resources, or do they provide a necessary transitional framework to democratic pluralism?

Perhaps the overriding lesson of the workshop was that in the face of blatant realpolitik and self-interest of the international community, the focus of international and national organisations should be more on

the building of just societies through the strengthening of a grass-root citizenry that can build on the traditional concepts of justice, duty and mutual responsibility: the essence of the moral economies of African ethnicity. Poverty, insecurity and fear have severely tested the will of communities to respect and honour the rights of the vulnerable or the minority. Above all, economic insecurity, particularly in the guise of rural decline, has fuelled local divisions, ethnic suspicion and gender disparities. An enabled and secure citizenry is the best instrument with which to manage and order the competing claims made between, on the one hand, the demands and entitlements of the state in relation to community and nation-building, and on the other, those of the human being — the respect for individual liberty, the right to personal development and the sanctity of human life.

As the African Charter reminds us, these are inextricably linked. The preamble states that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". And as Article 29, Sections 1 and 2 of the Universal Declaration of Human Rights states:

Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone should be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Considering the track-record of western states and societies, it might be asking too much from ordinary African people to make these potentially contradictory processes of individual, state and social contract a reality without first removing the economic hardships that are endured throughout the continent. Ultimately that means we all have a responsibility to ensure more of the world's resources stay in Africa.

*African Studies Centre, Cambridge  
Summer 1995*

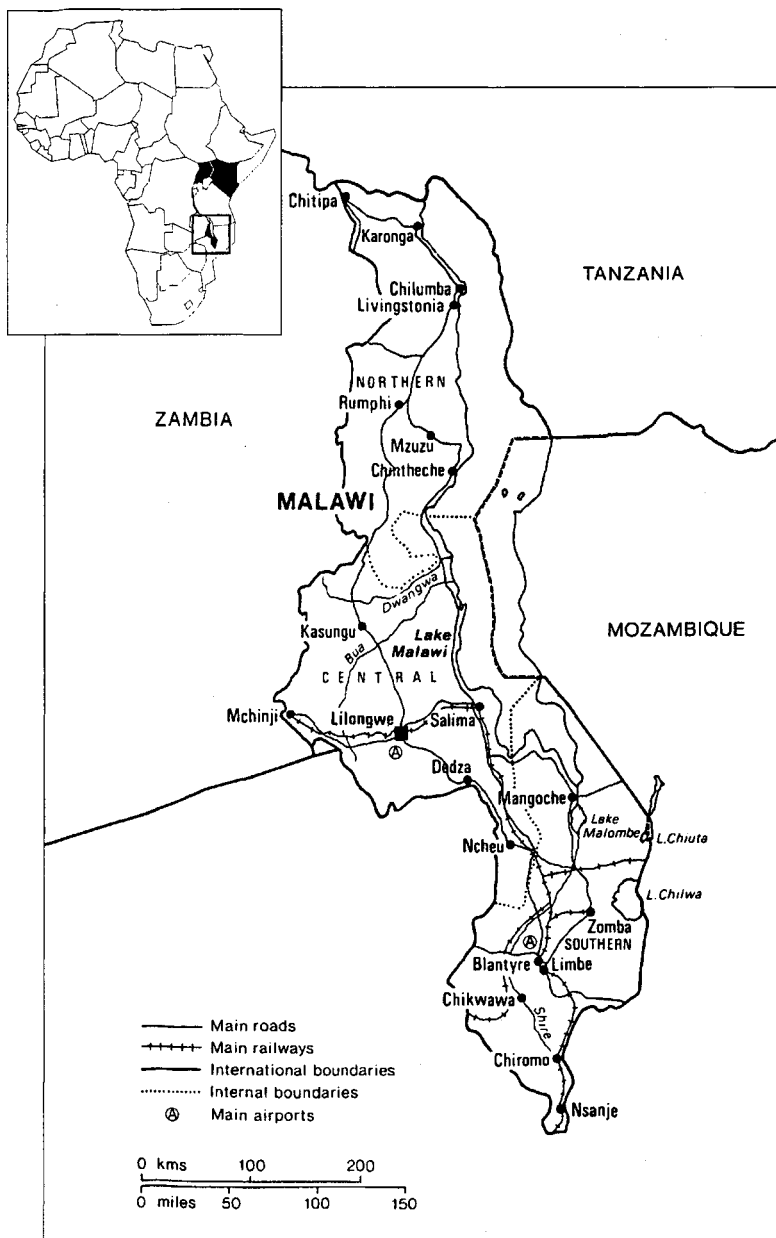
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Peggy Owens  
Louise Pirouet***

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## Workshop Participants Continued...

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Dr Joanna Lewis	African Studies Centre and Churchill College, Cambridge
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Dr Michael Twaddle	Institute of Commonwealth Studies
Rev Derek Wales	Council of Churches for Britain and Ireland
Mr Nigel Wenban-Smith	Former British High Commissioner to Malawi
Rev Dr Chris Wigglesworth	Director, World Mission Board, Church of Scotland
Mr Andrew Wines	St John's College, Cambridge



# **SESSION 1**

## **Human Rights and The African Charter of Human and Peoples' Rights**

*Chair*

**Mrs Anne Campbell**

*MP for Cambridge, Vice-Chair of the  
Women's Group, Labour Parliamentary  
Developmental Committee*



## **The Panel**

***Opening remarks – Dr Keith Hart***

### ***Speakers***

Mr Robert McCorquodale

Mr Garton Kamchedzera

Dr Chaloka Beyani

### ***Discussant***

Dr Christopher Forsyth

***Address – Mr Kamdoni Nyasulu***

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## **Opening remarks**

***Keith Hart, Director, African Studies Centre, Cambridge***

Good morning, ladies and gentlemen. My name is Keith Hart and I would like to thank you all for coming to Cambridge today; I know that some of you have come a long way. I am looking forward to this conference with a great deal of anticipation, not least because of the quality of the sessions that the organisers have put together,

but also because of the variety and size of the audience. I would briefly like to welcome one or two people specifically. First, Mrs Rosemary Kanyuka who has travelled from Malawi, courtesy of the British Council, in order to join us today: we are very honoured that she was able to come. Then it gives me great pleasure to welcome Mr Kamdoni Nyasulu who is the Director of Public Prosecutions in Malawi who is able to be with us for the morning session and will speak briefly later on. I would also like to welcome Mr Nigel Wenban-Smith, the former British High Commissioner from Malawi. I could go on listing various people, especially our distinguished panelists, but they will be introduced to you directly. And finally, I would certainly like to welcome our strong Scottish contingent for having made such a long journey in order to be here.

I think you have all been very well briefed by the organisers. I would like to say one or two things about them. Joanna Lewis, Peggy Owens and Louise Pirouet are all members of the African Studies Centre here. They did not know each other very well until a year ago or less and they came up with the idea of this conference around an active interest in human rights and constitutional reform in Africa. They have been virtually self-organising in bringing off this conference and I feel an immense debt of gratitude to them for carrying on an initiative which the Centre began a year ago. In the conference on "Why Angola Matters" we sought to implement our policy of trying to bridge the gap between academia and other professions and interests, such as journalists, the NGOs, various members of the diplomatic profession and so on. It is our concern in the African Studies Centre to make African Studies part of a more general commitment to the advancement of human welfare in the world as a whole and in Africa in particular. We do not seek to 'exoticise' Africa, quite the opposite. We want to remind people that Africa is not just some place over there where all kinds of horrors happen which are fortunately far removed from us. Instead we want to bring into the consciousness and understanding of people in societies like Britain a knowledge that Africans and ourselves are part of the same world together and that our interests in many instances coincide, as I hope we will be able to see today.

This particular conference, as you know, was sparked off by recent constitutional innovations in Malawi, and it is concerned with the place of human rights within constitutional reforms precipitated by a rather hectic transition to multi-party democracy. The particular focus of this conference is therefore three-fold and is reflected in the organisation of the three sessions. The first of these is simply concerned with human rights as an issue. The second session will focus on questions of constitutional reform. The third session will look at the role that external agencies, such as the non-governmental organisations, the churches and so forth, play for good or ill in the attempt of African peoples to win a greater measure of democracy and development for themselves.

Not wanting to delay this conference any further, I will just say that there is a much broader issue which perhaps will enable us to see ultimately how the struggle for democracy and human rights in Malawi, Kenya and Uganda is relevant to our own condition and prospects in Britain. The notion of human rights is quite a new one. People use the phrase a lot, but there is always something of a contradiction in the way it is used, in that it is assumed that human rights relate to a society of some kind. But what is human society? Where is it? How is it manifested? And this is where the problem that we will be tackling today is most evident, namely that human society for most of us is a state or an association of states.

States are in fact quite archaic institutions. In many cases they fight the impulse behind the drive for human rights on a world scale and they fight it in a number of ways. Most obviously they fight it by dividing up the territory of the world and making movement between these territories more difficult than perhaps it ought to be; or making it easier for the more affluent states to tolerate the poverty of the weaker states. There will be a lot of discussion today as to what the idea of human rights refers to but it seems to me that one of the basic human rights, the one that I consider to be most important at this stage of the development of human society on a global scale, is freedom of movement. Indeed it is restrictions on freedom of movement, especially between the rich and the poor countries, often given a racial twist or discriminatory impetus, that allows the

inequalities that damage our aspirations for human unity to be maintained. Of all the practices of our government that I feel some distance from, those that offend me most and make me feel most ashamed are the restrictions placed on immigration, especially as they discriminate against Africans and other would-be immigrants from poor countries. And it is this quite blatant, inexcusable and barbaric application of a law which is not truly lawful, made in order to shore up some precarious privilege that we may feel that as British people we have in relation to the rest of the world, that reminds me most sharply of how weakly developed human rights protection is in our own society, not for everyone in our society, but certainly for many members of our society.

So I would like to remind you that the drive for human rights is international. In the end, it addresses question of fundamental human unity. It is a way for people trapped in archaic and coercive localised states to draw perhaps on the energies of other human beings in their search for some kind of human dignity and the freedom to develop themselves. In other words, what is going on in Malawi is part of a world-wide political situation which is, to some extent, in crisis. I think all of us know that the political structures we live by are inadequate. And it seems to me that the questions which Malawians, Kenyans and Ugandans are fighting for implicate us all and the structures by which we all live. That is perhaps one of the messages that I hope comes out of today's conference.

**Robert McCorquodale**

*(Fellow and Lecturer in Law at St John's College, Cambridge since 1988, his teaching areas include international law, international human rights law and constitutional law. Prior to this he practised as a lawyer in both London and Sydney, Australia. His primary research interest focuses on human rights law; he has advised governments and peoples on human rights including advising and assisting the drafting committee for the 1994 Malawi Constitution. His publications include Cases and Materials on International Law, Tibet: The Position in International Law, and Self Determination: A Human Rights*

*Approach. He is currently working on a monograph on the impact of international law on the protection of human rights in Southern Africa.)*

“The promotion and protection of all human rights is a matter of concern of the international community, a matter of legitimate concern of the international community.”

That statement was made in the declaration arising from the World Conference on Human Rights in 1993. All the states agreed with it; no state can say any more that how they treat those within their territory is a matter solely for them. It is a matter of legitimate international concern and a matter of international law.

My discussion will concentrate on states' obligations and priorities in the area of international human rights, examining first states' obligations: are they legal obligations and how are they supervised? Secondly, what is the extent to which these obligations have an impact on the constitutions of states, particularly of African states? And finally, the question of how the lack of resources of most states makes the issue of determining priorities between these human rights an important one.

The actual concept of human rights has been around for centuries. Human rights have been part of national constitutions since at least the 18th century and further back in some cases. However, the protection of human rights under international law has really been crystallized since the UN Charter in 1945. There are now a vast array of treaties — worldwide, regional, bilateral — which protect some or one or a whole range of human rights. Some of these will be dealt with in detail by Dr Beyani. Today, every state has ratified at least one treaty and some document in which it actually says it will uphold or protect a human right. Many of these can simply be dismissed as a collection of wonderful moral or political phrases which merely put an obligation of perhaps moral or political pressure on states. Alternatively of course states very often accept these treaties because of a desire for economic assistance from other states or perhaps as an alternative to actually taking any effective

action: they simply sign a treaty. Whatever may be a state's motives, by ratifying these treaties and by being a part of the international system, states are bound by international law. In fact even if a state hasn't ratified a particular treaty upholding certain human rights, it may still be bound because all other states value that particular human right be it genocide, or be it freedom from racial discrimination. A state, therefore, may be bound by a matter of what's called customary international law without ever having signed a treaty.

Different treaties place different obligations on states. Some require immediate action; others require that steps be taken over time to comply with that treaty. Some involve a state providing a report periodically on its compliance with a treaty, while others allow for an international tribunal to consider complaints brought by individuals against the state. Human rights advisors need to make sure they check exactly what obligations a state has undertaken when they're dealing with a particular matter involving a state and criticising that state for not complying with human rights. Every treaty obliges the state to take some action. In fact, about half of the African states have ratified the first Optional Protocol of the International Covenant on Civil and Political Rights which allows an individual to bring a complaint to the Human Rights Committee. All but four of the African states have agreed to be subject to complaints being brought to the African Commission on Human and Peoples' Rights. But to what extent are these obligations actually enforceable? It may seem a rather worthless exercise to invoke these obligations if nothing much can be done about them. Much of the human rights field is very, very thin, very, very weak in supervision of human rights, particularly against a determined state. In addition, many states put in reservations in which they express their limit of obligations under a particular treaty or in relation to a particular right. Or they may derogate from a treaty by claiming that a state of emergency exists in an area within the state which allows them to reduce their obligations. While this may be frustrating, it is a general problem in international law enforcement. It is also often a problem in national law. Take, for example, enforcement of national laws against abortion. The legal obligations of states to protect human

rights are standards by which states can be legitimately and objectively judged. Also, because human rights is a matter of international concern, it is a matter of international law. A state's lack of compliance with its obligations means that public national and international pressure, be it political, diplomatic, economic, or social, can be used justifiably against a state.

Further, very rarely will a state actually claim the authority to abuse human rights and say "we can breach our obligations." Instead, states tend either to deny that they've breached their obligations and to deny the existence of their breach of human rights, or else they seek to rely on a limitation or some exception to the rule in order to justify their action. In so doing, they're actually confirming that the rule exists, and then relying on an exception to it. Even under these circumstances, the international human rights tribunals have been very active in not allowing states to limit their obligations too much. The Inter-American Court of Human Rights said this:

"Modern human rights treaties are not multi-electoral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for common good, espouse various obligations, not in relation to other states but towards all individuals within their jurisdiction."

This strong stance can be echoed in the experience of an organiser of a UN conference. Buried beneath the usual vast amount of paper produced at these conferences was a document with just a few lines on it, once again a fairly unusual occurrence for the UN. The document was headed "Corrigendum" which means "error to be rectified" and it read "Human Rights Chapter, page 6, line 4. For idealism, read realism." So perhaps the boundary between idealism and realism is getting very thin.

We have established that there are certain legal obligations on states. What impact does this have on the constitution of a state? Ideally, it should not have much impact because most human rights will be

protected by the laws of the states and that's a much better method of protection. International human rights laws should simply be a backup to a state. Unfortunately, many states are unwilling or unable to protect human rights within their national law. Many of the international human rights treaties place specific obligations on states to amend their laws, to change their practices so that they are compatible with the treaties' protection of human rights. To give a few examples: Article 2(2) of the International Covenant of Civil and Political Rights requires that "states undertake to take the necessary steps in accordance with its constitutional processes to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present covenant." Similarly Article 2(1)(c) of the Convention on the Elimination of All Form of Racial Discrimination, provides that each state party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. Regarding economic, social and cultural rights, Article 4 of the Convention on the Rights of the Child states that "With regard to economic, social and cultural rights, states' parties will undertake all appropriate legislative, administrative and other measures to the maximum extent of their available resources and where needed within the framework of international cooperation."

In fact, very few treaties contain an explicit requirement that states change their constitution. Nonetheless, there is a definite legal obligation to take some measures — legislative, administrative or other measures — and one of those other measures may well include amendments to the state's constitution. Above all, these measures must ensure that each state's laws comply with their international legal obligations.

What about the specific impact on African states? The African Charter puts forth the requirement that all states party to the Charter shall undertake to adopt legislation or other measures to give effect to the rights, duties and freedoms expressed in that Charter. This is so regardless of the right involved — civil, political, economic, social, cultural, or peoples' rights — the obligation on states is to adopt



legislation or other measures. In addition, there's been some significant state practice in the past few years, particularly within African states, which indicates that each new constitution of a state must include enforceable guarantees and protection of human rights in order for it to be considered legitimate. An example would be Namibia, whose constitution was moulded very largely by the United Nations. A second example would be Malawi, where it was clearly understood that the international community required enforceable guarantees of human rights within its constitution. With regard to the former republics of Yugoslavia and the Soviet Union, the European Union made it quite clear that they would only recognise new states arising from them if those states included within their practices guaranteed protection of human rights. Therefore we may be moving to a position where the international community requires that states not only take legislative, administrative or other measures to protect human rights of the kind they've agreed to by treaty, but also that any new constitution of a state must include entrenched protection of human rights. It is no longer sufficient for that constitution or for legislation simply to make wonderfully worded proclamations upholding human rights, without action. Those laws must be matched by effective action and remedies because the Human Rights Committee of the United Nations has said this:

"Implementation of human rights does not depend solely on constitutional or legislative enactments, which in themselves are often per se not sufficient. There must be sufficient activities by the states' parties to enable individuals to enjoy their rights."

It follows, then, that failure to comply with these legal obligations for action could lead to significant doubts about the legitimacy of a state and of its new constitution.

What then are the priorities for states with limited resources attempting to comply with their international obligations? How do they decide on priorities? One view was that civil and political rights should have priority as they are the only rights capable of immediate

implementation requiring no economic resources, simply restraint from government action. This view was rebutted by the argument that economic, social and cultural rights must be attained first, as these rights protect basic human needs. There has also been the stance that group rights are much more important than individual rights because all individuals interact and transmit knowledge through groups. The evidence does not support any of these statements by themselves, however. For example, a civil right to a fair trial actually requires significant economic resources for a state in setting up courts and a legal system. An economic right to form an independent trade union rarely involves much economic burden on a state, but very rarely is it provided in those states which claim to uphold economic rights. Some individual rights, such as freedom of expression, assist the formation and nourishment of groups. It is impossible to create a hierarchy of rights as rights are interrelated and interdependent. Indeed, in a message on Human Rights Day in 1992 the Secretary General of the United Nations said, "Full human dignity means not only freedom from torture but also freedom from starvation. It means freedom to vote as it means a right to education. It means freedom of belief as it means a right to health."

What action does this mean for a state? In fact, the legal obligations of a state in regard to human rights, in regard to these international treaties, do not very often require instant action. The state has to take steps to make policies. And very few rights are absolute. Almost all rights have limitations on their exercise to protect the common good. Article 27(2) of the African Charter makes this clear. "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and the common interest." The common interest must include care of the financial and other resources of a state. A state cannot choose to do nothing, however. They must take steps, they must make policies, they must do so to the maximum of their available resources. A state must take some action to protect all rights in order to comply with its international and human rights obligations. That action could begin by creating a constitution which guarantees and protects these rights and obligations. This requires very little finance. It may also involve

setting policy guidelines for future action, and for educating their populations about human rights.

What immediate direct action is necessary would depend on the circumstances of a state. For example, it may be in the middle of a civil war or going through the changes of a multi-party democracy system. But of course the most important right for any person or group will be the right or rights which they are currently being denied. They will not be concerned about the financial resources of a state directly. They will want to be protected from violations of the rights which they are being denied.

Human rights treaties very clearly allow for states to obtain international assistance and co-operation, especially economic and technical assistance. States with limited resources, however, must exercise some care in accepting international cooperation; the priorities of the foreign state should not allowed to dictate the concerns of the African state, which would be nothing more than a new form of colonialism. Seeking economic development is not inconsistent with the protection of human rights since the latter is a means of mediating competing interests — economic, social and political — and can create the peace necessary for development. The protection of human rights is a legal obligation on African states, and action to protect all human rights must be a priority for them.

**Garton Kamchedzera**

*(A Malawian academic and playwright, he is Senior Lecturer in Law at the University of Malawi; currently a researcher at Clare Hall, Cambridge, on social trust concepts and the rights of children in poor societies.)*

I will start by quoting a statement which the African Studies Centre sent me in the workshop materials:

"Malawians may have the entrenched freedom to express themselves but many do not have corn or medicine or clean water. Children may now have the right to an education but for most the schools

remain inadequate. For many women, having a constitution granting them equal status with men in contract and property rights is simply irrelevant."

With this in mind, my talk will focus on the philosophical concepts of constitution-making. My points may be controversial because some of the ideas are not yet fully developed, but perhaps I will benefit from the feedback. I am going to start by saying that the aspirations of democrats now indicate a gradual shift from social contract to social trust. I am going to argue that the social contract idea, the way we organise ourselves, the way we organise our legal systems, the way we frame our human rights provisions, still dominate our conceptions. Just to support that observation, that there is a gradual shift from social contract to social trust, if you listen to politicians, or people who like to describe themselves as democrats, they will describe democracy's key aspects as transparency, openness, good governance and accountability. These attributes, however, do not relate as much to social contract as they relate to the idea of trust.

If one examines the African Charter of Human and Peoples' Rights 1991 and Malawi's 1994 Constitution one sees how dominant the social contract idea is; but if one is aspiring to have a better society, social contract theory may be inadequate. In other words, and this was the point being made in the quotation, we may have human rights but is it enough?

Turning to the historical specificity of human rights, one often unspoken point about human rights is that they are totally specific in origin but futuristic in idea. If we go back to the English Bill of Rights of 1689, the American Declaration of Independence of 1776, and the French Declaration of the Rights of Man of 1789, we find that all had specific historic foundations. Similarly we have to place the African Charter in its historic context of origin. If we go back to 1981 we find that some dictatorships had just fallen such as those of Amin and Bokassa. On the international scene, we find strong human rights rhetoric coming from the USA government. If we look at Malawi's 1994 Constitution, we find that it is the result of internal

and external pressure against Hastings Banda's regime. One could look at the human rights provisions in the Constitution as more or less an example of the attempts by Malawians and the international community to do away with autocracy. The drafters of the Malawi Constitution followed a methodology called "precedent" by evidently using other human rights instruments. The Charter was one source which the drafters used, although it is not certain how dominant it was. The two covenants were perhaps the most dominant instruments used by the drafters. The point I want to make here is that it is important to note that both the African Charter and Malawi's Constitution were meant to apply to social units that are poor, so one would expect that the rights which were drafted should have some relevance to such societies.

If we look at Africa, we find that it is characterised by the vulnerability and interdependence of most of its members. Social conditions in Africa remain appalling. There is malnutrition, hunger, disease, under-housing, unemployment, environmental degradation and abject poverty, just to mention a few. The southeast African country that is Malawi remains among the ten poorest countries in the world.

I would like to select some classes of what I call vulnerable and dependent people in Africa and then consider how these people are represented in the way we conceptualize human rights. The first group or class of people to be considered are future generations. Society has a responsibility to future generations. The resources we have are supposed to be enjoyed by the people who come after us. But how do we conceptualize those people when we are framing human rights? We find that both the Charter and the Malawi Constitution fail to regard future generations as subjects of human rights. There is a reference in the Malawi Constitution to environmental protection but that is in the statement of development policy, not part of the human rights provisions. It is just a statement of government policy, which means it can only be used as a guide but it cannot be specifically enforced.

The second vulnerable and dependent class are born children, a class of particular interest to me as that is the area of my current research. Children need special rights because of their vulnerability and dependency and such rights should address the needs of children, as persons and as future adults. There are differences in those and the way we look at children. Do we address them as children? Do we address them as persons or as future adults? We have to ascertain what rights they can have. The Charter merely states that the human rights of the child, stipulated in international declarations and conventions, should be protected. Malawi's Constitution adopts a capitalistic stance toward children. Its sole purpose in according special rights to the child is to have healthy, productive and responsible members of society.

The Malawi Constitution goes on to abolish illegitimacy, commendably, and entitles the child to a name and nationality. He or she has a right to know and be raised by his parents. Lastly, the Malawian child is entitled to be protected from exploitation or treatment that is likely to be hazardous to the child's mental and spiritual development. Robert McCorquodale referred to the United Nations' Convention on the Rights of the Child. If we examine that Convention, we find that the survival, development, participation and protection of the child are the key concepts. There are two underlying principles of that Convention, which are that the best interest of the child should be a primary consideration and that children should always have the first call on society's resources. These are very important principles; but we find that the Malawi Constitution, by just singling out some rights, has overlooked these principles and simply abolishes illegitimacy in children, condemns their exploitation, and ends there. The drafters forgot, as society often does, that children are people who need to participate in society.

The third class of vulnerable people are women. The Charter directs that every kind of discrimination against women should be eliminated. Standards in other international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women 1967, take a slightly more committed approach to the idea of women than the Charter and the Malawi Constitution.

This particular convention requires that states take short-term measures to eradicate discrimination without delay, in other words, an approach similar to affirmative action.

The fourth group of people are the disabled. The Charter commendably required special measures for the disabled in keeping with their physical and moral needs. However, the participation of the disabled in political and other societal processes is not mentioned. The Constitution grants no enforceable special rights to the disabled, though the state is to facilitate their protection, participation and access to public places. The legal position of the disabled under the Charter and the Constitution are, respectively, strikingly similar to the legal positions of the fifth vulnerable and dependent class, namely the elderly. We could mention another group of vulnerable people, the poor. We can further subdivide poor people into the urban poor and the rural poor. Malawi's Constitution does not refer to poor people at all. It does, however, refer to rural life. It says that there should be a national policy to enhance the quality of rural life. Rural standards of living are, as a result, a key indicator of the success of government policies. This is merely policy and it is not in the section on human rights. In any case the reference to rural life not only neglects the urban poor but also fails to recognize the existence of the rich in the rural areas.

Perhaps it is enough to have simply a blanket term referring to the vulnerable individual. One could draw an example from the Swedish Social Services Act, which provides that an individual is entitled to assistance to liberate and develop inert resources for social and economic security, equality of living conditions and active participation. It is sometimes helpful when conceptualizing about human rights to think about this clause.

I will talk briefly about what I call the social-contract-based conception of human rights and what I call the need-oriented conception of human rights. The nature and dominance of the social-contract-based conception of human rights explains the lack of satisfactory consideration for the vulnerable and the dependent. Social contract, as I said, emerged during the Enlightenment, and

dominant ideas during that time were liberty and the social contract. As evidenced by this so-called first generation of human rights which I referred to earlier (the Bill of Rights here in Britain, in America and in France), vulnerability was excluded and the rights were primarily those between individuals and the state. There are other social units, however, such as the village, the community, the family, which also should bear rights. These ideas are submerged. It is only when we move to the period after the First World War and the Second World War that we see need-oriented rights receiving some prominence. The basic principle of these need-oriented rights is personhood. In other words, human rights should be based on those things which are essential for the person or the individual. The University of Helsinki's Measure of Living employs the phrase "having, loving and being", which would include civil and political rights, social, economic and cultural rights, and the so-called third generation rights: solidarity rights and the right to development. Perhaps we are progressing towards a view of human rights which is more inclusive and need-oriented; one that is not based solely on the principle of the individual's capacity to engage in a social contract. A fitting example is women's rights. Although human rights have applied to all people, based on the principle of equality, it is only recently that women have been considered part of this category.

### **Chaloka Beyani**

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I am very happy to be here to share a few views and perspectives on the problem of human rights and democracy in Africa. There are three essential areas of focus. One is the relationship between human rights and the development of the international system in general. The second is the focus on the principles of human rights



and international law which are, in a nutshell, relevant to the whole process of democracy. And the third is specific problems which affect the conduct of both democracy and the protection of human rights.

Starting with the first element, Robert McCorquodale has made very well the point of the significance of human rights within international law. The only point of emphasis I can make is that the primary responsibility as he outlined for the protection of human rights rests upon the state. The international system is remedial in character and its essential purpose under international standards is to provide a yardstick according to which the performance of domestic legal systems in matters of human rights can be measured. That specific aspect of human rights is an important one to grasp, because the expectation is that the international legal system will protect human rights. It cannot supplant the state system. It is in addition to the responsibility of the state to protect human rights.

Secondly, within international law, human rights arise from treaty and from customary law. Treaty obligations are international agreements concluded between states. Customary law is the law arising out of the practices and conduct of states at the international level and which states themselves agree to obey as a matter of habit. In that respect it matters less whether the state is a party to a particular international instrument or not. Within the Charter of the United Nations there are principles of international law which also reflect customary international law. Foremost, the Charter, in crystallizing the protection of human rights and international law, established the fundamental obligation to respect and observe human rights without discrimination on specific enumerated grounds. That responsibility has been accepted as fundamental and one which falls within the purview of customary international law, whatever its content may be. Within the Charter itself, it is quite clear, based on interpretations by a number of regional human rights protection groups, particularly the Inter-American Commission on Human Rights, that the obligation to respect and observe fundamental human rights has certain connotations. Above all, it requires that states do take certain measures both in terms of

promotion as well as in terms of implementation, and the duty of the state in that respect is germane. Beyond that, we also see that whereas the principle of non-discrimination and fundamental respect for human rights has been the basis for the elaboration of rights of a political and civil character, it's equally important to acknowledge that within the Charter, particularly in the framework of Articles 55 and 56, the principle of equality of well-being of peoples is fairly acknowledged. Within Article 55 it is quite clear that there are specific objectives that are targeted under that principle, namely the question of adequate standards of living, the question of health and employment, and the question of education. Within Article 56 of the Charter, states take on particular commitments for the fulfilment of these particular obligations. In other words, if the Charter of the United Nations provides evidence of the concept of human rights as it exists, it is quite clear that within the Charter the concept includes both civil and political rights, and rights of an economic and social character.

What then has been the process of elaboration of that concept? Here we may note the Universal Declaration of Human Rights 1948 whose total text makes no distinction between rights of a civil and political character, and rights of an economic and social character. In other words, as reflected within the Universal Declaration of Human Rights, the concept of human rights is indivisible.

There are problems about the status of the Declaration itself. The weakest argument is that as a resolution of the General Assembly it is not binding upon states. Others here take the view that insofar as the resolution elaborates the concept of human rights under the Charter, it is quite clear that it is binding as part of the law of the Charter of the United Nations. And others, perhaps more progressive, have taken the view that the Universal Declaration of Human Rights represents customary international law and this is a view that has been accepted within domestic jurisdictions, notably in certain cases decided within the United States itself. So it is important not to treat the Declaration as an isolated document in relation to human rights. It has a nominative basis which is quite closely linked to the Charter and above all which has fairly significant connotations for the

protection of human rights. Beyond that, of course, we do know that the text of the resolution was adopted in various legally binding instruments, namely the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights.

The fact that there are two covenants setting out two sets of rights may show that there was some disagreement about the manner of protection, but there were also more serious ideological disagreements in the heat of the Cold War, and I need not go into detail about that. But it does suffice to say, and again I repeat what was said earlier, that both sets of Covenants establish certain obligations. The manner of the obligations may be different, nonetheless the obligations themselves are binding, in particular the Covenant on Economic, Social and Cultural Rights, whose binding character is often doubted as Robert McCorquodale said, requires states to take concrete steps in particular circumstances. But it may very well be that the manner of achieving its objectives and of taking those steps may vary.

Having said that, what then are the principles within international law that relate to the whole question of democracy in the context of human rights? Again it's fruitless to pick out just some principles because within international law the general method of approach is that a particular instrument or document must be treated as a constituted whole. In other words, the meaning of one particular standard has relevance only in the context of other standards, and to try and isolate them is fruitless. For reasons of emphasis, we can isolate a number of standards that apply very directly. Foremost, of course, is the principle of self-determination itself. Basically, the principle of self-determination is about the right of a people to decide their own political and economic destiny. I add economic because the principle appears both in the Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights. In other words, there is also an element of economic self-determination in addition to political self-determination. That is the view that I take.

The second comment I'd like to make briefly in relation to self-determination is that the right is a right of the people; it is not the right of a state. There is a distinction between the people and the state in this particular context, and this may very well constitute a basis upon which people may take certain measures against the state if the state adopts a certain political system or economic system which does not reflect their will. Then there is the standard of political association, the freedom which has been taken as the indicator of democracy: namely the liberty and freedom of people to belong to political parties of their own choice. Within Africa in particular, the existence of political parties has been grossly equated with the advent of democracy. I do not believe that the mere existence of political parties in most of the new democracies has actually led to the development of democracy as such.

Then there is the question of political opinion and freedom of speech and freedom of the press, and there is also the reference to periodic elections every so often. All these taken as a whole tend to suggest that the methods by which particular governments are established is not simply a matter of domestic concern, it is a matter of international concern, and indeed we see the principle in practice of election-monitoring elevated to the international level, so that wherever there are elections, there are international monitors running all over the place to monitor the process by which a particular government comes to power.

Turning to the question of economic, social and cultural rights in relation to the democratic process; as I mentioned earlier, the principle of self-determination appears under the Covenant on Economic, Social and Cultural Rights, and it quite clear that the principle of non-discrimination also applies under the Covenant on Economic, Social and Cultural Rights. Its broad effect is to ensure that there is no discrimination in the allocation of benefits and services, as well as the realisation of social and cultural rights within a state. This is of particular significance to Africa, because, in the so-called new democracies, governments tend to have an ethnic base, and in the context of the political and economic system, tend to marginalize groups which do not give them political support.

It is also quite important to note that, in my view, the standards set under the Covenant on Economic, Social and Cultural Rights do not provide a basis for claiming more international assistance or more aid. Instead, they provide criteria by which economic performance has to be determined. Is a particular economic, social and cultural programme adopted by the state conducive to the enjoyment of adequate standards of living, rights to education, rights to employment and rights to health? This is, in my view, the most important aspect of economic, social and cultural rights. Moreover, I would argue that those who take the view that these standards provide the basis for claiming more international assistance and more international aid are possibly wrong-footed. If anything, they are standards which primarily make demands upon the state itself. The so-called right to development, even if some see it as a claim upon the international community (and part of it may very well be), is essentially a claim upon the state to adopt a political system and an economic system which is conducive to development, and which is also conducive to the well-being of peoples within a state's territory.

This is the context within which the African Charter applies; it is a regional instrument and it is subject to the limitation under the Charter that its obligations must not conflict with the obligations assumed by member states.

What are the other problems in relation to democracy and human rights? Let us look at the question of political and economic conditionalities. Political conditionalities have applied largely to the standards that I enumerated, such as political association and freedom of opinion. In relation to the economic sphere, however, the whim of the market prevails and there is very little realisation that in fact standards of human rights are binding upon the state; the economic pressures on the state tempt it to contract out of its international obligations. This an important point to consider.

Turning to the question of the legitimacy of the process by which the constitutions have been adopted, we have seen various processes in African states. Malawi adopted a referendum, the results of which

were in favour of democracy. The referendum was about introducing several parties, and not about eliminating the life presidency as such. This seems to have been a peculiar way to go about eliminating the life presidency. This interpretation has a bearing on the question of legitimacy. Zambia adopted a Constitutional Review Commission, which by definition is an ad hoc administrative body whose task is to make an inquiry and put recommendations to the minister. At the end of the day the minister accepts some recommendations and rejects others. This approach, in my view, is inappropriate. Government is merely one of the entities that is subject to the process of constitutionalism and it should not be in a position to pick which aspects of the constitution it should be bound by and which aspects it does not like. There are several actors in this process whose interests must all be reflected.

Another problem in bringing democracy to Africa is the weakness of the state. There has been an erosion of the state as an institution in Africa. If the primary responsibility for the protection of human rights rests upon the state (and the economic malaise that exists in Africa is a reflection of institutional degradation as a whole), then we cannot expect states whose institutions are weak to protect human rights effectively. As Robert McCorquodale indicated, the protection of human rights requires resources. It also requires investment. Democracy is both an economic as well as a political principle. To say this is not necessarily to make a claim for more aid or assistance but it is to recognise there is a problem which, if not addressed, results in human rights protection being a non-starter: a situation where the basic engine for the protection of human rights, the state, is unable even to protect itself.

Finally there is the question of reform. We've seen regimes made under the banner of democracy and yet they are still very undemocratic. The opposition is in a very weak state and is unprincipled. Parliament is dominated by particular parties. There is no attempt to reform the civil service as the main engine of government to take an active role in the new democratic process. The civil service is still very much dominated and treated as an

enemy by the political parties. We must have both political and economic reforms that strike at the heart of these problems.

**Christopher Foreyth**

*(A Lecturer in Law at Cambridge University, he specializes in constitutional issues in Southern Africa, particularly South Africa, and runs the Human Rights Seminar in the lower Tripos.)*

The first point that I want to make is that I am always swept away by Robert McCorquodale's eloquent advocacy of human rights on the international level. It is such a noble body of law, an exceedingly impressive body of law and it is quite wonderful. However ... [laughter] ... and I think Robert McCorquodale and everybody here would admit this — there's a mocking discrepancy between its promise and fulfillment as far as the international law of human rights is concerned. Of course it is true that states are supposed to protect human rights. They have a legal obligation to do this, but in fact, they do not; and the question has to be asked, which I'm not going to try and answer in five minutes, exactly what is the role of international law in enforcing human rights? There is more than enough excellent law; the problem is weak enforcement and supervisory mechanisms. That is one difficulty.

To pick up a point that arose both in Mr McCorquodale's and Dr Beyani's talks, Dr Beyani said that the primary responsibility for human rights protection rests on the state, and of course he is perfectly right. The question then arises, which Mr McCorquodale raised first, of hierarchy. Are all these magnificent human rights of equal value and worthy of equal protection and no one takes precedent over the others? I think that is a major issue that is going to have to be discussed. My view, which I will only briefly state, is that, contrary to the view of the United Nations, civil and political rights have priority. This is not because they came first in history. It is not because they have smaller resource implications than the social and economic rights. It is simply because those first generation civil and political rights have to be recognised and enforced so that the government becomes responsive to the social and economic needs

of the population it serves and gives meaning to the second and third generation rights. So I believe in democracy first and economic progress afterwards.

I will speak briefly about Garton Kamchedzera's paper which I greatly enjoyed. It raised all sorts of issues, and I could have listened to him for a good deal longer talking about his ideas which struck me as truly original. There are perhaps two points to make. Social contract theory is inevitable in the development of human rights and constitutions because people do not invent constitutions out of thin air. They are invented when political opponents sit down and try to agree on a constitution. This is bound to have the character of a contract and to represent compromises between alternative positions and the like. Of course some human rights theory is also born out of social contract theory and Rousseau. But one should not underestimate the perfectly good historical origins for his idea of trusteeship in the work of Hobbes and Locke, actually coming earlier than social contract theory.

The second point concerns his vulnerable classes. As regards some of those vulnerable classes I would entirely agree with the classification. I do not for one moment accept that women as a whole are incapable of protecting their own rights, but I think future generations, children, the disabled and to some extent the poor are often incapable of protecting their own rights. The question that has to be asked is who enforces the trust. Some of the answers may lie in the work of the social contract theorist Rawls who postulates the veil of ignorance in which you have to decide on what rights you have when you do not know whether you're a child, whether you're unborn, whether you're disabled.

## Discussion

*Robert Garner, M.Phil. Student, Cambridge*

I am interested that none of the speakers, perhaps because of the constraints on time, made specific reference to the role of an



independent judiciary in the area of social and human rights. Would the speakers please comment on how they see the nexus between national and international enforcement, and whether everything has to be channelled through one channel of communication between the national and international communities, or whether there should be something like an independent judiciary to communicate with the international legal fraternity.

***Chaloka Beyani***

It was a constraint of time. It is one of the issues that I had in mind when I spoke about the weakness of the state and its institutions. The judiciary itself is not effectively capable either of checking the executive in most cases or indeed of applying the scope of human rights as a whole. I take the view that the role of the judiciary in relation to human rights and democracy is to take into account what the international legal standards say in determining issues that arise at the domestic level. This approach has been taken, but it's been taken in only about two or three cases that I'm aware of. Two of them have dealt with issues of women — one in Botswana and one in Tanzania — where the courts made reference to and considered the direct applications of the principles contained in the African Charter as well as in other international instruments for the protection of women in the review of certain customary and traditional practices. It was also used in Zambia in the early stages of its travel towards democracy, when Kaunda's government was reneging and most of the lawyers went to court and questioned, for example, the fact that the state's media was not reporting anything that the opposition parties were saying, and indeed would not give them an allocation in terms of air time on television, and the judiciary was fairly effective then in stating that this was against human rights and that it was against democracy. In the aftermath of that we see a judiciary that has become fairly passive and which is seeing its role as assisting the executive to achieve certain things. So the independence of the judiciary is open to question, particularly in relation to Zambia and Kenya. I am not as certain about Zimbabwe or Malawi, but at least those two experiences support my claim.

***Robert McCorquodale***

Dr Beyani's point is equally valid in a number of other states where the courts have relied heavily on international human rights documents to support their argument. Two other examples are Zimbabwe and Namibia, but also within this country, because there is no human rights document, the courts have to rely on international human rights documents to give some weight and support to their conclusion. The second point to make is that independent courts are absolutely vital because even if a state has a wonderful constitution with the protection of human rights within it one relies very heavily on an independent judiciary to actually uphold that. Otherwise it becomes a right without a person actually being able to get a remedy. Article 26, for example, of the African Charter expressly puts an obligation on the states to create and ensure independence of the judiciary. There are two parts to it: a judiciary that can rely on this international law and can insist that it be independent. These both must be in place before a state can give real remedies to the rights.

***John Barker, Corpus Christi College, Cambridge***

I have to take some issue with Dr Forsyth's learned commentary on constitution making and his characterization of it as a product of horse-trading. It seems that there are examples where constitutions are made which are not merely horse-traded products and where it was possible to introduce concepts of trust, in the principles of constitutional protections and foundations. Could Garton Kamchedzera possibly expand on his position on the use and concept of trust?

***Garton Kamchedzera***

The concept of trust is not really a new idea and this is not to say that you cannot find examples under these constitutions. In fact under the Malawi Constitution there is specific reference to the concept of trust because it says "political and legal authority emanates from the people" and everyone exercising governmental authority does that on trust for the people. Now the problem of

course is who enforces the trust but that is why I qualified it to mean such a trust. It is not a trust under private property law where an individual has to be named to carry out the terms of the trust; that type of trust is more or less protected under social contract. The following example may help to clarify the concept of social trust. Children in the Phillipines brought an action against the government for degradation of the environment. These children, in essence, said that the government is acting against our interests and the interests of future generations. The court agreed.

*Christopher Forsyth*

But who brought the action? Who was the plaintiff?

*Garton Kamchedzera*

It was a group of children assisted by adults.

*Christopher Forsyth*

Well, isn't that my point? Who is to have the task of assisting your vulnerable groups?

*Garton Kamchedzera*

We have to make a distinction between substantive rights and instrumental rights. I think it is important to say there are these substantive rights but we need a further instrumental right to realise it. And most of these constitutions we have don't have these instrumental rights.

*Christopher Forsyth*

Obviously trust elements can be created during the course of constitutional negotiations as they could be created in other circumstances. I would submit, though, that you would be hard put to find many examples where fresh constitutions have not emerged out of a measure of political negotiation and compromise.

***Salah Bander, African Studies Centre, Cambridge***

The speakers have presented a 'top down' approach to issues of human rights and constitution-making. I was struck by the absence of the 'bottom up' approach of the African people at a time when they are faced with a very painful journey towards democracy. Are there any comments on this?

***Christopher Forsyth***

I think I was 'bottom up' in my primacy on civil and political rights because it is those rights at the bottom that make the people at the top respond.

***Robert McCorquodale***

That was our brief, to discuss the effect of international human rights on national constitutions. Of course one cannot neglect the fact that the 'top' — if you want to call it that and I do not necessarily subscribe to the view that international law occupies in some way a higher status than an individual in an African state — but if you take that view then very often change happens because there is a reliance by the person in the African state on the fact that there are these standards by which that person can judge the state. So it is not necessarily one or the other, but part of an integrated whole. If you look at the positive changes that have happened, for example in South Africa or Namibia, there you have a combination of the two — pressures nationally and pressures internationally — often the two combine quite well to create the change. Mr Kamchedzera's point was exactly right, one cannot ignore the fact that the particular needs and aspects of the state need to be taken into account. There is no one formula which can be acquired as a 'boiler plate' or template for the state. This would be a mistake. Very often, however, you see this particularly in the foreign policy of some liberal democracies — one formula for how all rights and all issues can be resolved. In this regard, I would agree with your point, one has to take into account the needs of the people on the ground.

***Garton Kamchedzera***

My belief is that the whole process actually was reflected at the grass root level and what the international pressure groups did was simply to make the governments turn around and acknowledge what was in fact being claimed on the part of the people here for human rights and democracy. It can be seen in the nature of the claims of people: "The government came to us in 1964 and asked us to vote. Now it is telling us that we can vote for multi-parties. What does it mean by that?" It is an unconscious expectation. My second point is a rather cynical reaction to your comment and to the whole process that is happening now, where people expect certain benefits and financial gains. That is greed; it is not democracy and human rights they are in search of. They want to see an improvement in their living standards. They want to see those benefits. The result is that in places like Zambia the whole campaign was based on new culture and new attitudes. People now make a mockery of that. They call it the 'new culture', meaning that you have to have a suit, a handkerchief, a BMW.

***D G Ballance, UN Association, Cambridge***

I would like to ask Mr McCorquodale a question concerning the effects of World Bank regulations on the poorer sections, especially where you have children. Do these regulations come at all within the purview of human rights?

***Robert McCorquodale***

That is a very good question and the answer would have to be that on the whole, until recently, the World Bank has not included within its consideration issues of human rights or issues of being violate. The Bank has been criticized for that and rightly so. It is now beginning to take into account these issues but it has not yet done so. To take a narrow view that economic issues are divorced from social, political, cultural issues is unrealistic, as we have discussed. All rights are inter-related and interdependent and such a narrow view does not necessarily benefit the majority of people. The World

Bank is now beginning to realise this and set up within their institution a division which considers these kinds of issues. In fact most of the more recent agreements by the World Bank have included some awareness of the impact on the general needs of the society.

*Oliver Furley, School of International Studies & Law, Coventry University*

One or two speakers have mentioned vulnerability and I think that is the key word when it comes to grassroots — on the ground as it were. To the African peasant when he is attacked by the Army or Police or whatever, or he sees Kalenjin warriors coming along to evict the Kikuyu farmers from their settlements in the Rift Valley — African rights seem a very long way away. Rwanda, of course, should be an example. It seems to me, states or groups like that can avoid the obligations of human rights with almost complete impunity in some cases. In Rwanda, for example, there are efforts to try and trace the perpetrators of the massacres and the originators of the campaign and so on, but the progress has been exceeding slowly. The new Rwandan government for example has set up a Commission to investigate violations of human rights but it has no money whatever, it has no resources at all. It is not being resourced by the international community. The odds are, probably, that the perpetrators will get away scot free. Some of them have already gone to foreign continents. There is such a huge gap between the practicalities and the enforcement of human rights and the various international documents. What the remedy is one doesn't know; whether one remedy is to provide the needed resources or to start with the pursuit of justice.

*Chaloka Beyani*

Vulnerability is a crucial problem and in future most of the grassroots people will be asking what is being provided in this whole process. I think that's a question they will be asking, because they have seen in more recent attempts moves towards governments having formed pieces of legislation in places like Zambia and Mozambique which effectively deny people title to their traditional lands and which

effectively means that they have been moved away. That is one particular problem. The second comment that you made in relation to the commission, international support or whatever, underlies the problem that the protection of human rights is actually a very problematic issue which requires some resources in order to protect human rights effectively. If you had a Commission whatever its nature — if it is an appointed commission, it is supposed to have the ability to move around, it must have adequate resource. The members of the commission must be educated; they must know exactly what it is they are doing. But the process of democracy or human rights is taking place without every effort to create a certain awareness in some of the most important aspects of civil society. The police are still as ill-equipped and ill-trained as they were and as authoritarian. And under democratic regimes, their normal reaction is probably the same or even more fascist than ever because they have also taken advantage of the prevailing democracy to do certain things. So there are certain dangers that are built in and so the element of vulnerability I think is crucial.

***Robert McCorquodale***

The whole of international law, let alone human rights law, is still developing. Your point about lack of remedies diminishes it in a sense. National law has a lot of those problems, as well. For example, the number of people who hide in various other countries to avoid criminal action in their own states. It is not solely a problem of international law, but clearly we are dealing with a system which is a long way from developing into a proper enforceable system.

***Colin Cameron, Cameron Solicitors, Scotland***

Would the panel agree or comment upon the fact that in a developing country human rights are likely to grow and develop and be observed in proportion to the amount of power which evolves in the central government by way of the constitution.

***Garton Kamchedzera***

Yes, I would tend to agree with that, referring back to the question of vulnerability. The problem is that most of the people tend to repose confidence in leaders and perhaps the solution is to encourage people to participate in what is going on.

***Ray Abrahams, Fellow, Churchill College, Cambridge***

A comment in regard to Mr Kamchedzera's discussion of the vulnerable. I suppose having just passed 60 I have begun to wonder when we drift into the vulnerable age. I mention this because it would seem very easy to assume that in rural, traditional African society the aged are fundamentally looked after via patriarchal lines and so on. But I've been coming across a fair amount of evidence in Tanzania and also some of my reading on Southern Africa which suggests that in some ways the balance between generations is turning perhaps in some urban societies particularly and that the aged are also becoming quite vulnerable not only to attack by the state but by younger generations.

***Garton Kamchedzera***

You have brought up a very interesting point. I am not trying to be idealistic, the social cohesion you refer to has been destroyed in African societies by the impact of the cash economy and emerging individualism. Those people who are weaker are bound to suffer and special measures have to be taken to protect them.

***Ray Abrahams***

This is part of the development of the whole idea of rights that belong to individuals.



### **Chaloka Beyani**

Your comment reinforces the fact that the African Charter has provisions that warrant respect for the elderly. I have heard elderly African peasants ask why this is.

*(The Chair, Anne Campbell, MP, introduced the workshop's special guest, Mr Kamdoni Nyasulu, Director of Public Prosecutions in Malawi.)*

### **Kamdoni Nyasulu**

I would like first of all to thank the organisers for asking me to be present here today. The High Commissioner was very delighted when he heard that I had been asked to come. I am flying back to Malawi later today, but I have arranged my schedule in order to make a few comments at this gathering.

One of the most important elements in the protection of human rights is the political order that you introduce in the system. If the political system that has been established cannot protect the human rights provisions, these rights are of no benefit to the people or the state. In this regard, the Malawi Constitution provides a good example. When the Malawi Constitution was being drafted, a workshop was held where it was discussed whether Malawi would follow proportional representation in the elections. Participants and drafters, who were operating under pressure to complete the drafting process before the elections, were against proportional representation, and the provision was not included in the Constitution. They apparently had in mind that the Malawi elections would follow along the lines of Namibia, where there was a landslide election, or Zimbabwe, where there was a strong majority vote. Neither case poses very many problems because the one party which is very dominant can actually proceed with the one-party dictatorship elements that were there before and be able to quiet dissent. In South Africa they introduced in the constitution a government of national unity, realising that the result of the election would require this. In Malawi, however, there was neither a landslide

victory nor a large majority vote, and unlike Southern Africa, only one party was allowed, under the Constitution, to form a government. What this did was to divide the country which had voted along ethnic lines. The two opposition parties subsequently formed a majority and threatened the new government's ability to govern. This alliance immediately forced the President to introduce into the Constitution the position of a second vice-president from the opposition, thus bringing the opposition into the government and forming something along the lines of a government of national unity. In my opinion, the hasty review of this issue momentarily threatened the protection of human rights.

There are elements in our new Constitution which are commendable. For example, it allows third parties to go to court on behalf of an individual whose human rights have been denied or abused. Third parties, such as human rights organisations, with a sufficient interest in the violation can take action in court without the person whose right has been threatened or breached actually knowing that it has been breached. The Inspector General of Police was removed from his position in breach of his rights and was unaware that it was wrongful. A human rights organisations sued on his behalf and asked the court to review his removal. This normally would have been something that would have been done by an ombudsman but we did not have an ombudsman at the time and this human rights body took over the responsibility of trying to defend this man's rights. In fact, the same human rights organisation is a core plaintiff in a case involving the former president, alleging that he has been wrongfully deprived of his property by the government.

In its attempt to protect the three organs of state, the Constitution introduced many checks and balances. Some of these are making it very difficult for my office to operate. For example, it gives the Ombudsman the power to direct the High Court to take up a matter which the Ombudsman has investigated and recommended for review. It also requires that if the Ombudsman has referred a matter to the Director of Public Prosecution (DPP) for action and the DPP refuses, the DPP should give the Ombudsman reasons for the refusal. This immediately undermines the independence of the judiciary in

that it gives an office outside the judiciary the authority to direct a High Court to adjudicate on a matter. It also undermines the independence of the Director of Public Prosecutions to decide what to prosecute and what not to prosecute. Moreover, an Ombudsman may not be a person who is versed in the prosecution of criminal matters. He may not actually be a lawyer. It would seem inappropriate for such a person to require reasons from the DPP for his decisions.

The Constitution also provides that the Director of Public Prosecutions, if he decides to discontinue a case, must within 10 days inform Parliament of the reasons why he wants to discontinue. In the present state of Malawi's judicial system, with over 1,000 people awaiting trial for homicide cases only and all of them in custody, the chances of the DPP coming up with over 30 discontinuances in 3 months are very high. Most of these people were arrested on suspicion with very little legal opinion written on the files or the dockets which were compiled by police. Between November and now, I have entered something like seven discontinuances. I do not have the staff to assist me with the required documentation and I do not see myself sitting down and writing reasons for each of these discontinuances.

Related to this is the constitutional requirement that if I am to delegate my authority, it can only be to my subordinates in the public service. This has come up for debate recently because politicians in our country wanted to engage lawyers from Britain to prosecute the former head of state, Dr Banda, and this provision was invoked to prevent them from doing so.

The Constitution, in establishing human rights, does not express in specific terms who bears responsibility for the enforcement or protection of some of these rights or set out time-scales for the implementation of these protections. For example, citizens who experienced past abuses or atrocities under the former government are allowed to claim from the National Compensation Tribunal, but up to now, the National Compensation Tribunal has not been set up. The biggest reason for the delay was because of these same checks

and balances. Under the Constitution, in order to set up a National Compensation Tribunal the judiciary has to appoint the Chairman, and the other two members are appointed by Parliament. Parliament sat soon after the elections but they have not sat again. So although the judiciary appointed the Chairman for the National Compensation Tribunal, Parliament has not appointed the other members of the Tribunal and therefore the Tribunal is not operational. Those people with claims against the former government are not allowed to take their cases to court because the court says they must claim from the National Compensation Tribunal.

Another example is the Law Commission and the Human Rights Commission which the Constitution says must be set up. No time-scale was given nor was anyone given the specific responsibility to set up these commissions. Up to now, the Government has deliberately ignored this provision and no one has taken up the issue. Even if someone wanted to use these institutions for the promotion or protection of human rights, they are non-existent.

On inauguration day, the President announced that everybody on death row would have his sentence commuted to life. The new Constitution, however, did not set up an advisory committee on the prerogative of mercy. Instead it provided that such a committee would be set up by an act of Parliament. As in the earlier instance, Parliament has not yet sat and the Committee has not been formed. The directive of the President cannot be given effect because to do so would be unconstitutional.

The last item that I would like to discuss is the entrenchment of certain rights. There are about seven provisions which have been entrenched, meaning that they cannot be derogated from or amended under certain conditions. One among these is the right to privacy, which protects a person and his or her property from search. The police are still conducting searches, under search warrants, but because this may conflict with the right to privacy, there is going to be a day when somebody challenges this in court. For the requirements of justice, this right to privacy will definitely have to be limited or restricted. [End of Session.]

## **SESSION 2**

### **Making Constitutions: Raising Public Awareness**

*Chair*

Ambassador Achol Deng

*Sudan's Ambassador-Elect to Germany*

of trust that Garton mentioned. No opportunity to create even the fiction of a social contract. There was simply a political will amongst the Malawi politicians to form a new political structure: a political motivation to embody human rights but a weak motivation. For it was not an informed motivation, not informed on the nature of human rights nor the problems of implementing human rights in the context of an actual working democracy.

Added to this, you had a situation where the international community had a broad agenda. Its broad agenda being at once economic liberalisation: the transformation of one of the poorest countries in the world into some kind of new market economy from a semi-directed economy; together with a transformation into a democratic state which respects human rights. Yet we do not have an adequate definition of what a democratic state is even in the UK let alone in Africa. Similarly, the donors involved were not necessarily fully aware of what they meant by human rights and were not effectively communicating the message of "this is human rights " to the Malawi administration and to the opposition groups.

When I arrived in Malawi I met the people who were supposedly running the show. However, exactly who was running the show was never very clear. Sometimes I got the distinct impression that the show was being run by the international community with some co-operation from the NCC. I arrived there to find, basically, that human rights was an issue that had become a political slogan and had no real substantive meaning other than undoing some of the wrongs that had been committed by the Banda administration. In that context, we received a lot of very expert assistance from people within Malawi, particularly Malawian lawyers, and from people outside Malawi. They stated exactly what the international standards for human rights should be, advising on the international obligations of the country, putting together, if you like, a ready-made package of: "This is international human rights law. These are your obligations under international human rights law. This is what you need in your constitution."

In discussions within the NCC, as the drafting of the Constitution proceeded, it became very obvious that the domestic application of human rights was not something that had been looked into with any great degree of sophistication. For example, what do we mean by the right to life when we are talking about a country that has the death penalty? The awareness of those issues within the NCC was very low. An awareness of a more fundamental issue, that of how you go about making a constitution in a legitimate manner was simply not there at all. I think it was one month into discussions by the NCC on the draft constitution, that the question arose, "How do you consult people about their future constitution?"

Somewhere along the line there was expert advice coming in about what should be in the constitution but there was very little advice coming in about numerous other problems. How feasible it is to make a new constitutional structure within any period of time? How long does the process take? What is the nature of the relationship between an election to create a new government and the creation of a constitution?

All of these issues about constitution-making were simply not addressed and it was left to the NCC to choose, by political agreement, between two options: either we adopt this new constitution, whatever its defects and without having discussed it, or we bring in a new government who we don't know whether we can trust under the old constitution. We were between the devil and the deep blue sea.

Efforts were made during drafting to guarantee a period of one year when the minimum standards for the protection of the judiciary and of international human rights would be maintained. During which time the discussion and the education, that should have gone before the drafting of the constitution, would be undertaken. This would be followed by another constitutional conference to incorporate these issues.

I have been critical of the donors by implication and also directly but not of the individuals who were there. All of the individuals within

the donor group were genuinely motivated in assisting Malawi towards a democratic state. What I tend to be critical of is this: they were not given the facilities themselves by their own organisations to understand what sort of undertaking the assistance of a democratic transformation entailed. They did not have advisors saying that if they wanted to assist Malawi to obtain a democratic form of government with human rights, they would have to create a culture of human rights discussion that had been suppressed by Banda. They would have to create an understanding of what democratic government means in the one-man state.

All of these issues and the methodologies of implementation of a constitution process were not available and no human being, however intelligent, is automatically going to have learnt all the lessons of constitutional history and development while doing their diplomatic training. Also, there are very many lawyers who have very little understanding of constitutional processes.

So fundamentally, somewhere between the referendum and the election and the adoption of the constitution in its provisional form, there was a skills gap. What I mean is a gap shared by all the players in terms of understanding the timing, the significance, the basic necessity of education of the public, the involvement of the public in order to create a legitimate form of democracy. It was a skills gap for which one need not allocate blame but which was nonetheless there. And this is the major lesson I would like to draw out of the experience in Malawi — that you need to have education for the general public.

Once you have got the constitution in a written form, does that mean that you have human rights? No. You need to have the structures, you need to have enabling legislation. You have to have radical institutional change and radical education. None of these things were fully addressed by the donors or by the Government because the urgency of economic considerations had completely taken over the agenda. People wanted to get on with their lives and govern. The major difficulty with this skills gap is how do you fill it? And this is an institutional problem for donor agencies. But there were



numerous NGOs operating within Malawi, before, during and after the referendum, during the constitutional process, assisting, working at grassroots. How did they address this problem? Did they bring up the issue of legitimacy and public involvement? I would suggest that the answer is again no.

Many of the NGOs were very concerned with working together with their partner organisations, following the agenda of their partner organisations in a highly politicised situation where the partner organisations were not necessarily committed themselves to allowing the widest possible debate and education on human rights, on constitutional development, on democracy. They were more concerned about ensuring that their pressure group, their constituency had a full say in this. So, again we can identify a technical problem in the actual method of coming to a constitution — not as the piece of paper which can be criticised or praised on its merits, but as a living organism that actually governs the relationship between the people within a state and the government, the executive, the judiciary, all of those institutions.

What I would like to stress most of all — and there are lots of related questions; there are suspicions that the donors have a secret agenda, of human rights groups having particular agendas, or of the West trying to overplay their role, there are all of these suspicions — and to give the most liberal interpretation of the problems of the Malawi Constitution, of human rights in Malawi is that technically it was not done well.

The only thing that I have to add is that this is not a new lesson. In eastern Europe, in Kazakhstan, in Uzbekistan, in a countless number of countries that have recently undergone radical political transformation, the same factors are present. There is expert input of a greater or lesser extent into the content of the constitutions and very little input into actually building constitutional societies. And in the absence of that input constitutions around the world are failing or being ignored, no matter how good they are. It is a waste of donor money and it is a waste of NGO activity, of goodwill, if the groundwork to achieving constitutional change, to achieving

democracy, is not done. For this then allows a government to say this is not a legitimate constitution, it makes the people feel cheated, and it undermines and destroys the fundamental faith in the concepts of human rights and democracy.

The situation where people do not have a stake in determining how their own country is governed, at a time when there is an opportunity to have a say, basically means that if people are denied that opportunity, the next time that democracy and human rights is raised as an issue people will say "We tried that, it didn't work and we weren't involved." It is a fundamental technical problem. And it is a lesson that has still got to be learned.

It needs to be learned in Eritrea, where their constitutional process again has this problem. All of these countries require a fundamental rethink on the part of NGOs and on the part of donors of the way in which they approach the process of democratisation and the process of human rights entrenchment. It is a cultural attitude within these organisations that needs to change in order to change cultures within these countries.

***Rosemary Kanyuka***

*(A legal practitioner and partner in the firm of Lilley and Wills Solicitors, Limbe, Malawi, she is also Chair of the Women and Children's Affairs Committee of the Legal Resource Centre.)*

My presentation will be a comment upon the current constitutional debates that are taking place in Malawi. As our speaker has just said, the Constitution of Malawi is a provisional one and in that Constitution, Article 2(1)(2) provides that the National Assembly (its Parliament) may amend the provisional Constitution by passing a bill prior to April 18, 1995. The current situation in Malawi is that all the political parties and all different types of organisation are gathering together at a Constitutional Conference to take place between 20th and 23rd of February. What they will look at is whether the Constitution provides their needs; where it needs amending and

where things need to be added. Changes must be made by April 18th.

Tonight, for example, in Malawi at Lilongwe Hotel, the women are meeting in order to discuss the Constitution and see if it does indeed provide for their rights. And on the 17th of February, the Law Society of Malawi is going to conduct an all day workshop.

What are the constitutional issues and topics that are currently being debated in Malawi? I will consider several of these but there are many more. The Director of Public Prosecutions has mentioned a few of the controversial debates, as well.

One controversy is over the Senate. The provisional Constitution provides for an upper chamber in the house of Parliament. Under the former Constitution, Parliament was made up of the National Assembly and the Head of State. At the moment, however, Parliament consists of only the National Assembly. There is a nationwide debate as to whether it is necessary to have another house. The arguments against the Senate are numerous. A Senate is just a white elephant and Malawians are merely trying to copy the international world. A Senate is not necessary because it will be deliberative in nature and as such it will be a waste of taxpayer's money. A Senate will not be as strict as the National Assembly.

Concern has also been expressed that even if we have a second chamber, would the Senators know what their role is? There would be 80 members, who would be semi-elected in that they would be nominated to stand. Would they be nominated by interested parties in Government and would this mean that the Senate would just be a rubber stamp?

In Malawi there has not been enough time to debate or enough education amongst the people. And it is not only education at the grassroots level but at higher levels. No one really understands what human rights are all about. And the ordinary person, the people in the village — have their views really been heard? We did not have any policy as to how this can be done.

Will there be proper representation at the February Constitutional Conference? There was a press release on the 8th of February 1995 whereby the Constitutional Committee decided which organisations were going to attend the February Constitutional Conference. These include 60 members of Parliament, 48 chiefs and one to three members from different interest groups. Is this enough? Others may come as observers, but it is said that the Secretary of the Constitutional Committee will not allow just anyone to attend. If an organisation is not yet registered as an NGO it cannot attend.

Then there is the debate over the office of the Second Vice-President. This has been a very controversial issue in Malawi because it was not provided for in the provisional Constitution. The new Government was in office only seven months, from May to December, when it amended the provisional Constitution to allow for a Second Vice-President post, which was offered to a member from the opposition party AFORD (Alliance for Democracy). The first news of it came over the radio, an announcement that the President had appointed the leader of AFORD to be the Second Vice-President. It was only after the Law Society issued a press release challenging the appointment that the Government realised they may have made a mistake. So in order to follow the new Constitution, the issue was brought before Parliament and the amendment was passed without opposition.

Many are now asking "Is this a democracy?". The President says that this move is in the interest of the people but what is the interest of the people? According to the provisional Constitution, there should have been something along the lines of a referendum to find out whether the country really wanted or needed an office of the Second Vice-President. This was not done. And indeed at the moment, there are members of the public that have taken the President to court and the matter is awaiting trial.

Another constitutional issue is the role of Office of the Ombudsman vis-a-vis the role of the Office of the Human Rights Commission. There is a feeling amongst the people that the new Constitution of Malawi may be too detailed. It is trying to provide for each and

every area that was not provided for during the one-party state. But they also feel there is duplication of work. For example, the Ombudsman and the Human Rights Commission appear to have similar tasks and responsibilities. If each office has to be staffed, many argue this will be too expensive for the nation.

The DPP has mentioned the removal of the Inspector General. The matter has been contested in court and the court found his removal improper but to date he has not been reinstated.

Another issue we are facing in Malawi is one of an awareness of our rights. We may have the new Constitution but how many Malawians know what to do if they feel their rights are being breached?

The most recent news concerns the ex-President, Dr Banda. There was recently a commission of inquiry on the death in 1983 of three Cabinet Ministers and an MP in what was said to be an auto accident along the Mwanza highway. The report of the inquiry came out in January 1995, whereby the Commission found that these men had died at the hands of policemen who were under orders and not as a result of an auto accident, as had been alleged by the former Government. By the 5th of January there were orders for the arrests of former president Banda and his aid John Tembo. At the moment Dr Banda is under house arrest and Mr Tembo is in prison. Mr Tembo's bail application was recently refused.

At the time the DPP was charging Dr Banda in Zomba, other prosecutors acting under the orders of the Minister of Justice were en route to commit Dr Banda at his residence without the knowledge of the DPP. The committal certificate had been signed by a member of the judiciary. This member was once the DPP but is now a judge and I think their reliance on this committal order was something that was overlooked. But the prosecutors were in a hurry to charge and commit Dr Banda because under the new Constitution, a charge has to be brought within 48 hours. As it happened, Dr Banda's lawyer was present when the prosecutors arrived and objected to his arrest. The trial is now an even more highly politicised issue because of this

event. Dr Banda's party claims his arrest is entirely political. It is a very heated debate in the papers and elsewhere.

Another controversial issue is the gender issue. When you look at the provisional Constitution of Malawi it is really beautiful. Those drafting the Constitution tried very hard to provide for women. Indeed, Section 13 of the Constitution states that one of the principles of national policy is to obtain gender equality for women and men through participation of women in all spheres of Malawian society, through the implementation of principles of non-discrimination, and through the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits and so on.

To follow on from the previous speaker, it is well and good that all these provisions are there on paper. But do we have the implementation facilities? I say no. Up to now, none of the laws that were detrimental to women have been changed. The new Constitution does provide for the Law Commission, which will provide vulnerable classes with some protection through its review of the laws. Unfortunately, to date, the Law Commission is not in place; the office bearers are not there; consequently, women remain subject to inadequate laws.

Take for example the inheritance law in Malawi. In practice, when a husband dies, the man's family takes over the house and property. They forget the woman, they forget the children. I know presently of a situation in Zomba, where the sisters of a gentleman who is on his deathbed have come and taken over his home. They have taken their husbands to his house and have decided what to do with the property and their arrangements do not include the man's child. The Inheritance Act itself is silent as to the woman, which means that upon the death of a woman, everything goes to the man. And indeed there has never been a case whereby the woman dies and the woman's relations have come and taken over the property. The women do not know their rights or how to protect them. We do have the Legal Resource Centre which is a child of the Malawi Law Society. The Legal Resource Centre now has a Women and

Children's Affairs Committee which I chair. At the moment we are trying to run a legal aid clinic to advise women on their rights.

As we are talking about democracy we cannot forget the economy. Our Committee does not have the funds to pay for facilities to hold seminars and so on, but we have started operating. In fact, the clinic is conducting interviews this morning. The strategy at the moment is, if there is a case, it will be referred to a lawyer, male or female, who is interested in women's issues.

There is still the problem of gender discrimination. We have a lot of educated women in Malawi, engineers, architects, doctors, lawyers and bankers. Most of the key posts in the government, however, are held by men. The post of the DPP is newly created; the DPP who spoke this morning has just been appointed. There is a woman lawyer who, in my view, was well qualified for the post. I am not undermining the new DPP, but I think this highlights the issue. There are also five to six newly appointed judges but none of these is a woman. Malawi has one woman judge who was appointed two or three years ago. Again, I know of one woman who many feel should have been appointed as one of these judges.

Yes, women are protected from discrimination under the new laws. Our Constitution does protect them. But there is no implementation, there is no policy as to how things are going to be done. And what is being done at the moment is being done only by NGOs who have limited capacity; not much is being done at government level.

**Louise Pirouet**

*(Researcher, lecturer and teacher in East Africa for over twenty years, she is recently retired from Homerton College, Cambridge, where she began lecturing in 1978. Her publications include "Black Evangelists", 1978, and a historical dictionary of Uganda, to be published March 1995.)*

The reason for bringing Kenya into this conference is, of course, that in Kenya rights have had to be defended. These rights which were

removed from people have needed to be defended. This has gained a new topicality, because on the first of January this year, President Moi announced there was to be a new constitution there. I will come back to this later.

A series of constitutions and changes to the constitution have really failed in Kenya. Since 1982 there has been a one-party state after which the security of tenure for judges and senior legal officers was removed. I do not think people immediately saw the seriousness of that, or not all of them. Then, in 1986, came changes to the electoral proceedings. At the first stage of the elections, a secret ballot was removed. You had to queue behind the candidate of your choice and if anyone got to more than 70% of the vote at that stage, he was declared elected unopposed. This effectively deprived about half the population of any vote at all because a great many people did not join the queuing. It has led to much dissatisfaction and turmoil and to a whole discussion on human rights. One-party rule which was intended to unite the country has failed. The Kenyan people felt increasingly aggrieved because they could not voice their dissatisfaction with the Kenyan state through any normal political channels.

Three groups of people have emerged as spokesmen for the people — church leaders, lawyers and journalists — and have been much more important than politicians. Let me turn first to the churches. They really started to voice their concerns in 1986, not only about voting, or divisions between the poor and the rich, detention without trial, or torture — but about a whole range of human rights abuses. But they did not in fact present a united front. The most right-wing fundamentalist and locally based churches did not go along with the quite strong statements made by the mainline churches. Even in the mainline Protestant churches a relatively small group of people voiced their concerns publicly: about three Anglican bishops, Bishops David Gitari, Henry Okullu and Alexander Muge; the Provost of Nairobi Cathedral; and the Archbishop Manasses Kuria who came in a little bit later. In the Presbyterian Church, the Reverend Dr Timothy Njoya was not always supported by the leaders of his church, though they did not actually condemn him. The



Catholic Church behaved rather differently apart from Bishop Ndingi a'Nzeki. They had been very cautious and quiet until 1988 and from then onwards they produced a series of very outspoken pastoral letters. These were backed up by the Justice and Peace Commission giving advice on how the subjects which the parishioners were to discuss, think through and act on, could actually be put into action at parish level.

David Throup is quite right when he said recently that church leaders were the only people in Kenya able to voice dissent without being arrested and detained without trial. But even so, one MP uttered what amounted to death threats against Bishop Muge should he dare to enter the MP's constituency, which was part of the Bishop's diocese. When the Bishop went there and then died in a road accident, there were very few people in Kenya prepared to believe that the accident was really accidental. And the Bishop's death, coming just after the murder of Foreign Minister Robert Ouka in very strange circumstances, provoked a colossal outcry and a national crisis.

Lawyers and journalists have fared much more roughly. A group of lawyers including John Khaminwa, Gibson Kamau Kuria, Paul Muite, Gitone Manyuira and Bitobu Imanyara have been prepared to speak out about constitutional rights and to act for the defence in civil rights cases. I remember John Khaminwa acting on behalf of students when I was there. And for their pains, these lawyers have been regularly subjected to detention without trial themselves and some of them severely maltreated. The Law Society of Kenya, also prepared to speak out, has been emasculated. When it mustered the courage to elect Paul Muite as its chairman, he was prevented from speaking on any subject which was deemed political by the Government, which was virtually anything.

When we come to the press, we find a division between those sections of the press which exercised strict self-censorship and so kept afloat, and those which gave a platform to dissent and were then banned. However, the people who actually supplied the voices of dissent with the oxygen of publicity and ensured that their

utterances were given wide coverage, were the wilder politicians, because their outbursts against church leaders and lawyers provided the press with just the kind of stories which sold newspapers. "Bishop Slammed by KANU Politician" was sure to boost the sales of The Daily Nation. So the bishops' or the lawyers' remarks would then have to be reported at length to provide the context for the outburst. Now the paper would cover itself of course by editorial comment criticising the speaker, but nevertheless, the content of what he had said was often there. The Weekly Review, which some of you know, handled this most skillfully. Its regular readers knew exactly how to read between the lines of its prolix accounts of who said what in the latest political confrontation. But what The Weekly Review and the daily papers didn't convey was the compassionate concern which motivated many church leaders to speak out on behalf of people deprived of the means of speaking for themselves.

The journals on the other hand which openly supported dissent and which published the pronouncements of the lawyers, church leaders and so on, and wrote editorials of their own, were banned. Beyond, an evangelical Christian monthly, was banned, its editor imprisoned on sedition charges. The Nairobi Law Monthly which not only reported lawyers but others as well, published a selection of the written evidence demanding radical reform which was presented to the Saitoti Commission, a body set up to look at how the ruling party could do better. Afterwards, it was banned. I think at least three other periodicals went the same way, in addition to sedition charges and other means of quieting critics.

What did all this gain? What were they able to achieve? Well, the queuing method of voting and the 70% rule were in fact abolished. The ruling party decided they would have to go. Security of tenure was restored to the judges.

International pressure, in which Britain played a small part too late, was mainly responsible, I believe, for persuading Moi that multi-party elections would have to be held. But because one-party rule had prevented the emergence of a credible alternative leadership, the opposition fell apart, and new ways were found of rigging the

elections, so these gains were, I think, ephemeral. Matters were at least as bad as before, with very serious ethnic strife in the Rift Valley, which somebody has already referred to.

Now, after irrepressible debate on constitutional issues, in which the Kenyan people have educated themselves, Kenya is to have a new constitution. It is not clear how President Moi intends to manage the constitutional consultation he has promised. It is important that the foreign experts whom Moi has said he will consult should work very closely with their Kenyan counterparts. I think that the Kenyan leaders who are invited to join in this must include churchmen, lawyers and others who are prepared to defend human rights. If such lawyers and churchmen are not chosen to be part of this constitutional consultation process, then the foreign experts ought not to lend themselves to it either, because Kenya desperately needs a constitution which will gain wide national assent.

I do wish the Kenya High Commission had responded to our invitation and been here to have heard this afternoon all that has been said about Malawi. I am certain it would have helped them a great deal.

**Michael Twaddle**

*(A specialist in African History at the Institute of Commonwealth Studies, London, he has just published and edited a book with Professor Holger Bernt Hansen from Copenhagen University, entitled From Chaos to Order: The Politics of Constitution-Making in Uganda.)*

My remarks are based upon a joint book, edited with Professor Holger Bernt Hansen of Copenhagen University who is with us today. I will take advantage of his presence to say that if some of the questions you put to me afterwards are too difficult for me to answer I am sure Holger will be able to deal with them instead.

The principal criticism that has been made of the new constitutional discussions in Uganda have been quite the reverse of Malawi. In

Malawi, if I understand correctly what has been said, there was not enough time for consultation with the people. In Uganda, a very lively press has repeatedly commented that far too much time has been spent consulting the people. The Odoki Commission which was first established in 1989 took not two years, as originally intended, but three and then four years to do its work, and even then did not do it properly because it recommended the election of a Constituent Assembly which would, in turn, debate a more definitive constitution.

This has led to all kinds of accusations about the Commission, suggesting that it has a secret agenda, that it is an illegitimate organisation, that it is in the pocket of foreign interests, of local interests and of the President. And that, really, is the great problem of Uganda: it is a deeply divided society and what one really needs to have is just a few foreign experts to come in, as in 1962, to work out a constitution and then to get on with it. Indeed at one point, the press even suggested that the politicians should all be sacked and the leaders of the three main religious denominations in Uganda, the heads of the Roman Catholic Church, the Anglican Church and the Islamic Community, should be brought in to rule the country for six months. A multi-party election would then be held and the politicians could get on with it again. It is a very different situation to Malawi.

Because its recent history has been so divided, Uganda is also in a very different situation to Tanzania, which is revising its constitution at present. The first government of Milton Obote was reconstituted as a presidential dictatorship in 1966 and then overturned by Idi Amin who was then overturned by a succession of subsequent and only marginally democratic governments. Consequently, the judiciary has been discredited in Uganda and it is not possible for any chief justice or judge to oversee the consultations preceding the formulation of a new constitution in the country. It is a very different situation therefore to Tanzania. It is this long civil war, lasting from 1966 to 1986, which brought to power, after the National Resistance Army guerrillas took over in January 1986, the present government. That is the background to the present constitutional discussions in Uganda.

Another background point I can perhaps make briefly is that by comparison with Kenya, the Christian churches have been much more muted in their criticisms of politics. Although theologically the Anglican church is very similar to its counterpart in Kenya there has been no prophetic counterpart of David Gitari in the country to underline the defects of earlier regimes. The Roman Catholic church has also been labouring under such an enormous grievance about being excluded from power meaningfully over the years despite its comparatively greater numbers than Ugandan Anglicans. This too has meant that it is a folk church also more penetrated by society than itself penetrating.

It is against this background that Yoweri Museveni and his guerrillas came to power in Uganda in 1986 on the basis of a ten-point programme thrashed out during their bush war against Milton Obote's second political incarnation. They extended to the whole of the country the resistance councils at local parish level and sub-parish level that they had based their guerilla strategy upon. The democratic government of Uganda in the first years of the present Museveni Government was very much a matter of these resistance councils. These were the places in which local people directly elected leaders who were then indirectly responsible for the election of a pyramidal tier culminating in a National Resistance Council of populists rather than representational democracy. It was indirect democracy rather than multi-party democracy. Museveni then, and since, has made much of the defects of multi-party democracy in Uganda leading to disunity, to politico-religious sectarianism and to economic corruption. And he has lauded the benefits of this alternative system.

However, shortly after he came to power with his National Resistance Government, governments in Eastern Europe and the Soviet Union collapsed, the cold war came to an end and pressure upon African states for a transition to good governance and multi-party democracy increased. Uganda like other countries in Eastern Africa came under attack for not being quick enough in moving towards more democratic government in the representational sense. That is the background against which in 1989 a Constitutional

Commission was appointed under a Ugandan judge to oversee a massive consultation exercise, visiting every parish in the country, taking evidence orally and receiving memoranda. These were then processed by a secretariat with immense meticulousness and care under the organisational direction latterly of Dr John Waligo, a Catholic priest and a graduate of this University, who was the Secretary of the Odoki Commission until it completed its work in 1993.

This remarkable exercise led to a constitutional report suggesting the appointment of a Constituent Assembly by secret election rather than indirect, open election. Those elections were held last March on a no-party, rather than a multi-party basis. Candidates for election were not allowed to declare allegiance to any political party. They stood as individuals, although most people, from accounts that have been published in the book that Holger and I have edited and elsewhere, indicate that their party allegiances were pretty widely known by local electorates. Nonetheless, formally they were individuals rather than party members. Since March last year this Constituent Assembly has been debating the final constitution under which a further government will be elected. It has yet to be decided whether that further election in government will be multi-party or movement, i.e. no-party, in character.

This process, the Commission and the Constituent Assembly have been criticised, as I have mentioned, on a number of grounds. They have been criticised because the government did not take the process seriously enough to give it sufficient resources to enable it to complete the work quickly. On other occasions, critics have said the new constitution has already been written in secret by Yoweri Museveni and his friends so why is all this delay taking place. Concerning yet others, you will find newspapers that suggest that just a few constitutional experts from London could have composed a draft constitution in a matter of weeks, so why did it have to take several years?

These criticisms were repeated by Cabinet Ministers, and here I think one has to stress that one of the oddities of no-party government is

that the patronage control by the leaders of that government is much weaker and Cabinet Ministers therefore feel far less loyalty to their political bosses because their primary loyalties remain to their outside interests and their political parties. The government of Museveni has not felt able to dismiss Cabinet Ministers who have gone out of line and criticised its activities because of the desire to have a policy of reconciliation after the twenty years of civil war.

The criticisms, therefore, were that it took far too long, and there was far too much consultation; it could have been done much more quickly if more resources had been given to it. Other suggestions have been that the Independence Constitution of Uganda of 1962 could simply be re-introduced with all the subsequent amendments made to it by Amin's regime and the two Obote governments simply deleted. Alternatively, the 'Pigeon-hole' Constitution of 1967 could also possibly have been used with a few amendments. This was called the 'Pigeon-hole' Constitution because it was simply found in the pigeon holes of Ugandan MPs in Government House before it was voted upon without any discussion.

That is the situation in Uganda today. I just want to make a few comments in conclusion. The attacks that have been made on the Odoki Commission, between 1989 and 1993 particularly, that it was in the pocket of the Museveni Government, had the paradoxical effect of delaying a decision on the return to normal politics. First of all it was felt that this would have to be simply decided by the Constituent Assembly. Then it was finally decided in the last report of the Odoki Commission that there should actually be a clause that the Constituent Assembly would have to debate on whether there would be a referendum or some other means of further consultation with the public before there would be a return to multi-party politics. You therefore have to look at the background to the history of Uganda to understand why this particular Commission has taken the form it has.

It was because Uganda suffered so many dictatorial regimes between 1966 and 1986 that the decision was made to have such a massive consultation exercise with the wider community. I should stress that it was an enormous undertaking and was undertaken with great

effort, sincerity and competence by John Waligo and his colleagues and just one foreign constitutional expert, the Australian lawyer Anthony Reagan. And it is really something that one hopes will be a model for others to consider very seriously in future African cases.

**John Lonsdale**

*(He is a fellow of Trinity College, Cambridge, a lecturer in history at Cambridge University and a member of the Committee of Management at the African Studies Centre. He is most known for his work on Mau Mau and Kenya.)*

My main thought is that I rather wish I was in the Lilongwe Hotel just now and a fly on the wall listening to the women of Malawi sorting out the country's problems. If Malawian women are anything like Kenyan women, they will do it with extreme forthrightness, with great determination and authority. The men will not listen but the men will be the losers ... [laughter].

We have heard very interesting presentations about three very different countries and it is quite difficult for me to try and round up some thoughts from those three. Malawi, which has recently discussed a new and provisional constitution if too briefly. Kenya, which I think got by with a very small constitutional amendment before the system triumphed and won the so-called election of 1992-93. Finally, Uganda after endless, bitter, dreadful civil war has perhaps been engaged in far too much constitutional discussion. Of course we in this country have none ... [laughter] ... and as Dr McCorquodale mentioned, we certainly have no document on human rights although there once was a Bill of Human Rights. In America, they have endless constitutional amendments.

I think my first reflection follows on remarks made by Mr Kevin Bampton. How far are we right to concentrate so much on the processes of the making of constitutions? Perhaps this is a foolish question to ask in a room in which there are constitutional and other lawyers but I am speaking as a very ignorant historian. How much more should we be considering, as Mr Bampton suggested, the



creation of responsible political communities? How far do constitutions create a political community? How far do responsible citizens make their own constitutions and political conventions as they go along, as I suppose would be argued by the defenders of our own unwritten constitution?

Can laws create a civil society? It is strange that this is the first time that phrase has been used. Were we in a conference of sociologists and political scientists, civil society would have been a term with which we would by now have got extremely bored particularly as nobody would be able to give us a satisfactory definition of what they meant. Certainly it is said that states and certain constitutions can destroy civil society. This is constantly said of the countries of eastern Europe where, once the scaffolding of the state had been removed or discredited, they found that there was no real way in which they could discuss matters — in order to put Humpty Dumpty together again.

With that reflection in mind perhaps one of the most interesting things — and I am speaking I suppose of my own professional self-interest as an historian and perhaps also voicing a silent wish of Michael Twaddle, a fellow historian — is the need to pay much more attention to the conditions under which constitutions are written. After very difficult experiences, certainly horrible experiences in Uganda, extremely difficult experiences both in Kenya and in Malawi, nonetheless Ugandans, Kenyans, Malawians have got together in very creative ways under very creative civil leaderships to sort out the problems of re-constructing some kind of a democratic society.

In other words, they have not lost the ability to engage in very responsible discussion and it seems to me that we ought to try to get our minds clear as to quite what has been going on underneath very unsatisfactory states in order to preserve this right of responsible discussion. And I hope that there may be some thoughts as to quite how one can explain this creative ability that has been retained in Africa, but apparently lost, say, in Russia.

The second thought I have is a worry about the role of non-governmental organisations, the role of which has been mentioned particularly in Malawi and by Louise Pirouet in Kenya. As we heard about the Malawian ones, they are clearly not disinterested. They have internal constituencies for whom they speak. They have perhaps, more importantly, external donors and constituencies and audiences. They do, very literally, honeycomb the states. They perform the functions which many would regard as being right and proper for the state. Very often, they are building up private baronies, particularly perhaps in Kenya, that I know quite well; baronies funded by and in direct wireless communication daily with far-right Christian groups in the United States with political agendas of their own which are not the political agendas of Kenyans. While in many ways I applauded what Keith Hart said this morning on behalf of the African Studies Centre in welcoming you to this conference, I do worry about what happens when you have these NGOs in control, rather than states, particularly NGOs which are based in the middle west of the United States.

It seems to me, and this raises my third worry, that we lack an international political theory to cope not only with the private transnational baronies of NGOs but also with international relations generally. I am very sorry that Baroness Chalker was prevented by another engagement from being present since there is a question which I would very much like to put to her. It is a reflection prompted by Dr McCorquodale's comments this morning which came certainly as news to me but then not being an international lawyer that is not surprising. Apparently in international law there exists no longer any form of state sovereignty — at least in the sphere of human rights. Domestic affairs are no longer an excuse for people to beat their own citizens around the head and that was certainly news to me — good news.

My problem is that if that degree of state sovereignty no longer exists then we also have to think very seriously indeed about international entitlements. And one of the problems, the problem perhaps for Africa now, is that its states seem to have no kind of entitlement at all in the international, economic and political systems.

Nobody could care less about Africa really. And I do very much wonder how it is possible for the so-called international community, which means in other words half a dozen powerful western countries, how we can make demands upon African states without also conceding the entitlements to have the resources to carry out the demands which we have placed upon them. This is a matter which demands really serious discussion, and which brings me on to my final point.

I found it astonishing really that this session was called "Making Constitutions and Raising Public Awareness". There is no lack of public awareness, certainly not in Kenya and I doubt there is in Uganda or Malawi either. In fact, my earlier remarks suggest there is a very great deal. Certainly whenever I visit Kenya, I engage in far more sophisticated, political discussion than is ever really possible in this country, unless one chooses one's friends very carefully. The political journals and the weekly press are certainly far more sophisticated than you get in most of the British press, remembering how many people read certain newspapers and how few read others. So it seems to me there is no lack of public awareness at all and in fact none of the speakers actually mentioned the problem of public awareness realising that in fact that was not the problem they had to address.

With this very considerable public awareness of which one is immediately conscious when one gets to Africa, one is bound to agree with Christopher Forsyth that what this public awareness needs are simply basic political rights to make itself heard. But whether the West can insist on this basic political right as part of the conditionality of aid and so on is, given my previous reflection, rather questionable. If Africa has no international entitlement then the amount of demand one can put upon its states is, it would seem, in question.

My final reflection would be that if there is a need for public awareness it is in this country and it is up to people like us to raise seriously the question, which is why I regret that Baroness Chalker is

not here, of Africa's international entitlements to have the resources to carry out the demands which we place upon her.

## Discussion

*Christopher Hart, FCO Research Department, 1966-92*

In Kenya particularly, the President's idea of calling in foreign international experts is obviously not needed because the Kenyans themselves have come up with very good ideas over the years but perhaps in the recent renaissance they have lost touch with some of them.

In 1969, some leading members of the opposition, now dead, in particular the late J.M. Kariuki and the late John Mary Seroney, came up with the declaration which led to the amendment of the parliamentary and presidential elections that year. They proposed a primary system in which there would be universal, adult suffrage to select the best candidates to stand for each party — which would be an excellent system to be introduced in this country as it would get rid of the problem of dud MPs. It was, in the event, used after the banning of the opposition purely to select the best among the KANU candidates in the elections from 1969 up to 1983. But what it actually did do was to produce a remarkably high quality of Parliament.

I had the privilege of observing the Kenya Parliament for a couple of years. It seemed to me a great shame that before the 1992 elections when hurried changes were made to the Constitution, parties were left to carry out their own primaries. There was also the tricky rule that the President would have to get 25% in 5 out of the 8 provinces, and that the distribution of constituencies, which was really devised by the British to prevent Kenyatta getting a majority and therefore favoured KANU in the 1963 elections, was in essence retained in the review, so that one had a very slanted table. One also had very rushed party primaries because the Attorney General made a sensible

printing error that cut down the time for holding them. And I think one of the reasons therefore for the disappointing outcome of multi-party democracy was the botching of the revision of the Constitution for those elections.

### ***Keith Hart***

I noticed in the abstract of Michael Twaddle's paper which he did not have time to refer to, he mentioned the debate on the form of government, especially between the strong centre and the more federal constitution. It seems to me that in response to John Lonsdale's remarks, everyone ought perhaps to consider what are indeed the competing forms of government in the world today, especially since there is, as everyone knows, a challenge being posed from a number of quarters to the idea of a strong centralised nation state.

The federal idea which the Americans pioneered and which has now gone out of fashion entirely, even in their own country, is, I think, possibly growing stronger. A system that would be one in which we could emphasise the greater local self-determination within much more inclusive, including global, forms of political association. One of the issues, in my opinion, is the argument that exists in a particular context between federal and more centralised, national forms of government, and that is in turn linked to the issue of the character of international polity.

### ***Michael Twaddle***

The problem in Uganda about federalism is two-fold. There is, on the one hand, an attempt both in the Odoki Commission's recommendations and in the preferences of the current Government for a policy of decentralization, to transfer functions of government from the centre to the district level. The question is left open whether a certain number of districts that so wish can aggregate themselves into larger entities, and thereby create some kind of federalism or quasi-federalism.

That is one issue related to the debate about decentralization, which, of course, is favoured by international agencies like the World Bank for its supposed efficiency and its functionality as regards eliminating corruption or making it more transparent.

The other problem, and the greater one, is the Buganda problem in Uganda: the fact that the Independence Constitution of 1962 was a fudge between a unitary constitution and a federal one with Buganda having federal status and no one else having federal status in the country. This proved unstable in 1966 when civil war broke out between representatives of Buganda and the central government, and led to the dismantling of all kingdoms constitutionally in Uganda under the 'Pigeon-Hole' Constitution.

Now as a result of the massive survey of local opinion throughout Uganda, the preference for kingdoms to be revived was very strongly emphasised in most of the areas of the country that formerly had kingdom status. In fact, Yoweri Museveni pre-empted the work of the Constituent Assembly by reviving the kingship of Buganda. All the other kingdoms, except the kingdom of Ankole, have also been revived in response to local opinion, which is extremely paradoxical in view of the assumption that the universal franchise will go hand in hand with economic modernisation, and that that is what it is all about.

It has been a case of what Sam Huntington called 'the clash of civilisations', that seems to be at work here and there is a much greater division in political values evident as a result of the Odoki Commission's work in Uganda on the issue of federalism. This is possibly one of the things that might even wreck the work of the current Constituent Assembly — some kind of compromise over the demand by Buganda particularly for some kind of stronger federalism, possibly based upon a number of districts to which functions had been devolved from the centre of some significant kind, and those coming from areas of the country which had more egalitarian-dominant political cultures. There are, therefore, two aspects of the federal issue within the country.

many constitutional resettlements which required the setting up of state apparatus, state parliament and the mechanisms for state democracy within the one nation state and it required a tremendous amount of manpower and resources.

*Louise Pirouet*

One of the constitutional models that has been discussed in Kenya is that of a federal or semi-federal state. The danger of ethnic strife in African states, and in Kenya in particular, is very real, judging by what has happened regarding strife in the Rift Valley. The second constitutional model is, of course, the maintenance of the one-party state. While most of the church leaders stood behind multi-partyism, one of the strongest critics of the government, Bishop Muge, was very reluctant to go down that line and argued for the retention of a one-party state because of his fear of tribal conflict.

Two other models have been put forward. One is that there should be a constitution of national unity on the South African model and there is one group which is dedicated to promoting that model. One problem is that apparently Majimbo, the more regional kind of constitution, has already been ruled out by President Moi at some point last year. I am sorry Sir Roger Tomkys, who was High Commissioner in Kenya for a couple of years, was not able to make it this afternoon. When he and I were talking a while ago, he wanted to see a return to the Majimbo constitution and he might have been able to argue for that.

The other possible model is, of course, the multi-party constitution. There is also a group of people that are saying to themselves, we have not worked out exactly what is going to work in African elections and we've a long way to go before we find out what is going to work at all. Uganda has been trying to learn from the roots upwards but it is not clear that that is succeeding either.

**Keith Hart**

If I could add one more point concerning the region, which includes Uganda, in the wake of the Rwanda crisis. There is a real question as to whether security in the region can be achieved within the structure of existing nation states acting independently. In other words, there is a case for federal regional security.

**Michael Twaddle**

Yes — one further complication is of course that there is pressure from the World Bank to reduce the size of the armed forces of local states to such an extent that they will be incapable of defending their countries. There is clearly a balancing act that has to be resolved.

**Kevin Bampton**

The issue of federalism within the Malawi constitutional discussions did not really come up and after the election AFORD in particular were saying that the Committee did not discuss this issue very much at all. Three general rather than specific comments on federalism. Regarding national identity and its boundaries, there are perhaps no strong ethnic reasons for these national identities. Quite often, nationalism was a function of fighting colonialism rather than any kind of uniformity of ethnic groups or cultures within the state, which leads to the problem that the state is inherently perhaps a little bit unstable because there are states within the state.

Now one might say that the obvious thing to do is to enfranchise those states within the state as it were, by creating a federal government. But a nation state like Malawi has one international entity and therefore resources, often international finance, donor resources, etc, are coming in through central government, and once you break those states down, the competition between federal units within a country becomes very difficult, and balancing financial and economic issues within a federal system becomes very, very difficult. Added to that the resources to actually run a federal state are quite considerable. I was carrying out work with regard to one of Nigeria's



***Roger Briottet, Director, World Development Movement***

I want to comment on the Ethiopian case. I have been in Ethiopia during most of the period when the constitutional debate was taking place. I found it very interesting that when the new provisional government came into power in 1991, one of the major promises that it made was to put in place a democratic constitution in Ethiopia. In 1993, I also happened to be there when a constitutional conference was held. I noticed how quite a large number of experts, mostly American, were trying to tell the Ethiopian rulers and politicians how the American Constitution could best be used to construct an Ethiopian constitution.

In Eritrea, a number of options were put to the public. For there was a long period of time during which the members of small groups at the local level were consulted, not on the draft, but on various options. The result was that the emerging draft was not only very far from what foreign experts were suggesting or producing at the beginning but was also relatively different from what the regional conferences were saying, in terms of women's rights, for example, and in terms of local autonomy and self determination over their future.

There is, therefore, the need for time for people to understand, not only the nature of the constitution, but the very nature of their state before they can actually think in constitutional terms. I think that the Ethiopian example is an interesting illustration of this.

***David Throup, FCO Researcher and Lecturer, Keele University***

I am speaking in my academic gown. I am a little nervous about what Louise Pirouet had to say. For it seems to me that, despite its faults, Kenya's political culture is relatively open and relatively benign. The fact that the bishops were able to speak out, the fact that the Law Society was able to speak out, means that despite its problems Kenya still operates within a kind of political democracy. And that, I think, is very evident with what has happened in the election, however much it was rigged, and I do think it was rigged.

President Moi did permit the return of 80 opposition members of Parliament who have continued to function fairly effectively. Failures are more a failure of the opposition rather than a failure of the political system.

If you think about Ethiopia, which the last questioner just mentioned, it seems to me that Ethiopians would be very, very fortunate if they lived in a political system which was anything approximating to that which is within Kenya. When you have virtually the whole Central Committee of the Amhari People's Organisation (APO) in jail for political offenses (except drug and other criminal arrests), you cannot hope to have a benign political system, you cannot hope to have realistic elections in Ethiopia in May this year in which any serious opposition party is likely to stand. APO is not likely to stand, the Southern Conference is not likely to stand, the OLF [Oromo Liberation Front] is not likely to participate. All you are going to have is a myth of ethnic sub-entities of the EPLF [Eritrean People's Liberation Front] participating in the elections.

If we are talking about constitutions, political systems and civil societies, not all African states are the same. Some have managed to preserve, as John Lonsdale has suggested, the rudiments of a working pseudo-democracy. I think Kenya fits very much into that category, much more so, I suspect, than Malawi, where I think the oppression was much greater for much longer. Probably much more so than Uganda where 20 years of civil strife undermined and destroyed the kind of political system which worked. There is damage in Kenya but I think that underneath there is an awareness of political debate, there is an awareness of the law within which you can operate.

When opposition members of Parliament get arrested in Kenya they tend to get arrested for three or four days as a shot across their bow. There is a warning to those arrested that they are treading on the verge of political impropriety and sedition but they do not actually remain in detention for very long. They come out again and are allowed to function after having had that open warning. I think we need to think about this and consider the kind of hierarchy, if you like, of the vitality of political institutions within African society. And

however appalling it may be and however much we may dislike President Moi, Kenya has those kinds of fundamental rudiments of a political system in which everyone knows how to operate.

With regard to the sort of 'cat that was let out of the bag' by Keith Hart, the federal question, I think that is potentially, fundamentally very dangerous in a great many African states. I would be much less convinced than Dr Pirouet that Majimboism — regionalism — has been abandoned, and what you will see at a constitutional convention in Kenya will be a fully fledged Majimbo strategy on the part of the government, giving rise not simply to the present eight provinces but a whole kind of political geometry designed to cut up the opposition areas. One could probably expect the Gusi to be bought off by being given their own province, and the Embu, the Meru, and the Kamba certainly, to be bought off by being given their own provinces.

A federal system and the separation of powers between centre and periphery in Africa, is warped with dangers in a place like Kenya. They exacerbate ethnic rivalries. In Kenya, in the short term, I think it will enable the government to co-opt other ethnic groups whose support has hitherto been marginal, further isolating the Kikuyu and the Luo in Central Province and in Nyanza Province, although they will, of course, have a modicum of control over their local affairs. In my view, there is yet another kind of issue — what we mean by separation of powers and what we mean by federalism. There are pros to it but there are also very severe ethnic disadvantages.

#### *Louise Pirouet*

I am very grateful to David Throup for both parts of what he has said. As to the second set of his remarks about Majimbo, yes, I agree that it is probably still on the agenda and being discussed.

The fact that Kenya is so much better than her neighbours is well understood by Kenyans, and only too well by outside powers who could have made sure that she was not nearly as bad as she is. It is all very well to say that Kenya is much better than her neighbours.

That is not saying much. Much better than Idi Amin? Than Mengistu Haile Mariam and Siad Barre? Than what is going on in the Sudan at the moment? What a compliment!

This is, I suppose, what prompted Mrs Thatcher's remarks at the time when Amnesty International was producing a document on torture in Kenya, where I am sorry to say, they do not just put you inside for two or three days. I have met people who have been inside for a lot longer than that and have been tortured and these include people I know. Mrs Thatcher said we had no human rights quarrel with Kenya. Well, I have plenty.

It is Kenya's tragedy that instead of stepping in to stop the rot, again and again, the Western powers and Britain in particular who have the leverage of aid, have said "Oh well, she's not nearly as bad as her neighbours". It is not good enough, and they have not helped take the preemptive action which might have stopped the rot. Nyayo House in Nairobi, which the University looks out towards, is where in underground cellars people are tortured and held in detention for years without trial. There are some Amnesty researchers here who may be able to amplify this. My colleagues at the university were among them, including Ngugi wa Thiong'o, who was held for years.

A series of politicians, although nothing like as many as in Uganda, namely, Tom Mboya, J M Kariuki and Robert Ouko have all been murdered in extremely strange circumstances. Everybody thought that Bishop Muge's car crash was not an accident because it was such a well known means of getting rid of people. There is rampant corruption in Kenya. Kivutha Kibwana, who is the Dean of the Law Faculty of Nairobi University, has just produced within the last ten days a document on the extent of corruption among the police and among lawyers themselves. What chance have you got of a fair trial in those circumstances?

I would plead with the Foreign Offices of various western countries who have aid leverage not just to say, "Kenya's not too bad", but to say, "For heaven's sake let's help her to be really decent."

***Lindi Rubadiri, Lecturer, University of Central Lancashire***

I want to direct this to Rosemary Kanyuka. As a Malawian woman, I am very proud of the work that you are doing on the constitution regarding human rights for women in Malawi. I think that as a lawyer you have a strong platform on which to speak and I was wondering how those of us in other professions could actually contribute in Malawi to issues as far as women are concerned?

***Rosemary Kanyuka***

If you wrote to the Legal Resource Centre, with articles or information, we can organise seminars, for example. At the moment there is so much excitement about gender issues in Malawi. Everybody is very interested. In March we are having another conference.

***Christopher Carey, Church Missionary Society***

Coming back to the Uganda example, I should like to know if the panel sees the political pathway chosen by Museveni for Uganda as an anomaly among other multi-party democratic ventures in Africa, or an example of a valuable alternative model — non-party, non-tribal, non-religious. I feel that donors have continued to assist Uganda, not because they see it as a clear movement towards democracy, but because they cannot evaluate what is happening there. It appears that donors respect Museveni as a pragmatist whose system to date is working, so the aid keeps flowing. Since the new RPF Government of Rwanda all came from Uganda and were in Museveni's NRA movement, is it possible that Rwanda might adopt a similar non-party, non-tribal, non-religious political system to unite the country?

***Michael Twaddle***

Briefly, I would say that I am personally optimistic about the Uganda experiment. I do think the Odoki Commission is a quite remarkable piece of work, which repays reading, not only by Uganda fanatics

like myself, but by anybody concerned with new constitutions in Africa. With reference to Rwanda there is a very interesting precedent in the shape of the Human Rights Commission which was set up almost at the beginning of the Museveni government to review atrocities committed under earlier governments. This Commission has had many sittings and has led to a lot of publicity and discussion of earlier atrocities and current ones. But it has not been empowered to initiate legal actions itself and this has meant that such legal actions as have been undertaken, have been quite separate. Because of their comparative infrequency, and the general policy of reconciliation between differing factions in the country attempted by the Museveni government, these actions have led to a really quite successful lessening of tension over the last ten years in Uganda and one looks very hopefully to Rwanda whose Patriotic Front is modelled so closely on the Uganda National Resistance Army, indeed some of whose members were themselves members of it in 1986. The principal fear with reference to Rwanda surely must be that there is so much concern to seek retribution through investigations of crimes of genocide last year that it may get totally out of hand and lead to the very reverse of reconciliation.

***Nigel Wenban-Smith, British High Commissioner to Malawi, 1990-93***

Separate from the issues relating to citizens' rights and the recurrent abuses of executive power, there is the difficulty of differentiating practical opposition in the government process from disloyalty to the Head of State. While Africans' supposed cultural preference for executive Heads of State is well-known, perhaps, in the light of experience, constitution-makers should now consider what scope there is for introducing, as it were, 'constitutional monarchies'.

***David Bolt, Retired Priest, Magistrate & Judge 1946-1970, Malawi***

We have heard a lot today about grassroots and the importance of how constitutions will affect those at the grassroots. The people in my day who exercised most authority at the grassroots level were the chiefs and the headmen who had both judicial functions in some cases, and also administrative functions, sometimes based on native

law and custom — traditional law and custom as they call it now of course — which differed from one area to another. This traditional law and custom was not codified or written down so you have got different decisions in different parts of Malawi. I remember one case in the late 1940s where someone was sent to prison for adultery and this was actually upheld by the High Court in Malawi insofar as it was said to be within the native law and custom in that area. I wondered if under the new Constitution there is a role for the 'mafumu' — the chiefs and headmen?

The other question concerns those with claims for a violation of human rights, what remedy or redress would these people have? Again, in my day, after independence, the Constitution provided for anyone with a complaint to seek redress before the High Court and the Supreme Court. Where would it end now? Under Malawi's new Constitution, can one go beyond that to some greater court, some outside court?

**Rosemary Kanyuka**

To respond to your first question, yes, there will be about 50 chiefs in the Senate. At the constitutional conference, there will be 48 chiefs, two chiefs per district. In the new Malawi, the chief is going to be paid for his job in the village. As you see, they are being recognised.

**David Bolt**

What will they be doing at the grassroots level? Will they still do what they used to do, namely, try cases? Chiefs and headmen used to have quite considerable authority, which under the old system was referred to as indirect rule, with most of it bearing on human rights.

**Rosemary Kanyuka**

They will still try cases involving day-to-day matters. For example customary cases where women are fighting over land. In fact, their judicial roles are emphasised. They are more recognised now.  
[End of Session.]

# **SESSION 3**

## **The Contribution of NGOs and the Churches: Local and External Networks of Co-operation**

*Chair*

**Jim Lester, Esq, MP**

*Member of the House of Commons  
Select Committee on Foreign Affairs  
and Chair of the Africa Committee of  
the Refugee Council*



## The Panel

### *Speakers*

Mrs Annie Sajiwa

Rev Dr Chris Wigglesworth

Mr Richard Carver

Ms Jane Deighton

### *Discussant*

Dr Ian Linden

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### *Annie Sajiwa*

*(First Secretary, Political, of the Malawi High Commission (appointed in May 1994); served in the Ministry of External Affairs in Malawi's Protocol Office; desk officer for Africa, Europe and the Commonwealth and at the Economic Desk of the Ministry.)*

My presentation this afternoon is on the Malawi Government's response to pressure during the period leading up to the referendum and to the general elections. The referendum took place on 14 June 1993 and the general elections took place on May 17th 1994. So without repeating most of the things that the previous speakers have

said, I will just give you a little background about the state of affairs: the position which the Malawi Government adopted; and how it tried to resist change, particularly those proposals which addressed human rights and good governance.

First of all, before there was open talk about the referendum and the general elections, the position the Government adopted was really that of trying to deny anything that was coming from the outside, let alone from its critics within the country. Pressure groups within the country had not yet gained the strength they would ultimately have. Therefore, all the criticisms levelled against the Government by the international community — this would include donor governments as well as international human rights organisations such as Amnesty International — were simply regarded by the Government as inaccurate, malicious products of embezzlers. Most of the reports were actually handled with that attitude.

As a result, the more the Government tried to ignore the criticisms, the more the criticisms grew. Having been in the Ministry for External Affairs for almost eleven years, I saw the tension in the Ministry itself because its function was to liaise between the Government and its international critics. The situation continued in this fashion until 1991 when the international donor community actually came up with a concerted position to try and force the Government to do something about observing and respecting human rights and good governance. The donors set out a programme or agenda which the Malawi Government had to embark upon, and they eventually withheld aid and other than humanitarian assistance.

It was during this period, when these demands were being made upon the Government, that there was a serious drought in 1992. With the drought and the agenda set by the donor community, particularly the European donors, the Government was in a corner. The European Community had set out certain issues they wanted the Malawi Government to address because of the numerous violations of rights in connection with these issues. These included detention without trial, prison conditions, freedoms of association, of

expression and of assembly, and the forfeiture of criminal jurisdiction in traditional courts.

As a result, other donors, including the United States, started employing similar tactics, and a document was produced by certain parties for presentation to the U.S. Congress for debate. This document was intended to encourage Congress to take measures similar to those taken by the European Union and to suspend aid. Upon getting hold of that document, the Malawi Government produced a document in response, entitled *The Realities About the Human Rights Situation in Malawi*. This document presented a counter-argument to all the points raised in the U.S. document in an effort to convince the diplomatic community that the U.S. view did not depict the real situation in Malawi.

This document was sent to all diplomatic commissions abroad, who in turn had to prepare responses in their countries' papers. It was a time when these Commissions had to be on the alert, to be aware of what was in the papers and to come up with rebuttals. As I have already indicated, the more the Malawi Government tried to rebut the criticisms, the more they invited the interest and the excitement of the international community. As a result, there was confusion within in the Malawi Government itself.

At the same time that interest from overseas was increasing, local pressure was mounting at home. One of the pressures was the pastoral letter which we have heard about in earlier presentations. This, I must say, having been in the country at the time, was what really 'turned the tables' because the moment it was issued, everybody was excited and talking about it. The Government knew what was happening, so it issued orders not to let the document be circulated and banned it. It also issued orders of deportation to most of the Catholic Bishops concerned, which caused an international outcry demanding that the Government rescind its decision.

As a result, in April, the Government received an envoy from the Pope who came to plead on behalf of the Catholic missionaries. In early June, the Government received a delegation from the World

Alliance of Reformed Churches (WARC) and Malawi's Church of Central Africa Presbyterian delegation which had come to see the President and talk with him regarding the letter and the decisions taken in response to the letter. The results were positive. Shortly following the papal envoy, the President actually announced in Parliament that all the misunderstandings that were there between the Church and the Government had been sorted out. The Government also decided to rescind the deportation notices.

The most encouraging development for the people of Malawi who wanted change was the announcement following the WARC delegation that from then on, the Government would be talking to a representative body from the pressure groups and the non-governmental organisations. In response, representatives from Malawi's religious bodies, its legal and business communities and political pressure groups (some of which had been operating underground) formed the Public Affairs Committee to engage in consultation and dialogue with the Government, which was in turn represented by the Presidential Committee on Dialogue (PCD).

When the donor community met in Paris in May 1992, the decision was made to insist that the Malawi Government had to produce a programme of action regarding the areas I mentioned earlier: freedoms of assembly and association, detention without trial and so on. As a result the Government had no choice but to come back home from the meeting with the intention of actually implementing what the donors had asked it to do. Immediately after its return from that 1992 Consultative Group meeting, the Government amended the Preservation of Public Security Act and the Forfeiture Act.

At the same time that the meeting was taking place in Paris, arrangements were concluded to allow the International Committee of the Red Cross to visit Malawi prisons. The more the Government tried to concede to the demands, the more Pandora's box was opened and one thing after another emerged from it. It was really unbelievable in a country which had been under such pressure and such oppression for so long.

With this background, we now find that arrangements were being made to hold a referendum, and that the Government was still trying to tough it out. It knew that it would be in a better position to win the referendum if it denied certain things to the political pressure groups. The Government decided to set the referendum for March 1993 which gave very little time for the pressure groups to do any campaigning. When the Government set this date, the pressure groups refused to accept it, making their position known through the PAC and PCD dialogues. A June 14th date was agreed on for the referendum.

The Government also used its muscle to deny access to the mass media by the pressure groups. The radio was not allowed to cover the campaigns by the pressure groups, and since the papers were also Government controlled, they could not cover much material put out by the pressure groups either. The pressure groups therefore raised this issue with the donor countries. I remember seeing a group from the EEC Heads of Missions in Malawi coming from the Ministry with a *démarche* to present the grievances of the other parties and force Government to do something about them, because there was a really serious disagreement.

In spite of this pressure, we find the Government still trying to make it appear as if things were improving. All the while, there were still some secret activities taking place. For example in the Central Region where the ruling MCP were in a majority, the Nyau traditional dancers were threatening people not to vote for multi-party democracy but to vote for a single party state or suffer the consequences. The MCP campaigners were arguing that there was no need for change to a multi-party system. They argued that single party rule had not been imposed upon the people, but was what the people wanted because multi-party rule had existed at the time of independence and the other parties had "died", as they put it, a natural death. They also argued that ever since then the MCP had "delivered the goods", people were well dressed and were sleeping in good houses as well as having enough to eat. Yet, as I've already pointed out, it was actually a period when there was famine, and the country was really in need of food.

So in spite of all the international pressure, there were continued rumours of threats. As a result the people began to voice their worry about what was happening, and despite all the threats, 63% of the people voted for multi-party rule in the referendum. Since this was the verdict of the people, the Government had no choice but accept it. And after accepting it, the Government wanted to reassure the international community, since they greatly feared that more international aid might be cut. They therefore told the international community they would do what it wanted. Eventually a programme of action was drawn up which included a continuing dialogue between the Presidential Committee on Dialogue and the Public Affairs Committee, the repeal of the relevant provisions of the Malawi Republican Constitution to allow for the legal existence of opposition political parties, a time table to be agreed upon for a multi-party general election within a year, to be contested by all the new political parties and the Malawi Congress Party, plus a general review of the Constitution and existing laws to take into account human rights concerns wherever these had been raised.

In spite of this programme the Government still resisted change, and though it was preparing for the general elections, as a result of its defeat in the referendum, it still did not want to give up hope. The choice in the referendum had been whether people wanted to continue with a single party or switch to a multi-party system of government. Rumours began circulating among the parties and the people concerned that the Government was hiring experienced party people from neighbouring countries to come and assist in the rigging of the general elections. Because of the freedom of expression in the country and in the press, this rumour was all over the news media.

People were able to read about alleged Government delegations being sent to this country and that, and once again it looked as if the Government was reneging on its expressed intentions. Because the Malawi Government felt there was a need to oversee the transition process, they created the National Consultative Council and the National Executive Committee, on which there were to be representatives of all the parties. The Council was made up of seven representatives from each political party, and other pressure groups

and the Committee had two representatives each. These bodies met until the elections on the 17th of May 1994, which ushered in the new Government.

In view of this and what previous speakers have said, it is clear that the new Government needs assistance from non-governmental organisations, as well as from the international community. We have heard about the unconstitutional practices which are taking place in the country. So I will echo that we still need your efforts. It is important and apposite to note that Malawi is one of the countries you are featuring at this meeting, and we still need the support of all of you to ensure that this transition goes on smoothly.

**Chris Wigglesworth**

*(A geologist and theologian, he has spent considerable time in India, Sudan, Malawi, South Africa and Zambia. He was a lecturer in practical theology at Aberdeen University, and since 1987 has held the post of General Secretary to the Board of World Mission, Church of Scotland.)*

It is interesting to be here and to listen throughout the day to a whole range of fascinating topics. I do not want to spend too much time going over historical events which people here already know much about. There are a couple of points however I would like to raise.

I have always believed that the churches can sometimes claim too much for themselves and their role in stimulating change, partly as a reaction against many situations in which they are regarded as being so much a part of traditional value systems that they do not really have any future role. However, in the case of Malawi, for a variety of reasons, not only was the participation of the Catholic Bishops and the other churches decisive, but it has an important part to play in the present situation.

One example in particular which has already been stressed today, and which religious bodies should continue to stress, is the way in which issues of civil and political rights are inseparable from

economic issues: one cannot really separate economic, political, cultural, ecological and religious aspects when looking at a society and the way its constitution should develop. There is an inter-relationship which is extremely important. It is vital to ensure that a balance between these aspects is being maintained in what is being done.

The other point which Dr Lonsdale mentioned is the issue of international entitlement. This is extremely important. There is something a little precious at times in saying well, perhaps this could have been done better or that could have been done less, when the problem which clearly affects Malawi, as many other African countries at the moment, is the lack of resources to do the things which people have agreed they want to be done. The most basic need is for the infrastructure of a society to be provided. One of the things I hope will come out of a discussion like this, is a fresh resolve to continue pressing the people with the resources and with the authority to do more about providing this basic need because without that enabling, a lot of other things could come apart in the wake of a sheer failure to tackle enormous and mounting social problems.

The role of the Church of Scotland in Malawi is unusual because it is the only country with whom we share a very close and long-lasting link. And I would want to argue that the period from the coming to power of Dr Banda until the Bishops' letter was, in fact, a kind of atypical period of collusion among established power bases. In my talks with people in the Church of Scotland who knew the situation a lot better, I sensed that among members there had been a great feeling of hopefulness about the new political situation which independence was expected to bring and yet a great reluctance toward getting involved for fear of slipping into a kind of colonial attitude. The feeling was that the people on the spot had to get on with things. For a long time, while providing economic assistance and skilled personnel that was clearly needed (and still is), the Church of Scotland leaned over backwards to respect the self-government rights of our sister church in Malawi wanting it to make up its own mind on various things. This approach was partly the



result of a corrective mechanism to counter the colonial mentality which assumed that direction should come from outside. So, if the Malawi church leadership felt that the best thing was not to say too much then we had to be guided by that rather than appearing to interfere. But as everybody knows, the situation towards the end of 1991 was clearly deteriorating. One factor not often mentioned is the effect of the coming to power of President Chiluba in Zambia, particularly the impact of his visit to Malawi in which the idea of multi-party government came back onto the agenda in this part of Africa.

When President Banda was reported as saying that the 'outrageous' statement by the Catholic Bishops was simply a reflection of Catholic-Presbyterian animosity such as goes on in Britain and Ireland, we were given the opportunity to put the record straight. It was the kind of situation (and such small details matter) where you get a phone call from BBC's Focus on Africa and they ask "What do you think about so and so?", and this is the first you have heard of the matter. So I asked that they fax us the information and told them we would get back to them within the hour.

A few phone calls later, we had the chance to make these points clear: Dr Banda was not an Elder of the Church of Scotland; we agreed with the Catholic Bishops; the things they were saying were coming out of the lives of the people of Malawi; and the people had been saying these things quietly for a long time and seeing the situation worsening around them. It also allowed us to send the message that we in Britain were learning to co-operate as Christians. Afterwards, we were somewhat surprised by the depth of the reaction in Malawi, the chords that rang within the country. Many years earlier, the people who were suffering from the police state in Malawi had said to us "At the end of the day, you will know when you must speak out and we leave it to you. It is up to you to do what you think is right." It was an example for me of the meaning of the international relationship between Scotland and Malawi where we could understand what the people were wanting and recognised the moment for speaking out.

Also relevant to any of these constitutional questions is the underlying need for trust in relationships, something that has already been mentioned. Maybe at times people outside are hasty. A delegation from all Presbyterian Churches around the world went into Malawi in June 1992 to discuss with the Church of Central Africa Presbyterian details of a joint letter to be sent to President Banda. One of the values of being together was that we had with us a respected black Christian from Lesotho. He was able to talk out of his experience and we could put that alongside our attempts to understand what it was our sisters and brothers wanted. Subsequently, we were able to put together a joint letter which was far more powerful than any kind of unilateral conversation could have been. Our letter was also strengthened by the fact that we had been able to talk with fellow Christians from the Anglican and Roman Catholic Churches, both inside and outside Malawi.

We experienced what many others in Malawi and in other countries have experienced in the way of intimidation, attempts to divide people, attempts to appeal to sectional interests. Religious bodies have an important role to play in resisting the short-term appeal to narrow self interests. Out of the situation in Malawi, in an encouraging way, there has been an ability to try and co-operate across denominations, across sectional interests, across religions, too. One of the great and perhaps not adequately recognised achievements of the church-led Public Affairs Committee (the official body which engaged in dialogue with the Government on the terms of the 1993 referendum vote and which subsequently has had its shortcomings and its critics) was its ability to hold together denominations and different regional interests and to incorporate the Muslim Community leadership into the discussions. This was despite all the pressures at work which could have easily pulled them apart.

After the referendum in 1993, there was a long time lag before anything happened because of attempts by the Malawi Congress Party to divide people and stop them co-operating. These tactics contributed to the haste in which the constitutional work had to be done. The ability to co-operate in spite of these pressures is something to hold onto. It sprang out of consultation and out of a

creative use of the media which is, for me, another lesson we have to learn for our practice elsewhere in the world.

To give you a useful example of this, it was possible to come out of a meeting in central Malawi, to get on the phone to a foreign correspondent in the United Kingdom, and then for the BBC's World Service to produce a bulletin which was heard in Malawi within a half hour or so. We were finding that, working as we were in Lilongwe, by the time we had travelled north to Mzuzu the information we had sent to the BBC had already been transmitted around the country. Of course the Malawi Government accused the BBC of being politically partial. There is always a danger of that sort of thing. But the speed with which information could be shared greatly altered the situation.

I will finish with the question of integration. We, in the churches, are often sensitive about being regarded as traditionalist. But in our post-traditional society, our post-modern society if you like, people are beginning to recognise that religious institutions and religious questions are important when looking at the future of a nation. And that has to be integrated in a strange way with the way in which modern technology can help accountability. The Malawi Government tried to suppress information sent by fax machines, for example, because the speed in which information could be transmitted inside and outside the country by fax machines helped undermine the government's control of the internal media and revealed its lies and half truths. Faxes, telephones, radio and latterly electronic mail, can be used for greater accountability and greater transparency. We need this holistic understanding of the different components of society, to see how we can use modern communications in our efforts to build up trust and to support constitutional change. And in these matters the churches have a useful role to play.

**Richard Carver**

*(A consultant for NGOs, including Article 19, Lawyers Commission for Human Rights and the United Nations High Commissioner for Refugees, he was formerly the researcher on*

*Malawi for Amnesty International and Research Director for Africa Watch. He is currently writing a book on the history of the Malawi Congress Party government and the origins of the democratic opposition.)*

I am taking it as a premise that one of the necessary checks and guarantees of respect for constitutional rights is a vibrant civil society. I say that not simply because it was mentioned earlier. Nor will I attempt to give you a definition of civil society in these ten minutes, but I can tell you some of the things which go to make up that civil society, and I would include within that the churches, the human rights groups, professional and trade union organisations, the press and other such bodies.

My particular interest is with the human rights groups, and particularly, why the human rights NGO sector in Malawi today should be so weak. The reason for this lies in the very long history of restriction of every sort, not only of political activity, but of every free activity within civil society during the years of Banda's MCP rule. There is a tendency in these sorts of gatherings to be a little bit smug and self-congratulatory about the transition that has taken place. I personally think that the democratic and constitutional process in Malawi was in some ways a failure, especially in that it happened many, many years too late. Unlike other long-delayed transitions, for example in South Africa, the reason was not simply the intransigence of the old government, but a neglect from the international community of a truly criminal nature. Until the changes in the world political order from 1989 onwards and particularly the changes in South Africa, the international community was perfectly happy to allow the situation in Malawi to continue. Dr Wigglesworth referred to things having fallen apart in 1991. I would argue that in many ways — though I would not perhaps have said it at the time — respect for human rights in Malawi was rather better in the late 1980s and 1990s than it was in some earlier stages, particularly the early to mid-1970s when very few international voices were raised.

While it is not part of my mandate here to look at the role of the international governmental community, I do want to consider how

some non-governmental organisations confronted events in Malawi. In some ways I am not well placed to do this because I believe the organisations that I was associated with did a reasonably good job in the circumstances, and I would prefer an independent evaluation. There is no doubt that organisations like Amnesty International campaigned on the question of human rights in Malawi at a time when it was deeply unfashionable to do so. They did so in extremely difficult circumstances because they were not allowed into the country. The possibilities for a free flow of information out of the country were severely limited. We depended upon an extremely small core of very courageous people to supply that information. The strategies used were very simple because they were based upon a real dearth of information about what was going on inside the country.

Almost by default a strategy was devised which tended to focus on big name cases, though that is something I personally do not like very much. For example, from the early 1980s we focussed on the case of Orton and Vera Chirwa, and then later on in the decade, on the case of Jack Mapanje. These were well known people at the international level about whom we could campaign, using them as a way of drawing attention to broader abuses of human rights in Malawi of which we had very little detailed evidence. It was not until from about 1988 onwards that we began to gather more extensive and reliable information about political detention for example.

I would like to comment on the failure of the churches throughout that period because this is intimately related to the current state of the human rights movement in Malawi. This contrasts very starkly with what we have heard about Kenya and the generally very positive role that the churches have played there. Yet many of the Malawian sources that I depended upon were individually members of churches of different denominations — clergy in some instances. So it is clearly not the case that the churches were unaware of what was going on. I would argue that the churches generally, not just in Malawi but in any similar situation, are in a unique position because they are the one section of civil society which has a national

structure and a degree of official tolerance. That was the case even in a state like Malawi where no other sort of dissent was tolerated.

In Malawi, although the state was quite exceptionally strong in African terms in relation to civil society, the church was able to function nonetheless. However, the use it made of such space as it had, was in effect to constantly legitimate the arbitrary power of the government. The reasons for this were somewhat different in the case of different churches. The Presbyterian Church had a historical link with the MCP which made it rather difficult for it to criticise government. The Anglican and the Roman Catholic Churches had a historical anti-MCP bias; at least it was perceived as such, which made them equally reluctant to be seen to be criticising the government, though for a quite different reason. So for whatever reasons, the major churches in Malawi did not speak out critically about the actions of the state.

This is not said just with the benefit of hindsight, nor is it said to minimise in any way the risk of taking such steps. However, I would repeat that the churches were the only organisations within Malawi which were capable of criticising publicly what was going on and criticising it at a time when things were, in fact, far worse than they were in 1991-92. One only has to look at the devastating impact of the 1992 pastoral letter of the Roman Catholic Bishops when it was eventually published to imagine what might have been the effect if this letter had been issued earlier on.

It is a misconception that there was no sort of opposition earlier. It was however, fragmented and of a 'quixotic' nature that had, for example, university students sitting down in 1983 to discuss setting up a Marxist Party of Malawi. By 1989, students were openly demonstrating against the authorities, even though they risked expulsion from college and detention. In the early 1970s, at the time of the worst repression, railway workers issued a manifesto calling for "Bread with Freedom and Peace". Jehovah's Witnesses were driven from their homes, imprisoned, exiled, killed for refusing to buy party cards, yet none of the established churches came to their defence. Poets and dramatists tried to stretch the bounds of what was

acceptable to say, while church members sat on the Censorship Board trying to limit the freedom of expression. When members of the churches did speak out, such as the Reverend Peter Kaleso of the CCAP in the early 1980s, their own hierarchies sided with the government.

I make this point, not because I have any particular animus against the church but because it is in contrast to the role the church has played elsewhere. This has particular implications for the situation now. Unlike Kenya and South Africa or a number of other places, the church in Malawi never developed that radical tradition; that association with opposition and human rights movements. The churches in Malawi were, and probably to some extent remain, deeply conservative. For example, they were a central part of the Malawi Censorship Board right up until the change. I am not certain of the present composition of the Board but I would not be surprised if a number of church representatives were still on it. I attended a meeting in Lilongwe a few months ago and spoke on the question of the press and censorship, in relation to Malawi's international obligations and its new Constitution. It was very clear that the view I was expressing was unacceptable to a number of the members of human rights organisations present. Such is the strength of that conservative dominance.

Consequently a real weakness exists because of the lack of engagement, for many reasons which were plainly the result of the inherited situation and completely understandable. The failure to build up human rights groups in the campaign against the old government, puts them in a very weak position now, both in terms of their own experience and in terms of their own moral authority, in relation to the new government and in relation to the protection of the constitutional order.

An example was mentioned in passing this morning about a human rights group intervening on behalf of former President Banda because of his properties being confiscated. Then too, human rights group intervened on behalf of the Inspector General of Police because of an alleged violation of his employment rights. In the latter instance,

there may be a case for this, but in the former, in my view, there is absolutely no case at all. In a society where rights are routinely violated on a daily basis, the fact that human rights groups are worrying about the number of houses owned by the former President is an indication of the level of development of that movement. It is not encouraging for the role that civil society and human rights groups in particular may have to play in the future in the protection of constitutional rights.

It might appear that I am arguing very strongly the case for the international human rights groups and against the churches. However, what I found quite disturbing was the way in which a number of international human rights groups, who had played no part in the campaign against human rights abuses when they were at their most serious, moved in rapidly once the transitional period began. This is something that has not yet been mentioned, that there is an international fashion in these things.

Anyone who has taken part in election monitoring, as I did for the first time in Malawi, finds a sort of "old boys club" of people who go from democratic transition to democratic transition, spending a few days here and a few days there, and then pronouncing on whether democracy has been achieved or not. This invariably happens because of the amount of money that has been invested in the transitional process. I was concerned to see even some international human rights NGOs on that bandwagon. And the reason again? It is a sorry fact that the reason is money. NGOs follow where the funds are, the same as everyone else.

Again, the sad fact is that when abuses in Malawi were worst, funds were not available from international donor institutions, which is why it was a member-funded organisation like Amnesty International which took up the situation and not anybody else. Of course international attention was very important in the transitional period and perhaps Jane Deighton, the next speaker, will talk about one mission which played an extremely important role in safeguarding the transitional process. There exists a kind of gravy train which people jump onto for a short period. Precisely because it is a gravy



train and because it runs for only a short period, these organisations are not there to provide long-term support, either for the development of institutional safeguards, both internationally and perhaps more appropriately for the local NGOs, or for the long-term development of the human rights NGO community.

In conclusion I find myself somewhat pessimistic, while, like everybody else, I am at the same time encouraged and surprised by the speed and the depth and the peacefulness of Malawi's transition. I am pessimistic because I do not believe that fundamental changes have actually taken place in Malawian society, changes in the way that Malawians perceive their relationship to the state and the exercise of their rights. One reason for failure is the weakness of the human rights NGO community in the struggle against the Malawi Congress Party government, and its lack of roots.

### *Jane Deighton*

*(A solicitor specialising in civil liberties and a member of the Law Society of England and Wales, International Human Rights Sub-committee, she was a member of the British Lawyers Human Rights Delegation to Malawi in 1992.)*

I want to tell you about a very basic human right. It is fundamental to the criminal justice system, and, in this country, stems from mediaeval times. It is the right of silence. That is the right of a suspect who is arrested and taken to a police station, or a defendant in a criminal court, not to incriminate him or herself, but to stay silent. Yet it is an almost empty right, and so ineffective is it that it was the basic cause of some of the grossest miscarriages of justice seen this century in this country: the basic cause of the Judith Ward conviction and the Birmingham Six convictions. So widespread is its emptiness that only some 15% of people arrested by the police exercise it. And I think it helps our discussion today to inquire into why it is so ineffective.

The first reason is that an awful lot of suspects do not know about it. They are ignorant of their right to remain silent. The second reason is

that even where they do know about it they are too frightened to exercise it. They do not have the will to enforce their right to silence. The third reason is, of course, the reason why they are frightened. In part, that is simply the environment of a police station which is a scary place. But it is also often because of the way in which the police are behaving. They can abuse their powers. They offer inducements to suspects to speak, or they threaten them in physical ways in order to try and get them to speak to obtain confessions upon which they will later base prosecutions.

There is another reason too, which is that often suspects are denied lawyers to which they have a legal right. When the lawyers do turn up, they may fail to advise their clients properly, maybe because they too are ignorant, or maybe because they too are frightened, or maybe because they are very pally with the police in the local stations which they visit day in and day out. Finally, when the case comes to court and the police seek to rely on the confession that they have obtained in breach of the suspect's right to silence, the courts often fail in their duty to uphold that suspect's right. They often fail when a court declares, "However you obtained this confession, we're going to admit it as evidence against the defendant in court". Courts do not always do that, of course, but they have done it and certainly did it in the two cases I have mentioned. So the courts have failed the suspect in their guardianship of human rights.

It is an empty right as I have said. Yet the fear of crime in this country and the popular outcry for law and order has meant this — that last year the Government, elected by less than half of the people in this country, decided by a simple majority vote in Parliament to effectively abolish the right to silence as a human right.

I have given you that account of the right of silence in this country to underline a point: namely that to be effective human rights and constitutions have to be much more than mere written documents. They require those elements that I have enumerated. They require people to know about them, and they require the will and the means to enforce them. And I say this to build on Kevin Bampton's excellent points about civil society. But I also wish to tilt those points

a bit in these ways. It is not just a matter of the institutions. It is not just a matter of consultation taking place about those rights and people knowing about them. It is a matter of individuals and their organisations having the will to enforce them. At the very least, those individuals and those organisations must somehow feel that it is worth their while to take the risks and to go through with a process that may be frightening and intimidating in order to try and enforce their own rights.

I would like to tilt Mr Bampton's point even further because, of course, his point is not a geographically specific point about Africa. It is about this country, and it is perhaps a universal point, and it would be a mistake for us to leave this conference and think that paper constitutions and unenforceable human rights are matters only relevant to Africa. Failures to respect human rights take place here and they take place throughout the world.

I tilt Kevin Bampton's point again in this respect: failures to protect human rights are not simply caused by the newness or the birth of democracy. Protection is a function even of old, ancient democracies such as in this country. That is a lesson that we have to bear in mind and it is a lesson that I also would want to pitch against the notion that was left hanging at the end of the first session of this conference, which was the notion that it was up to the state to enforce human rights. Of course on paper and in the various international protocols, that is legally and technically correct. In practice, however, it is often the state which is the abuser of human rights, and in reality enforcement is left as the responsibility of the victims of human rights abuse and those who work with them and represent them.

What is the role of British lawyers in all this? There is no written constitution in Britain. We do not incorporate the European Convention on Human Rights and when the British Government is taken to the European Court of Human Rights, it is found guilty more than any other government within Europe. So why, we may ask, does anybody ask British lawyers to go and help them with human rights and constitutions anywhere? But people do, and one reason must be the colonial legacy.

Certainly, one reason why we have been invited into Malawi must be that Malawi was a British colony and of course, more specifically, there is a very close inter-relationship between the two legal systems and the training of Malawian lawyers, a lot of whom were trained here. But it is that colonial legacy that should sound warning signals to those who invite us, because we are dangerous. Firstly, we can and have produced on request model pro forma constitutions or human rights documents, or discussed the applicability of this or that international protocol. Asking for this type of assistance is the easy thing to do for those in Malawi, or in some other country, where people are struggling to develop a new constitution or a new set of human rights laws.

It is, however, dangerous because it exacerbates the haste that has been spoken about before by Kevin Bampton. It assists local organisations to by-pass the absolutely essential elements of building a constitution which are discussion, debate, argument, and publicity. And, of course, the sorts of systems that we bring and recommend are systems developed for different countries at different times with different interests.

I must say this for the Law Society of England and Wales, that on being invited to do just that, we said "No, we're not going to do it. We don't agree with it and we're not going to do it. We invite you, the Malawian organisations who've asked for this through your foreign intermediaries, to set up conferences and discussions and we will come and take part if you want us." It was difficult saying no when people asked for help, particularly when it is not that hard to give that sort of help. But we did feel strongly about it and I think we made the right decision. Certainly the conferences that have taken place, not merely as a result of us being stubborn, have proved very useful. We want to see our role as continuing to assist in such discussions and conferences.

There is another way in which we are dangerous, and that is as practitioners. Again, I suspect, it is merely a function of the colonial legacy. We are invited to go to countries, including Malawi, to assist the state in bringing legal actions and to appear as practising lawyers

and advocates in that state's courts. The last time that happened in Malawi was when British lawyers were invited by the former Government to prosecute Chakufwa Chihana on sedition charges that breached the most basic of international human rights interpretations of the meaning of sedition. Chihana had opposed Banda and called for a democratic system and he was charged with sedition.

It is internationally accepted that for sedition to amount to an offence, it should include some sort of incitement to violence. Under Malawian law, this was not required to bring a charge of sedition. Thus, it was a prosecution that was fundamentally in breach of basic international human rights standards. It was brought right at the time that our delegation was there in 1992, and we opposed it and told everybody we were able to bully our way into seeing that we did so.

We denounced the law and the prosecution, and came back to London only to find that a British solicitor and a British QC were employed to prosecute Mr Chihana on behalf of the Malawian state. There can have only been one reason for that, which was to bring a veneer of respectability and legitimacy to that prosecution. I hope it did not work within Malawi. I suspect, however, that it did work in the international community because of this image that British lawyers have and can perpetuate about themselves. It is something that both the Law Society of England and Wales and the other organisations that went on the delegation opposed and tried to stop. It was quite wrong that British lawyers were used to give a veneer of legitimacy for what was an illegitimate prosecution. We failed, and as you will know, Mr Chihana was sent to prison.

That being said, I do not think British lawyers are all bad. I think we do have some uses and I hope we have been of some use to Malawi and the Malawi Law Society. We did, as Richard Carver said, go to Malawi in September 1992, at the invitation of the Malawi Law Society. As Richard wants an objective assessment of his role, I will give it: this visit was really engineered by Richard and Amnesty International and it was very well done and brilliantly organised. We certainly did have a measure of success: September 1992 was during

Banda's era and we were able to act as a mouthpiece for the Malawi Law Society, flaunting our position in Malawi, sure in the knowledge that as foreigners and as British lawyers, we were not going to get prosecuted. We could say things that the Malawi Law Society members who had invited us could not say.

As a delegation we interviewed many victims of state brutality and complained about their treatment. We analysed the application of many of the laws and the treatment of detainees, and we voiced our concern to Dr Banda in particular. We argued with Dr Banda for the release of Orton and Vera Chirwa, and urged that we should be given permission to see them. We gained the right to see them and we publicised the visit and I hope in doing so, we also gave the Malawian lawyers who were struggling in fear and at real risk, the sort of support that is intangible.

So to that extent, I think that foreign legal organisations have a role. We also have a role when attending conferences at the invitation of the local organisations to advise on particular issues where our expertise enables us. But we hold the view very firmly that our advice should be of the sort I mentioned earlier: that human rights and constitutions are not about bits of paper, they are about climates of human rights awareness and mechanisms to ensure those rights are enforced. We therefore very much welcome the development of the Legal Resource Centre in Malawi and the legal aid sessions that we heard about earlier on, and we have been involved in discussions about these developments.

In relation to those sorts of activities we have offered our help both materially and in terms of any expertise if that is useful. For example, in the opening up of police stations, we have offered to help in this way: to give to lawyers who now have the power to go into police stations and to argue for their clients who have been arrested, the opportunity to come to this country and to Belfast to practice in situations which are slightly less scary — slightly — than the Malawian situation. We hope that this sort of practical help, without seeking to impose or to get caught up in the unconscious imposition of British traditional ideas on Malawi, is helpful. The Law Society of

England and Wales certainly hopes to continue to co-operate with the Malawi Law Society in these sorts of ways.

**Ian Linden**

*(He lived and worked in Africa from the late 60s to the late 70s, and has written four books on Christianity and Islam in Africa, focusing on Malawi, Zimbabwe, Rwanda and northern Nigeria. From 1980-86, he was the Southern Africa desk officer for the Catholic Institute of International Relations, and is currently its General Secretary.)*

I thought Annie Sajiwa's "insider" account was fascinating in the way that it showed the counterpoint between economic pressure and the rise of militancy and prophetic action by the churches in the country. Obviously the two coinciding are nearly always critical: you need the two working together.

Chris Wigglesworth brought out a point which I found fascinating because it certainly corresponded to our experience in CIIR in the liberation in Zimbabwe. This was the way in which the churches can indeed be a very powerful communications network, if the vision is there amongst church people to turn them into that and to use them in that way. My own memory of the late seventies was these extraordinary links between the Justice and Peace Commission in the then Rhodesia (now Zimbabwe) and the CIIR in London. On one occasion when we had somebody secreted at a Rhodesian Front meeting and the speakers were all saying how Bishop Muzerewa was in our pocket and would do exactly what we wanted, we got Louis Heron to put that on the front page of The Times in September 1978. When the then editor, William Rees-Mogg, arrived home that evening, he was furious. He blasted Louis Heron and the piece totally disappeared. It was not just put on page 3 or 4 in a small column: it was removed. So, we had this precious edition of The Times with a big front page story which quickly disappeared because it did not exactly fit Lord Rees-Mogg's vision of what was going on in Zimbabwe.

I was also fascinated by the way in which the subject of civil society came up. I think it is fascinating looking just at this country, Britain. We have the Conservative party after Margaret Thatcher, then onto the stage wanders civil society, looking rather plump and rather pleased with herself/himself, to sing a new song and be applauded both by right and left. You notice the Institute of Economic Affairs are very happy with the concept of civil society and indeed so is much of the left. It is an old song, though, and it is a bit of a Gracie Fields act when you think that you can go back to Hobbes, Locke, Rousseau, Hegel, Marx, Gramsci, right up to the latest analysis of Kerwin, all giving a different account of what civil society actually is.

I would like to endorse all the frequent appeals which say "let's not forget that civil society contains such things as transnational corporations". It contains chambers of commerce, it could be described as containing quangos and death squads if you want to interpret civil society particularly widely! It is a concept that is used extremely loosely and we are going to run into the most enormous amount of confusion unless we sharpen it up and make it more precise and try and give it some definition — but this is obviously not the conference to do it at, as everybody has said.

It is not reasonable, in my view, to suppose that this vibrant civil society, however it is defined, can exist without a strong state. The experience of Africa, Latin America, and many other places around the world illustrates that, if you are in a situation where the state has either been withered away by neo-liberal policies or has disintegrated through civil war, and ex-KGB colonels, or mafiosi or drug barons can actually run the show, you cannot have human rights because there is no one to defend them. There is no possibility of human rights surviving in those circumstances.

The real danger is that we get into a kind of 'either-or' game about the state. What is required is not the withering away of the state to a kind of impotence, to a custodial role, to being a custodian of human rights, but the reform of the state, to turn it into an enabling state, a non-corrupt state, and a state that is actually going to sponsor the conditions for the growth of a vibrant civil society. I believe that



certainly means a stronger state than we see in most African countries at the moment.

As a representative of an NGO myself, I would accept some of the strictures that Jane Deighton is making about lawyers as being a sort of an estate, and I would certainly accept the strictures that were made by Richard Carver on the whole issue of NGOs not being an unequivocally good thing. John Lonsdale raised the same question in relation to some of the Christian churches coming out of the United States. Some of the Californian churches are quite weirdly pernicious; they are big business and very powerful. They are not simply found in Africa, they are also in Latin America, and they are very, very dangerous, intrusive organisms.

Of course, NGOs are vulnerable if they are not transparently accountable and if they are not democratic. They have an enormous vulnerability in that regard which, for example, trade unions do not or should not have, if they retain their democratic traditions. NGOs will have to be very, very careful not to go too far in the direction of becoming providers of unaccountable experts parachuting in and out. The situation that we saw in Mozambique, where the country was almost carved up by NGOs, and certainly the incredible situation in Rwanda now, with hundreds of NGOs disempowering people of their capacity to move out of the trauma, is going to be something that needs very deep thought and consideration, and a kind of auto-critique by NGOs — which, of course, is going on.

I would say that at the moment there is extraordinary disillusionment and demoralisation in many of the northern NGOs. For on the one hand they feel thrown into emergency aid rather than development, and on the other are very often being donor led in just the ways Richard Carver described, in terms of fashion and direction. It's very difficult — I say this as a Director and General Secretary of a development organisation — to keep to your principles and the path that you want to go on, without being buffeted by fashion and donor pressure. We need help, and we need the sort of criticism that's come out of this conference.

The problem in Africa is obviously the weakness of the state, and I was thinking when John Lonsdale was talking "yes, absolutely" to many of the things he was saying. And what about the fiscal capacity of the state? The Latin American left have woken up to the fact that the whole question of taxation in Latin America is going to be a very critical matter. If we are stuck with an ideological politics in which redistribution and taxation are an absolute anathema, and you can't possibly win elections with such policies, this is not going to create conditions in which African states are going to be able slowly to develop some kind of fiscal capacity.

I cannot see how you can get any kind of economic viability in Africa without the state having some capacity to tax its citizens, so as to provide some type of communal wealth for the state that is not a kind of gatekeeper wealth which requires either corruptly, or not corruptly, controlling the comings and goings of capital and international business. It is a very great problem indeed, and obviously African states are even further away from a solution than many Latin American states.

Finally, I was very interested in the whole issue of entitlement. Along with the question of international entitlement is also the question of the coherence of the powerful economic countries' policies. There is an incoherence at a number of levels between our aid and trade policy, and that goes for the European Union as well. There is an incoherence in saying that 'we wish to empower women but by the way you must accept a structural adjustment policy' — and 99 countries out of 100, rather than reduce the size of their army and military power, are going to cut back on health and education and — surprise, surprise — it is going to be women's education they're going to cut back on.

How on earth are we supposed to be empowering women if their health and education is being cut back before our very eyes as the product of structural adjustment policies? How are we going to have population reduction if we are cutting back on women's health and women's education? There is a lot of incoherence that we need to

look at within the policies of northern governments. This needs to be addressed and exposed urgently.

## Discussion

*Charles Humfrey, Foreign & Commonwealth Office, Africa Section, So.*

I want to pick up on the question that Dr Lonsdale made about how can we make demands on the African countries without entitlements and resources. I think this is a fair question. I don't know quite how Baroness Chalker, Minister of State for Overseas Development, would have answered it had she been here herself, but I'm very happy to have a shot at it. I think the first point was really answered by Robert McCorquodale when he explained how the change in conceptions about international law, and indeed practice, has meant that over the last decade we have moved to a position where we no longer feel that we cannot comment on human rights situations in other countries because that would be interfering with national sovereignty. There is a complete change in the way in which we approach these questions these days. I think this is very important.

My second point is that probably western politicians would feel that it would be difficult to get democratic support for giving aid to African and other third world countries without making demands these days. And there would be criticisms, speaking very informally, from the left about giving aid without taking into account the treatment of human rights in the country, and criticisms from the right about giving aid without taking account of the economic effectiveness in the way in which the countries spend that aid. And so there is a pressure on governments both to stress the human rights aspects and to stress good governance in terms of economic efficiency in the way they conduct themselves. I think I would turn the question around and ask how can you in these days give aid as a democratic western government without making demands on the countries to whom you are giving aid and still expect the support, the full support, from electorates?

My third point is that in fact governments these days do link giving resources to the demands they make on particular states. For example, in the case of Malawi — I've just accompanied Lynda Chalker on her visit to the country — we've been talking about police and human rights and the way in which police treat people and the way in which they have operated under the earlier regime, and how we can do something about this: how can we make demands of the kind of treatment they should give ordinary people, without providing some sort of assistance for the re-training and re-structuring of the police force? And that is one of the strategies we have in providing resources: to assist in the re-training and re-structuring of the police. So there is an attempt in particular cases where requests are made or pressures are brought, to link that to the British resources, whether it's helping to strengthen an anti-corruption commission, strengthen a drugs enforcement commission, or whatever.

### ***Kevin Bampton***

I would like to respond to Richard Carver's comment that he would like an outside view of NGOs. I experienced the work of Amnesty and Oxfam and similar NGOs from the governmental side, and they're very good at publicity — bringing awareness, criticising the situation. What I fail to see often, and Malawi is one of the cases in point, is the more constructive side. Certainly there are problems with NGOs in Malawi and there were problems with assisting NGOs in Malawi up until the liberalisation process got started. But what I didn't see was the human rights NGOs actually doing anything.

Now obviously Amnesty International had a seminar which was mistimed running at the same time as the Commonwealth Secretariat seminar on administrative law. But it's very, very easy to document problems in the country and then move on to another problem country. I rang up Amnesty International recently to find out what was happening now about human rights in Malawi, and the answer I got was, "Ah, well, we're focusing more on other countries now".

Obviously this is partly a problem of resources, but the problem of resources is not the same problem of resources as there was five or ten years ago. There are people in this room who have been able to go out and get resources from various places to put on seminars, to put on training programmes, and to give assistance. So what I would like to ask is whether the NGO international fraternity is going to have to look, rather in the same way as the donor fraternity, at how it deals with democratisation issues so as to come up with a more constructive approach towards creating ongoing care and responsibility.

### *Richard Carver*

When I started working for Amnesty International ten years or so ago, I very strongly shared that view. I felt that the criticisms we were making were wholly negative and that one had to put forward constructive proposals so that governments could then adopt them. Not that we could give them the resources to do it, but we could at least give them the directions to follow. I certainly have no objections still to human rights' NGOs setting out the direction they think should be followed.

We mentioned in passing resource restraints. Resource restraints are quite crippling: Article 19, for example, has an Africa programme which consists of one and a half people. At Amnesty International, when I was the researcher on Malawi, I was also the researcher for seven other countries which included, when I started there, Uganda, and Zimbabwe during the Matabele killings. So when we in the NGO community say we have to shift some resources elsewhere we are talking about highly limited resources.

The other point, and I should have perhaps mentioned this in my presentation, is the relationship of the NGO community and the UN. Before I became involved in UN work, I had heard of this place called the UN Human Rights Centre. I thought this was a big centre in Geneva which monitored human rights throughout the world. When I began working for Amnesty, I became aware that the Human Rights Centre was virtually non-existent, and that all the enforcement

mechanisms of the human rights centre totally depended at that stage (there's been a bit more diversification now) upon the activity of Amnesty, and subsequently of other NGOs as well. But even after the World Conference on Human Rights, the UN human rights mechanisms are pretty pathetic, as we see in the paper every day about Rwanda.

I am a little bit upset about the demand that NGOs have to do more. It seems to me that we control perhaps massive resources in comparison to our Malawian or other African counterparts but we are very weak groups of voluntary activists who are being used by governmental and inter-governmental organisations as a cover for their own lack of activity, in a rather similar way to the way that development is left in NGO hands. I don't think that is desirable, particularly in the development field because of the necessity of institution building, and I think it's equally undesirable in the field of human rights.

We can certainly play an advisory role; we can say what we think is desirable. I think our independence would be compromised if we were too closely drawn into the process of actually devising mechanisms. My view is that human rights organisations have to monitor the next Malawian government in the same way that they monitored the last one, and that too close involvement would reduce their capacity to do that. So don't push everything on to the NGOs.

### *Jim Lester*

I think that one of the results of the review that the Foreign Affairs Select Committee did of the United Nations was to find how very, very under-resourced the Commission in Geneva is, and the desperate way in which, for every inquiry, they have so little with which to do the job properly. There is also a serious lack of sanctions that can be applied. And one of the results of that is that the European Union foreign ministers have actually themselves now provided resources for the organisation, and argued for more resources, for there's need for more still. The Commission has far more responsibilities than they have resources to cover them.

*Ian Linden*

I actually thought very much as Charles Humfrey did that we were going to have as enormous a problem in this country as they have in the United States about development aid. It is normally said there are no votes in development aid. Well, the United States seems to have reached the point where there are negative votes in development aid. My perception is that we are a very different type of society in Britain from American society in that respect. The reaction of the British public to Rwanda was absolutely extraordinary, as you know, and I don't see how it can be the case that it is damaging for British political parties to try and keep up their development aid when you have a British public that churns out tons of money the moment the television pictures come up. This response is obviously television led, there is no doubt about that. But I don't think we have reached the American position, and I don't think we are in fact going to.

If we did, I would make two arguments which are perhaps mutually incompatible. One argument would be that most of the political parties are actually very happy to allow members of Parliament to continue to vote against capital punishment, whereas if we consulted people about hanging through a referendum, we would probably end up restoring it. Development aid is also a moral issue. In the same sort of way as a responsible MP votes against capital punishment, a responsible MP should fight for development funding irrespective of the views of the man on the Clapham omnibus, who would much rather be protesting about the export of live animals to be confined in cramped crates in France and then slaughtered for veal, and about other issues of that nature.

The other argument I would use is one that is much more of a Pan-European rather than British-only issue, and that is the question of the spread of AIDS and drugs, and of increased immigration from poverty-stricken countries. That rings bells in the States as well. If you do not want AIDS and drugs, and you do not want increased immigration of people trying to escape poverty, then you must stabilise the economies which are exporting all of those. And that weighs considerably for France and the European Union vis-a-vis

North Africa. Whether or not Britain has to accept more and more policy determined at the level of the European Union, I think the danger is that we will have Germany obsessively trying to protect herself against Eastern Europe (and that therefore buckets of money will have to go to Eastern Europe), and France very worried about North Africa (so buckets of money will have to go there). So the question is whether we are going to be able to achieve a common European Union policy on overseas development aid which would be as progressive as, say, the British policy would be if it were left to itself. It will be worrying if more and more money were to be channelled through multilateral aid.

### ***Roger Briottet***

I would like to come back to the point which was made by Kevin Bampton about human rights organisations, and I would like to take them a little bit further. I think human rights organisations, particularly Amnesty International are now a very powerful voice to be reckoned with. Their accountability is actually very limited. And I think that their responsibility should increase. It is not a question of whether the role of human rights organisations is actually to give the funds but they have to pass on the message to donors that justice is costly.

If one wants a relatively poor country to have a proper process of law, an independent judiciary, and proper prisons, well administered, all this requires much money. And I do not hear human rights organisations telling the richer countries in the West this fact. I think that they have quite a responsibility now, given that they are so powerful, to make this quite clear to the donor community so that some progress can be made. I think that is the next stage. If you have power then you also have responsibility.

### ***Salah Bander***

Just a simple point which I think was missed by people here talking about the enormous contribution of NGOs, and that is the neglect of the role of public relations and lobbyists who work in Brussels,



Washington and London etc really to undermine the international pressure coming from these NGO groups. It seems to me this is a very important point. Banda's government committed \$10 million to three companies in London, Washington and Brussels to undermine this pressure. This is something worth mentioning.

*Suta Chimombo, Malawi Contact Group, London*

The government is also under pressure to meet its social obligations. So I was just wondering how you think we are going to pay for all these things: the cost of the process of amending the constitution so as to satisfy the donors. Most of the new provisions are being included to satisfy the donor community.

*Jim Lester*

I will mention the fact that as a result of the combined pressure of the European Union countries on the donor conferences, donors are now geared to finance precisely these changes, with the agreement of the new Malawi Government. I was delighted to hear this.

*Kevin Bampton*

Can I just make two points on the financing of the constitution which as far as I know are old hat. I seem to remember the World Bank Representative in Malawi holding a conference with members from all the parties. Basically he said, "Honestly, from our point of view you don't get rewards for getting democracy: democracy is its own reward". So from the World Bank point of view Malawians are going to pay for their own freedom. Ideally there would be more money to assist these processes.

I was interested to hear the speaker from the ODA saying that assistance for the police was going to be one of the benefits, as it was under the consolidated practice. However this kind of assistance is standard assistance; assistance to the police force is standard assistance whether it is a good country or a bad country. It is a refocussing of aid.

One of the big problems that I saw at the time in Malawi, and that I was constantly talking about to the Constitutional Committee, was the question of who was going to pay for this. And that is a huge issue when it comes to human rights — who is actually going to pay for human rights? — and until that is sorted out, a lot of the issues about aid conditionality, about this issue of whether the governments which receive aid have some kind of accountability to the donors, all of this discussion becomes pretty immaterial.

Constitution-making and human rights cost money. Governments cannot be responsible for the implementation of human rights if they do not have the money. You cannot say the state is responsible for economic and social rights if the people who hold the purse strings are the World Bank and organisations like that. So it is not the states themselves that are responsible for the enforcement of human rights. Ultimately it's the donors who actually run and bank-roll these states and can determine their economic future.

### ***Suta Chimombo***

As far as the donor community is concerned, it keeps moving the goal posts. The donors say, "If you have multi-party democracy, then you will be rewarded". The ordinary working person is asking, "When is the money going to come?"

Now that we have this democracy, the goal posts are being moved all the time. Today we must look at corruption in the customs and excise department, tomorrow it will be an anti-corruption act that has to be passed before we get any money.

### ***Jim Lester***

What we need to do is to look forward to the next donor conference of the Paris Club. But as we say at any good conference, we leave with more questions in our mind than we've actually answered.

## Closing Remarks

*Joanna Lewis*

I will make this very brief. Jack Mapanje was supposed to be here to say a few closing remarks but unfortunately — fortunately for him — he is talking to the BBC tonight and is unable to be here. I have found the discussions today extremely enlightening. We have had sober reminders of the recent past, personal reflections, hard-hitting analysis, plus a dash of humour.

I would like to thank Peggy Owens and Louise Pirouet for all their hard work. I conclude with a recognition of the unequal burdens this conference has imposed on the three of us. This was a collaboration forged out of friendship and I hope this friendship has survived the collaboration.

Finally, I would like to thank you all very much for coming to Cambridge and speaking so frankly and with such eloquence. As an historian, ignorant of recent developments in human rights and constitution-making, I certainly come away from here today feeling that I have a much clearer picture of what the issues are. I also carry with me a great sense of optimism — optimism because there is such a strong constituency of advocacy and expertise in this field and I'm sure this will help to reach the kind of people that have been pushing their trolleys around Sainsburys underneath this very auditorium, while we have been sitting here wrapped up in our world of discussion. So thank you all very much indeed and I hope we all meet again.



## **African Charter on Human and Peoples' Rights**

### *Preamble*

**T**he African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115-XVI of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa ...

## The Westminster Foundation for Democracy

**T**he Westminster Foundation for Democracy was established by Parliament in March 1992 and received a grant in aid from Government of 2.5 million. It supports projects which are aimed at building and strengthening pluralist democratic institutions overseas. These may include work with political parties, parliaments or other representative institutions, independent media, trade unions, human rights groups and other non-governmental organisations.

The three main political parties are all represented on the Board of Governors, as well as representatives of the smaller parties, and non-party figures drawn from business, the trade unions, the academic world and the non-governmental sector. It is fully independent in its decision making.

The Foundation concentrates its efforts on three priority areas: Central and Eastern Europe, the former Soviet Union and Anglophone Africa, and will not fund organisations which advocate or support the use of force. It does not seek to impose a particular model of democracy.

## **African Studies Centre**

### **University of Cambridge**

**T**he African Studies Centre at Cambridge University was founded by Audrey Richards in 1965, largely in response to the great interest shown by members of the University in the newly independent countries of Africa. Three decades later, Africa is still a cause of universal hope and despair, with South Africa and Rwanda revealing the extremes of human possibility, as nowhere else in the world can. In that period over 700 PhDs have been awarded on African subjects across the whole range of disciplines; and no region outside Britain is more strongly represented here. At any one time over a hundred masters and doctoral theses on Africa are being researched in Cambridge; and some 300 residents are registered with the Centre as having active African interests.

The African Studies Centre exists to support research and teaching on Africa within the University. These functions are generally carried out by the various departments and faculties. A major aim is to make research-based knowledge available to meet the needs and interests of African people, while bringing the achievements of African civilisation to this country. In the wake of the communications revolution, the Centre is committed to exploring new ways of bridging the gap between the academy and the rest of society. It also supplies a wide range of services to the community: a library which opens the way to Cambridge's rich African collections; other research facilities; public lectures and seminars; workshops and conferences; a meeting place for Africans and others interested in Africa.

Apart from helping to launch Cambridge University Press's prestigious series on African Studies, the Centre has long published its own monograph series.



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