HUMAN RIGHTS IN MALAWI

REPORT of a JOINT DELEGATION of THE SCOTTISH FACULTY OF ADVOCATES, THE LAW SOCIETY OF ENGLAND AND WALES and THE GENERAL COUNCIL OF THE BAR to MALAWI

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PREFACE

This report on the state of human rights in Malawi records a significant initiative undertaken by the organised legal profession in the United Kingdom. Six practising lawyers, nominated by the Scottish Faculty of Advocates, the Law Society of England and Wales and the General Council of the Bar, visited Malawi in September 1992. They were guests of the Malawi Law Society. They discussed its legal system with the President, Dr Banda, and several of his most senior ministers, after gathering evidence from some of its judges, magistrates, officials and lawyers, as well as from many individuals who have recently been arrested or detained. What follows is an authoritative account of the problems which the country must solve before individual liberty can flourish there.

We welcome this initiative for a number of reasons. Many lawyers from our organisations freely lend their expertise to renowned human rights organisations like Amnesty International and Article 19, but there is a ground-swell of opinion amongst our general membership that we should be doing more, as a profession, to assist the cause of human rights, especially in countries which have inherited our legal traditions. Moreover, international organisations have agendas which do not exclusively focus upon legal issues: by limiting our scrutiny to the necessity for bedrock guarantees for individual freedom, we can avoid some of the complications and controversies of wider political and social debates. By offering expert observation and analysis, independent of the UK Government, we may be able to assist Governments to bring their legal systems into line with international human rights norms, as well as providing guidance for other Governments and international organisations which have the task of judging whether those norms are in fact being honoured.

The delegation came at a time when Malawi was being placed under international pressure to improve its human rights record. There were reports of fundamental breaches in the right to fair trial, and to freedom of expression and religion, and of the failure of police and administrators to respect the rule of law and the orders of the courts. There was concern for the safety of individual lawyers who took up cases against the state. In particular, we were impressed by the fact that a Law Society which had only 97 members to serve almost 9 million citizens was being placed under enormous pressure at a difficult and transitional time when calls for a multi-party democracy were at last being heard in the land, to the discomfiture of the state and to the danger of lawyers who supported, or acted for supporters of, that cause. Furthermore, the request came at a time when the Government, for the first time since independence from Britain, was retaining English counsel and solicitors to prosecute a political opponent on charges of sedition. The reason, as explained to the delegation

by the Minister of Justice, was that the outside world would find these proceedings acceptable.

This report is at times severely critical of the failure of the Malawi Constitution and its state authorities to guarantee basic human rights. We hope it will be considered, by those authorities, in the spirit of helpfulness in which it is offered. Basic human rights are not so much fundamental as elemental. The independence of the judiciary, and of the legal profession from which it should be drawn, must be secured in every country. We hope that President Banda will act on the findings of this report; and that the delegation's work will lead to strong and productive ties with the developing Malawi legal profession, and to more of such missions to other countries in the future.

The Dean of the Scottish Faculty of Advocates
The President of the Law Society of England and Wales
The Chairman of the Bar of England and Wales

INTRODUCTION

Malawi is a small landlocked country, slightly smaller than England. About one fifth of its area is occupied by Lake Malawi. It is surrounded to the north-west by Zambia, to the north-east by Tanzania, and to the south by Mozambique. It has a population of some 9 million, swelled by at least one and a half million refugees from the war in Mozambique.

The largest towns are Blantyre, with some half million inhabitants; Lilongwe, the official capital; Zomba, the colonial capital, University city and army headquarters; and Mzuzu, the northern capital, and traditional centre of the best education. The delegation visited all these centres.

Scottish missionaries were the pioneers of the British take-over of Malawi, and their influence still remains. The strong Presbyterian Church, and President Banda's claim to be an Elder of the Church of Scotland, are continuing reminders. As Nyasaland, which became a British Protectorate in 1890, Malawi was part of the Federation which included Northern and Southern Rhodesia, now Zambia and Zimbabwe. The present ruling party, the Malawi Congress Party (MCP) was the chief opponent of British colonial rule. Dr Banda spent some 40 years of his life studying and practising abroad as a medical doctor in West London, in Scotland, and elsewhere. In 1958 he was invited to return to lead the MCP by the younger generation of political activists, who included Vera and Orton Chirwa, and Chakufwa Chihana. They saw the need for an older statesman to lead the country into independence.

Dr Banda was imprisoned for a year, from 1959 to 1960, by the British; but became Prime Minister in 1964, on independence, President in 1966, and Life President in 1971, presiding over a state in which only one political party, his Malawi Congress Party, is permitted by law. The Malawi Constitution of 1966 provides that the President may dissolve Parliament whenever he chooses, appoint (occasionally after consultation) all significant officers of state, including judges, and the public prosecutor; and gives no specific rights to citizens. The nation, it states, has four "cornerstones", namely "unity, loyalty, obedience and discipline". President Banda's rule has been characterised by the suppression of dissent: hundreds of people have been detained, and it has been reported that some opponents of the regime have been killed.

The repressive political system has failed to bring prosperity to the country. The United Nations has designated Malawi a Least Developed Country. In 1989 the World Bank reported that Malawi is one of the six poorest countries in the world, with a per capita Gross National product of $160, an infant mortality rate of 153 per 1,000 live births, a life expectancy of 46 years, and a literacy rate of only 25%. President Banda incorrectly told us that the country was prosperous.

Aid donors have been putting pressure on Malawi. In December 1991 and April 1992 EC member States made diplomatic demarches urging improvements in Malawi's record. In May 1992 the fourth Consultative Group Meeting for Malawi, including the World Bank, EC, European Investment Bank, IMF, UNICEF, UNDP, UN High Commissioner for Refugees, and World Food Programme, and a number of states, made it clear that they were seeking "tangible and irreversible evidence" of a basic transformation in Malawi's approach to basic freedoms and human rights as a condition for further non-humanitarian aid.

We spoke to the President, his Minister of State and other representatives of Government about Malawi's approach to human rights. We thank them for their time and courtesy in seeing us. We spoke to judges, magistrates and court officials, to lawyers, and to bishops and other clergy and nuns, to businessmen and other representatives of the community, and received their testimonies about the abuse of human rights in Malawi.

Our hosts were the Law Society of Malawi, who themselves have organised a symposium on justice; and are planning a legal aid programme. We thank them for their courage and for their efforts to ensure we met so many people. Our 6 member delegation visited Malawi between September 17 and September 27 1992, and sent an English barrister for a week in early November to observe the sedition trial of Mr Chihana. In order to cover as much ground as possible, members of the delegation from time to time divided into pairs to interview witnesses in different parts of the country. We have sometimes in this report removed the identity of the persons to whom we spoke, because of their concern at the prospect of reprisals. We were able to satisfy ourselves, in every such case which is reported, that the information was communicated in the genuine belief that it was true.

We are satisfied that what follows is an accurate snapshot of the state of human rights in Malawi today. We wish to emphasise that the emotion we encountered, among citizens at every level, from villagers to Government officials, was fear. There will be no real freedom in Malawi in the future until this fear is removed, by effective guarantees that those who speak out about state action will not receive punishment, either at the hands of the state or from state-supported vigilantes. Protection for the basic freedoms of speech and assembly, guaranteed by the rule of fair and enforceable law, must be an objective of change in Malawi.

CHAPTER 1: TESTIMONY FROM THE COMMUNITY

The delegation's visit took place in a year when internal protest against the government raised its voice. On Sunday 8 March the Catholic bishops' pastoral letter was read to approximately 1000 congregations in Malawi. It criticised the "growing gap between rich and poor" in the country, noting that "academic freedom is seriously restricted; exposing injustices can be considered a betrayal; monopoly of the mass media and censorship prevent the expression of views". The letter is reproduced in Appendix 1. Seven bishops were arrested, and released after 8 hours. It is reported that at a meeting of senior Party officials, there were calls for the bishops' murder. Possession of the letter was declared an arrestable offence.

The pastoral letter brought a movement for democracy and human rights to life. We spoke to people from different parts of the community, both activists for change and those caught up in the reprisals by the state. The Sunday following the reading of the Pastoral letter, churches were crowded. Students of Malawi University marched to their local Church to show support for the bishops' protest. We met students and lecturers.

Within a few days Chakufwa Chihana, the Secretary General of the Southern African Trade Union Co-ordinating Council called, in Lusaka, for a committee to work for multi - party democracy. He returned to Malawi on 6 April and was promptly arrested. We met him and his lawyers.

Ministers from different denominations preached in support of the bishops' letter. In Mzuzu, Presbyterian Moderator Elect Reverend Aaron Longwe and others were detained following their sermons. Movements for democracy took shape throughout the country. We travelled north and describe what we found.

We heard reports of three days of riots during May in Blantyre and Lilongwe that culminated in a demonstration outside the Court which was due to hear a bail application for Mr Chihana. We heard of an avalanche of written protests; in an unprecedented move, leaders of different sectors of the community wrote and signed open letters to the President seeking reform. We spoke to factory and office workers who were caught up in the riots, who were found to be in possession of the protest letters, and who had been detained by the police, some merely for having access to fax and photocopying facilities. There follows an account of what we were told and shown.

SECTION 1: THE UNIVERSITY

There is only one university in Malawi. It is located in Zomba, in the Central Region. We record the evidence of a student, a teacher and the former Head of the Faculty of Law.

Sister Aster Tesfaye

Sister Tesfaye is a member of the Order of Medical Mission Sisters in Blantyre. She had graduated in July from Chancellor College in Zomba, where she had studied social science for four years. We asked her to describe the events which had happened at the University earlier in the year.

> After publication of the Roman Catholic bishops' pastoral letter students from the University decided to walk together to a the Roman Catholic church in Zomba to show solidarity. Demonstrations are illegal. This took place in April 1992. On the walk back to the University many people from the town joined us at the bus station and at the market place. The demonstration became aggressive with chanting against the President and the Minister of State. The police stopped us and surrounded us. They sent the people from the town away. There were about 20 to 30 police surrounding us and aiming their guns at us. This was the first time I had ever seen a policeman with a gun. They fired once or twice in the air. We returned to the College. The incident at the bus station lasted 45 minutes or more.
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> The College was closed the day after the demonstration and opened again after 5 weeks. It was closed again after a week. It was closed this time because we were supporting the lower grade College staff in an industrial dispute. The Principal and Registrar came to address the low grade staff. Some of the students interrupted the Principal and started singing multi-party slogans. At about 4.00 pm the Vice Chancellor came. About 20 students started stoning him. Windows in the Chancellor Pavilion were broken.
>
> The following day (a Tuesday) the teaching area was deserted and everything was closed. About 1,000 students were assembled. A policeman came with a megaphone and said we had to leave in less than an hour. This was a message from the Council - from John Tembo himself. After about 40 minutes we were surrounded by many armed police. We were very frightened, so we dispersed.
>
> The College re-opened on 12 July but there was a very bad tense atmosphere. People were very afraid and didn't want to say anything.

Each student received a letter warning them to behave or be expelled. 11 students were expelled and 42 received serious warnings. They had signed a letter in May acknowledging that if they misbehaved they could be expelled. Recently multi-party slogans had been written everywhere on the walls in chalk.

I do not feel in danger as a result of my part in these activities. Those in danger are those who had taken an active part by speaking or stoning, not myself. I feel that it is possible to talk freely now for the first time in Malawi.

A College Lecturer

The University was set up by statute under a government subvention. It is governed by the University Governing Council. The Chairman of that Council is the Minister of State, John Tembo.

After the student riots the administration drew up a list of trouble makers. Professor Raj Bansee of Haiti had been at Chancellor College in the Political Science Department as part of the US Aid programme. He should have stayed at the college until next year. But he was accused of inciting the students and told to leave before the 28 September, which is the day that term begins.

Father Chakhanza, a Roman Catholic Priest was head of the Religious Affairs Department. Normally heads of department are given contracts for two years which are renewed as a matter of course after each of the two year periods. At the time of the student riots Father Chakhanza had been head of department for only a year. He was accused of inciting students to support the Bishops' pastoral letters. and replaced. His replacement was a very junior member of staff who had been at Chancellor College for less than a year.

Gausi, a junior man in the Accounts Department of the University, said something about multi party democracy. He did not think he had committed an offence. He was detained for two days. He was then taken to court and pleaded guilty to a charge of breach of the peace. He was fined 50 kwacha. As a result of his conviction he was fired by the University.

The Law Society is offering its new Legal Aid scheme to students. This is symptomatic of the new lack of fear amongst lawyers in taking up cases.

Christina Chihana

Christina Chihana was also sacked from the University, merely for being Chakufwa Chihana's wife. She took the country's first ever judicial review case against the University claiming that the dismissal was wholly unreasonable. The court has ordered the University to compensate her to the full extent of the earnings and pension she would have received had she stayed. The University is appealing this judgement.

Dr Matembo Nzunda

Dr Nzunda obtained an LLB from the University of Malawi in 1980 and was then invited to join the Department of Law. In 1982 he obtained his Master's Degree from the LSE, and then a PhD in law from Darwin College, Cambridge. In 1990 he was appointed Head of the Law Department of Chancellor College, where he is planning to start a Human Rights Course.

> Last year there were a series of articles in the press in which the police were saying that the dress codes were being broken and complained that women were wearing trousers at home. Such women were being arrested and fined. I looked up the Act and found it related to women wearing trousers "in a public place ". I wrote to the Daily Times but they would not publish my article. I wrote a letter to Moni Magazine and they did publish it.
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> The next day, the College Registrar said the police wanted to see me and I was taken to Blantyre Police Station where I was interrogated by the Chief of the Criminal Investigation Department. I accepted that I had written the letter. I was asked to underline the parts of the police articles I disagreed with. I was told the articles reflected Government policy. I was told I was putting a point of view about the law that differed from that of the Government. In their view this was sedition. After lengthy interrogation, I was told I was under arrest and a caution statement was taken. They said they were investigating sedition. This was rubbish. The police started a discussion in the paper and I replied to reach a common understanding.
>
> I was taken to Chichiri Prison and put in the security section. There were some 200 prisoners in the one large cell. The size of the cell was such that in order to sleep we had to squat in rows. I was then transferred to another cell. I was then taken to Southern Regional H.Q., where I was interviewed by the Inspector General of Police. I was there for 30 hours. I later found that the Editor of Moni had been picked up, and released with me. He was forced to print an apology for printing my letter in the next edition .

After the student demonstrations, the University carried out a secret investigation into who took part. The police were called in and some students were told to leave within the hour. The University was closed and on re-opening, every student had to sign a form saying they would not take part in any demonstrations in the future. By 12 July 1992 they had a list of 52 students. 41 were "warned" not to take part in demonstrations. 11 received letters saying they had participated in destruction of college property and would not be allowed to continue their courses. I told the students that as they had not been given a hearing before the decision was made, there was a breach of natural justice. I wrote to the Vice-Chancellor to this effect and told him if he did not review the decision, I would seek judicial review of the decision.

My contract as Head of the Law Department was not renewed.

SECTION 2: CHAKUFWA CHIHANA

Chakufwa Chihana is the Secretary General of the Southern African Trades Union Co-ordination Council (SATUCC). Now aged 52, he was a trade union official at the time of Malawi's independence in 1964. He soon fell out with the Government over the right of trade unions to be independent of the Malawi Congress Party, and in 1971 he was one of many suspected oppositionists who were detained without trial - in his case for 7 years, 5 in solitary confinement, during which he was adopted by Amnesty International as a prisoner of conscience. After his release in 1977 he left the country to take a degree at Oxford University, followed by a masters degree at the University of Bradford. In 1984 he took a research post at the University of Botswana, and was there elected to the post of General Secretary of SATUCC. This year he was awarded the Robert Kennedy Human Rights prize, for his work towards strengthening democratic institutions in Southern Africa. He has been an outspoken critic of President Banda's government, and is committed to the transition of Malawi to multi-party democracy.

In March 1992, Mr Chihana was the keynote speaker at a conference in Lusaka, Zambia about the prospects for multi-party democracy in Malawi. He was arrested at Lilongwe airport on his return home. Police seized material which was subsequently to be described as seditious, namely the papers delivered at the conference and a two-page typescript of a speech he had planned to deliver on his arrival. His lawyer, Bazuka Mhango, was himself detained for some hours by police when he asked to see his client.

Mr Chihana was detained without charge. Police refused to produce him to the court on 6th May, which had been set for his *habeas corpus* hearing, or (despite the judge's order) on the following day, or on the next day set for the case (2nd June). On that

day the application was adjourned until 19 June, when it was the judge who failed to appear. Finally Mr Chihana was charged with sedition, and with publishing statements "likely to undermine public confidence in the Government". He was released on bail on 11 July: 4 days later he was taken back into custody, and subsequently charged with 3 more sedition and public security offences arising from interviews he had given to the BBC while he was briefly at liberty. He was re-released on bail in early September, and his trial ultimately commenced on 2 November.

We met Chakufwa Chihana with his lawyers, Bazuka Mhango and Harry Chiume. Mr Chihana said:

> I am on bail, on condition that I report to the police twice a week, pay a security of 3,000 Kwacha, and do not speak to the media. That is the question at stake at my trial. Is it an offence to express an opinion in the international media?

We asked him to describe his detention, he said:

> I was arrested on 6 April 1992. I was held in conditions which are unrealistic by Malawian standards, in that I was not physically assaulted. I was subjected to psychological treatment which would make those people who are not strong lose their will.
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> On 10 April I was moved to Mikuyu Prison, a maximum security prison in Zomba, now used as "death row". There were 70 condemned people there;and me. I can still remember the screams and cries for help of the condemned prisoners. Two or three people had died.
>
> On my first night, the warders put a wild cat in my cell. It was like a small cheetah, which grew in size as it became angry. The warders moved the cat at about 4.30. The cell was a very small cell. It was only the size of my body. There was a window in the cell which had been deliberately blocked off. There was no ventilation. Their intention was that I should suffocate. I was held for almost a month in leg irons that had been imported from Sheffield. My legs swelled. I was incommunicado from family and friends.
>
> I was only given 5 minutes a day outside my cell. I had two minutes to empty my toilet bucket; at gun-point. I had three minutes to have my cold shower in. Every day the warders debated whether I could remove my leg irons before the shower. If I gave my dogs the food the prison gave to me,

they would not take it. I had beans that had only been cooked for one hour, with weevils (maize beetles) on top.

On 13 May 1992 the delegation came from the International Confederation of Free Trade Unions, and things started to change. I was released at 5.45 on 11 July. I was a skeleton. I had pains all over my body. I was driven to my lawyer's office by the Superintendent of Police. He told me not to say anything to the press. I got there and I spoke to the BBC. I was re-arrested. On 24 August I was seen by the Red Cross. Their inspections have a tremendous effect.

The case against Chakufwa Chihana

The delegation was able to examine this case in great detail. We considered all the prosecution evidence which has been disclosed against Mr Chihana, and discussed it both with the Malawian prosecutors and defence lawyers and with Mr Chihana himself. The case has received a great deal of international publicity.

The charges

Mr Chihana faces two separate indictments containing 5 charges of sedition and two charges of acting so as to undermine confidence in the Government, contrary to Regulation 5(1)(b) of the Preservation of Public Security Act. Each charge carries a maximum penalty of 5 years, so that if convicted, Mr Chihana could face up to 35 years in prison. The relevent provision of the legislation is set out at Appendix 3.

The pre-trial evidence

The evidence against Mr Chihana available before the trial comprised statements by the Commissioner of Police, his two assistant Commissioners and a police officer who regularly monitors and tapes BBC broadcasts which might contain criticism of the Government, and copies of Mr Chihana's speeches at Lusaka and at the airport. Additionally, it was the prosecution case that "there was an uneasy state of affairs in Malawi during the time the accused was planning to come to Malawi and after his arrival in Malawi which state of affairs the accused planned to take advantage of".

The documents

We have carefully considered all the documents which the prosecution alleges show a "seditious intent", and the BBC World Service transcripts. We can state with complete confidence that no reasonable person could construe them as an incitement to violence. They contain reasoned criticisms of the existing Government, and politely call for progress towards restoration of basic human rights and the

reintroduction of multi-party democracy. The short address prepared by Mr Chihana for his return to Malawi on 6th April - a key part of the prosecution case - is reproduced as Appendix 4 so that readers can judge for themselves the general tone of his campaign. The first indictment against Mr Chihana contains four sedition counts and one charge of "doing an act prejudicial to public order" by returning home with a seditious intent. The only seditious intent which is specifically charged is that of "promoting the object that all foreign aid to Malawi (other than humanitarian aid) should be frozen". The second indictment contains two charges of sedition and one charge of "undermining public confidence in the Government" by making statements to the BBC World Service "to wit, that 90% of the Malawian people are ready to change the Government" and that "the President is too old to run the country".

It was plain from our examination of the evidence that Mr Chihana had not committed any act which could reasonably be regarded as a criminal offence in accordance with basic human rights standards applicable to freedom of expression. Nor can it be accepted, consonant with these standards, that it can be a crime peacefully to express views about democracy in a situation where such views (because, no doubt, they have such obvious merit) appeal to many other citizens. Reference in the prosecution evidence to the "uneasy" state of the country is disingenuous: that uneasiness exists because police and pro-Government forces have unlawfully attacked people peacefully protesting for democratic change. Even if Mr Chihana's publications were intended to encourage peaceful protest, the fact that such protests might be suppressed by police violence cannot make Mr Chihana, in law or morality, responsible for that violence. It is fundamental that a lawful action cannot be rendered unlawful by the lawless reaction to it by third parties. (See *Beatty v Gillbanks* (1882) 2 QBD 308.)

The prosecutors

While we were in Malawi the Government filed an application with the High Court to permit the admission of an English QC, John Beveridge, and solicitor Andrew Nitch-Smith to conduct the prosecution. Malawi Law Society members could not recall such a step being taken since the country's independence, and the Society opposed the application. The Minister of Justice, who is constitutionally responsible for the conduct of the prosecution, told us that it was not his idea to instruct British prosecutors, but an order which had come to him from the President's office. He informed us that he had been told that the purpose of instructing them was to "show the outside world that we have nothing to hide": that the proceedings were acceptable.

Just how, exactly, were John Beveridge (a QC who enjoys a significant commercial practice) and Andrew Nitch-Smith (a partner in Messrs Denton Hall Bergin & Warrens, a commercial firm which does little criminal prosecution work) chosen, from all the range of English lawyers, to be instructed by the state to conduct its most important prosecution? The Minister of Justice and the Solicitor General (who is

responsible for payment of prosecution fees) had no idea as to who these particular individuals were, or what their reputation and experience was. "We had never heard of them before", they told us, until they were provided with their names and directed to instruct them by the President's office.

Of course, Messrs Beveridge and Nitch-Smith are experienced lawyers in good standing with their English professional associations. Both have been retained in the recent past by Lonhro, a corporation with considerable investment and influence in Malawi, and when this was pointed out, both the Minister of Justice and the Solicitor General accepted that this might have been the reason for their nomination. What we find extraordinary is that the two senior legal officers of the state should be given by the President no discretion at all in the appointment of overseas counsel.

We see this incident as the clearest evidence of something which struck us in speaking to senior justice officials: in practice they are subservient to the President's office, whatever the law may say.

SECTION 3: THE NORTH - THE REVEREND AARON LONGWE AND HIS COLLEAGUES

Reverend Aaron Longwe is the Moderator Elect of the Synod of Livingstonia, based in Mzuzu. His outspoken sermons, and the frequency with which he has been detained, have made him famous in Malawi. On the day we arrived in Mzuzu a Muslim friend of Reverend Longwe stood trial for entering the police station in which Reverend Longwe had been detained. We observed that trial and met some of the parties. The day after we arrived the Alliance for Democracy, a peaceful campaign for the introduction of multi-party democracy, was launched.

The Reverend Longwe told us:

> On Sunday 26 April 1992 I was preaching from the Book of Micah, Chapter 7, and calling on the Church to use the occasion to preach the truth. In my sermon I began by saying that there were many injustices in society, and structural sins that have not been addressed by the Church. I said that it is the Church which should speak out on behalf of people, and advocate the search for truth. At present, certain things are tolerated by the Church in our society. Equally, lawyers have failed to speak out for and defend people. I said that I supported the initiative of the Catholic bishops; they had spoken the word of God.
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> On Monday 27 April I was picked up at about 10 am. The police said first, that I had been wrong to tell the people the plain truth; and second, that I had been wrong to challenge lawyers. After an interview, I was taken to

Mzuzu prison. The next day, I was released; but was told that the Inspector General of Police and Prisons wanted to see me in Lilongwe.

On Wednesday 29th I was driven to Lilongwe with some of my Church Elders, who had supported the sermon. I was interviewed for two hours. We were then driven to the police station at Kanengo. This is where political detainees are held. We were kept there in a very small dark room without ventilation for 3 days, with no food nor bath. One of the Elders would have died if he had been kept there longer. From there I was taken to Maula Prison in Lilongwe. I was held there in a cell with 7 others, and only allowed out of the cell for 7 hours each day. I was held until 12 May 1992, when I was released. I was only allowed to see my relatives once during that period, for 20 minutes.

Following my release, I appeared once more before the Inspector General, who asked me to preach to him the same sermon I had preached on 26 April. The Head of Administration and the Head of Security were also present. I was asked why I had spoken to the BBC; I said I had only told the BBC the truth, that I ordered the security police to leave my church. The Inspector General told me that the sermon broke no laws; but that I should not preach any more from the Book of Micah.

On 13 May 1992 the Police arrested two Elders. They arrested Mr Kaunda because he preached a very good sermon on Easter Sunday. They arrested Mr Beza because he had led the congregation in singing Hymn No.150, which must be considered to be subversive. They were charged with conduct likely to cause a breach of the peace, and detained for 2 months and 14 days. When Mr Beza came out, he had scabies.

I was released while the Elders were still in custody. I and my wife went to the police station to see them. My wife brought them a copy of "Faith on Trial". After the visit the security police came to my home, and said I should report to them every day because I had brought that book. I was told I would be re-arrested unless I apologised to the police. They also called the General Secretary of the CCAP (Church of Central Africa Presbyterian) to say that I and my wife would be banned from police stations.

When the two Elders were released, I asked them to address a service in the church. Visitors from Canada were present. The visitors were terrified by the Elders' testimony. After the service, I was asked to go to the police station, and went the next day. I was kept there for three hours. The Commissioner of Police said first, that no-one should talk about prison life; and secondly, one should not talk in the presence of foreigners.

> At 10 am on 31 August 1992, I was with Roger Nkhwazi, a prominent businessman and Catholic lay person at the Mzuzu Convent. Police arrived and handcuffed and arrested us. I demanded to see their warrant of arrest, but was told that there are no such things in Malawi. The police told me that I was being used by an Irish Catholic Priest, Father Leahy, who has since been deported.

Reverend Longwe was not charged. But a Muslim friend attempted to visit him in the police station, and he was charged and brought to trial. We spoke to the participants.

The Defendant

Ismail Khan is a prominent local business man, and 42 years old.

> On 31 August 1992 Reverend Aaron Longwe and Roger Nkhwazi were arrested by the Mzuzu police. They were locked up. I went to the police station to try and find out about them. I wanted to see them. I went with my little dog, which I take everywhere. The police officers I saw kept sending me from one office to another, and my dog snapped at them. That did it. An officer said "bye-bye, this is your cell", and I was taken and put in solitary confinement for 24 hours. No reason was given for my detention.
>
> I was then handcuffed to someone else in detention. As we were handcuffed together, in the corridor near the cells, the police grabbed him. They beat his knee with a stick about 3 foot long, but broken, wrapped around in leather. They then injured his hand, his shoulder, his skull and the soles of his feet so they bled. They forced one of his arms up behind his back. We were then put in a cell together. He kept crying all night in pain. I hugged him, but I am not an antibiotic. I think he was released next day.
>
> I was then taken to Mzuzu prison and put in G block for 2 days. I was locked in a very small cell, about 4' by 5' with 5 other people from 4 pm until 6 am. There was a bucket in the cell, but no toilet, so I refrained. The cell was nicely painted. I was then taken to Court and charged with disorderly conduct. The charge reads "On about 1 September at Mzuzu Police Registry Office in the city of Mzuzu (Ismail Khan) did conduct himself in a disorderly manner, by entering into the offices without permission of the officers on duty"; contrary to section 65(1) of the Penal Code.

Ismail's health appeared to have suffered from his detention. He had developed a stutter and hypertension.

The lawyer, Leslie Ndovi

Leslie Ndovi is Ismail Khan's friend and legal representative. A barrister trained in Lincoln's Inn, he was formerly DPP for Malawi. He resigned in 1986 to set up the first and still the only legal practice in the North.

> When I heard that my friend Ismail had been arrested I went to the Mzuzu police station. Because I used to be DPP I knew the Commissioner of Police there from Lilongwe. So, the station officer was very kind and allowed me to talk to Ismail. Next day I went again to the police station and was told that Ismail would be charged. On September 2 I went and applied for bail from the Magistrate and it was granted. This was pleasing although the penal code specifies that detention pending charge should only be for 24 hours. The charge is not one I have met before. It's odd as the Penal Code allows for access to a police station without prior permission.

The trial

Ismail Khan's trial started in the afternoon of 21 September. It took place at the Mzuzu Magistrates Court, and attracted hundreds of onlookers. Reverend Longwe and Roger Nkhwazi are local heroes for their campaigning through the Church for social justice. Ismail Khan is Muslim who had been unusually brave in going to a police station to enquire about his friends. The police had behaved unusually in charging him and releasing him on bail. The expectation was that he would be detained without trial, for the impertinence of enquiring after prisoners. The trial was therefore to be a rare spectacle.

The proceedings took place in English, translated simultaneously into Tumboka, the local language. A single magistrate heard the case which was prosecuted by a police officer. Unusually, the defendant was represented. As the afternoon wore on more and more people crowded at the windows to hear. Mr Ndovi was cross examining the police effectively. The effect on the public was electric. It was a new experience for them to see the police humiliated.

The first officer described to the court how Ismail's dog had charged the police at Mzuzu station. The officers had been forced to retreat. Mr Ndovi produced the dog - a very small spaniel. The public hooted. After that the officer turned his back on the public gallery, hiding his face; and the prosecutor asked for an adjournment. He was taken sick, he said. The case was adjourned. The Court was guarded throughout by armed plain clothes officers.

Aford

Leaders of the Church, the Unions and business launched the Alliance for Democracy (Aford) on Tuesday 22 September, the day after Ismail Khan's trial. It is a campaign for the peaceable introduction of multi party democracy. All political parties except for the ruling Malawi Congress Party are currently illegal. Aford's Chairman is Mr Chihana, its committee members include the Reverend Aaron Lilongwe and the head of the prestigious Phwezi educational foundation.

Cards were issued to people prepared to commit themselves to multi-party democracy. The organisers were exhilarated and tense. They simply did not know whether they would be detained - a fear we underlined when two days later, we heard President Banda denounce multi -party democracy. Thousands of cards were printed. Publicity depended on a single press release, broadcast by the BBC World Service. The government controlled Malawi Daily News, the country's only newspaper, actually mentioned the formation of Aford in the body of a news story which headlined the defection of one of its original supporters. There was considerable excitement that the opposition had been mentioned at all, and amusement at the ingenuity of journalists who had managed to do so under the pretext of publishing "knocking copy".

SECTION 4: BLANTYRE - OFFICE AND FACTORY WORKERS

We were told of riots that had taken place in early May in Blantyre and Lilongwe. They had started as a result of an industrial dispute, and spread to encompass popular outrage at the treatment of Mr Chihana. Mr Chihana's trial had originally been scheduled for May 6, but the police did not produce him from prison. We heard reports that some 3000 rioted, and about 40 people died, and many more were arrested.

The bishops' pastoral letter, declared illegal on March 11, was still circulating, as were copies of letters from proponents of multi-party democracy to the President and the Minister of State and copies of Mr Chihana's speeches. Proponents of multi-party democracy exiled abroad had long faced the difficulty of bringing material into the country. The post is censored, and customs officials search baggage. The exiles developed the ingenious route of using fax machines.

People with access to fax machines became victims of police attempts to suppress the multi-party propaganda. On 22 May and the following days office workers at the National Bank of Malawi, the Electricity Supply Commission and other companies were arrested, tortured and detained. We sought to find out how many people were arrested and whether any prisoners from this wave of detentions had not yet been released. We found no system for providing this information; no effective mechanism for questioning the government, and no press free enough to find out. It was probably

the largest purge of the country this year, in order, so the police told one victim, to find the perpetrators of multi-party democracy within 40 days.

Some of those arrested were released without charge. Others were charged with sedition. We reproduce two of the allegedly seditious documents in Appendices 1 and 2, and have considered several other documents. We do not consider that these documents are seditious, on any view of the law. We spoke to numerous witnesses to these events: the following three cases are representative.

Factory worker

> On Thursday 7 May I was walking home from work with friends. We had been sent home early because of an industrial dispute. It was about 10.00 am. I saw a group of youths being chased by soldiers who were firing at them. A police landrover stopped by me and asked me why I had not run away. I said "Why should I? I am coming from work", and showed them my identity card. The commander of the four soldiers who were in the landrover said "No, no, bang him up". Then one of the soldiers fired his gun next to me and knocked me down. Then all four of the soldiers beat me up. I stood with my arms round my head to ward off the blows. The commander pointed his pistol at my chest and said "We've shot your friends. You're lucky". I said "But Sir", then he fired his pistol in the air and the soldiers bundled me into the van.
>
> They drove to the police station. They kept boasting about how many people they had killed and saying that I would soon be dead too. Inside the police station there were a lot of constables who started beating me on the head and legs and on the knees which meant that I could not walk. Some beat me with their hands, some with bottles or sticks and some with guns. There were lots of people there and they were all being beaten.
>
> I was then put in a small cell about 4 metres by 4 metres with about 45 other people. The police used guns to push people to get more into the cell. We were there for two hours when warrants were issued for our imprisonment in Chichiri Prison. One man resisted being put in the van to go to the prison. I saw the police shoot him in the hip and then place him in the doorway of the van so that everyone getting into the van was forced to trample him. On the trip to the prison there were 95 of us in an enclosed Bedford truck. Some people collapsed.
>
> At the prison there were about 250 of us. We were made to kneel with our hands on our heads, stripped naked, and made to bend over so that they

could check our anuses. Then we were pushed into a big cell. We were beaten with 4 inch diameter hose pipes.

Our daily routine was that we were let out at 6.30 to wash. There were 4 showers for 500 of us. The showers were next to the urinals so that urine ran across the shower floor. Shortly after being let out we lined up for breakfast which was a small cup half full of water and half full of flour. After breakfast we stood around in the yard. Together with convicted prisoners there were 1397 of us in the yard. If any relatives came to the gate to see us we would be called up to the gate to talk to them.

Our main meal was at 11.00 and was cold porridge which had been cooked the previous evening together with beans full of weevils, or matemba fish. The convicted prisoners warned us not to eat the matemba - those of us who ate them were ill. Relatives brought us food. As time went by people with no relatives became malnourished. I saw 5 people die and most of these were people who had become malnourished. There was no medicine available apart from aspirin.

In the evening a prisoner known as the prefect would say "I'll stack you". Then we would be seated on the floor each with some-one else sitting between his legs. The prefects would cram most people into the middle of the cell. The gaoler would demand money to allow you to sleep against the wall of the cell.

I stayed in the cell for a month, then about 40 of us were released and bailed to report to the police the following day. I went home and celebrated. The following day, when I reported to the police, they told me that their boss was very angry that we had been released and that we had to go back to Chichiri. Out of 40 who had been released 30 were sent back. After two weeks I was seen by a public prosecutor who told me that I would be charged with breach of the peace and fined. If I said I was not guilty I would be brought back to prison and forgotten about. I said I would plead guilty. I was taken to the Traditional Court, charged and fined, and then released. Since my release I have not been able to get my job back.

Office workers arrested at the end of May 1992

Office worker 1

I am woman office worker in Blantyre. In May ten police came to my home. They carried large rifles. They searched my house. They admitted they did not have a search warrant. They found a copy of the bishops'

pastoral letter. The police said "so it is true you have been distributing letters".

The police arrested me. I was put in a cell with a schoolgirl. Four policemen and two policewomen came into the cell. I was hit by a policeman's fist. I was hit on the leg. I was pushed into the wall of the cell. I was punched just above the nose and on my temple. I was punched under my left breast. I was kicked on the right side of my stomach and on the left of my back. I was kicked on my leg. An officer put both hands on my chin and pushed my head against the wall. He then kicked me. I fell down and he kicked me while I was lying on the ground.

I was then taken to the office where I worked and the office was searched. The police found another document. It was a copy of Chihana's speech to a conference in Lusaka. I was interrogated by men who said that I conducted multi-party meetings and I should tell them which party I belonged to. I told them that I knew nothing of these people. I told them that I read the letters that had come through but nothing more. I told them that the letters had been thrown on the road. They said "you are in the hands of the government. We can do anything we like with your life." Then they ripped the clothes off me. They left me naked. They made me lie down. One pulled my hair. One pulled my legs. One man had pliers. They forced my knees and my legs apart. They started putting the pliers into my anus. I was crying at the top of my voice. They withdrew. They sent me back to the Blantyre cells.

Next day they went through the same procedures. It was the same three men. They said to me "if you are not telling us the truth today we will do the same to you again today". They stripped me naked. I was lying on my back with my legs apart. The Officer said "this is your last chance. You will rot here. You will remember this chance". They went on to say "we have never given people the chance to tell the truth before. You are one of the lucky people. We usually just dump them and let them die. This is your last chance to tell us the truth". I said if there were multi-party meetings I did not know about them. I told them "I am not interested in politics. I am just an ordinary girl". That was the truth that I was telling them. I was put back in the Blantyre cell. They called me back that evening. They said "You have a beautiful baby and you want her to die. If you want to save your baby then we will release you immediately". On Monday they took me to Chichiri prison. I left my handbag, watch, shoes and belt at the gate. Twice more the same three men called up.

The worker identified by name the three men who tortured her.

After a month I was taken from Chichiri prison to Zomba prison. My strongest recollection of Zomba prison is the very bad toilet facilities. The toilet was 100 metres from the cell. It was an open building with no roof and no door. There was no water. So the flush did not work. It was very smelly with plenty of malarial mosquitoes. There were 20 of us ladies in one cell. We were kept in a cell from 4 p.m. till 5 in the morning. We were then allowed in the yard. The cell and the yard were bigger than in Chichiri. But the cell had no toilet facilities. We all shared one bucket which we used as a toilet at night and in the day time to carry water to wash in. It was the same bucket for both things. The water was brought from outside by prisoners on hard labour. There was one pail of water for four or five people to wash in.

I was not interrogated while I was at Zomba. I was just dumped there. I heard nothing from the police. The food was much better than in Chichiri. We were eating nsima (maize porridge) and beans with weevils. We even had some fresh fish and some dry fish.

After two months I appeared in a Magistrate's Court, and was charged with distributing seditious material. I have been released on bail, and my case has not yet been heard.

I check in at work, and then I go home. I am not allowed to work at all. I have nightmares. I do not go out. I stay at home every evening. I am still frightened. I have a swollen face from the beating I received from my first day. I had pains under my breast for about three days after then. They have swollen. It is very painful between my eyes and nose. There was a lot of pain. Since I have been in custody I have developed malaria.

Office worker 2

I am a woman office worker at the National Bank, Blantyre. On the 25 May policemen and a policewoman in civilian clothes came to the Personnel Department of the National Bank. They had a list of names, and called 7 women and 8 men. We were told that the policemen had come to search our desks. They took each of us to where we were working and searched our desks. They did not find anything.

Despite that, we were all taken to Blantyre Police Station. We left our shoes and sat down in a row. There were lots of police there. I was slapped on the face. All of us, men and women were beaten. The officers shouted at us: "You followers of Chihana. Your time has come. You will never get

out of prison now. Forget your children. You will stay in prison and die there."

That night I was taken to a cell. There were 11 other women in the cell. It was about 12' x 12' square. There were no lights in the cell. There was no bedding either. There was no toilet. I remember we used to ask if we could go to the toilet. The officers said that any one belonging to the party was not allowed to emerge from the cell. They meant the opposition party that they believed we were members of. We had to urinate in the cells. The room began stinking. We were there for three days and three sleepless nights. There were no washing facilities and very many lice.

The second day I was there I was taken out to search my house. My son asked the police if they had a search warrant. They said they did not. He refused them the right to search. They insisted and they just searched and said they found an article they said was seditious.

I was driven back to Chichiri for interrogation. I was interrogated by three men. They started questioning me about the paper. I said I know nothing. They started beating me. One man was beating me with both hands clenched. He was beating me beside my ears. Ear fluid came out of my right ear. He pulled my hair and made me fall down. He started stamping on my ears with his boots. The other two policeman had left the room at this time. He took a chair and started beating me with the chair on my left middle finger. He killed the nail altogether. He pulled my clothes right up. He then took a pair of pliers and pressed the pliers into my vagina and pinching it with the pliers. He worked his way all around and outside. He pinched me with the pliers about 10 times. I cried and cried. He left me. I started bleeding so I asked to go to the toilet. I was discharging a lot of water. When I came back from the toilet he told me I could go. He said I would die and should forget about my children. He told me I was disturbing our President's Mama and Tembo. He told me that Tembo had given them 40 days to find the ones who were distributing the papers about multi-partyism.

The people from the National Bank and Escom were all held together. I found my friends at Chichiri prison. Then I felt pain in my jaw. I did not eat anything. It became septic. For two months I was there in the prison discharging pus. I asked to see a doctor but was refused.

There were about 50 women in the cell in Chichiri prison. It was approximately 12 foot by 25 foot. There were so many in there that we had to sleep in two rows next to the wall. We all faced in the same direction as

there was not enough room to sleep facing different directions. Whenever somebody wanted to change direction she announced it and said "lets change direction". We all changed together. Others slept in the corridor between the two rows. This meant that we could not stretch our legs.

We were not allowed to see a lawyer. I asked for a lawyer.

The police told me that if it had not been for international pressure we would have been killed. But there is a rumour that they will find ways and means of eliminating us. After I had made the statement I was taken to a Magistrates Court. I was charged with possessing seditious documents. I denied the charges and was released on bail.

I came back from prison with a very bad cough, malaria and a bladder infection. I go to the office in the morning and then I go home. I am not allowed to work. I was told that the National Bank had been directed to suspend everybody that had been charged. In fact, I could not go back to work. I am too frightened. I want to stay at home with my child. If I did not have her I would go away, or would have killed myself when in detention.

All those we interviewed were extremely nervous and asked us to expose the torturers, who were the same three people in each case. We wrote to the Minister of Justice on 6 October naming the torturers and requesting a full enquiry. We received no reply.

CHAPTER II: LONG TERM PRISONERS

We had the sad privilege of meeting Orton and Vera Chirwa in Zomba prison; and Machipisa Munthali who had just been released from 27 years in custody.

SECTION 1: ORTON AND VERA CHIRWA

Orton and Vera Chirwa were thrust into international prominence when they were sentenced to death in 1983. They had been convicted of treason by a Traditional Court. In that Court they were denied legal representation. (See Chapter IV, Section 5.)

Orton Chirwa was one of the founders of the Malawi Congress Party. A member of Lincoln's Inn, he was called to the Bar of England and Wales and became the first African barrister in Malawi. He was well known as an effective poor persons' lawyer. In 1963 he was appointed Minister of Justice, and Attorney-General in the first independent Government in Malawi. Within a year Orton Chirwa was one of six Cabinet Ministers forced out of the Cabinet because of major policy disputes with President Banda. Orton Chirwa went into exile, set up a law practice, and founded the Malawi Freedom Movement to campaign for greater democracy in Malawi.

Vera Chirwa, Orton's wife, is now 65 years old. She is also a British trained lawyer. Vera Chirwa fled Malawi with her husband in 1964. She was employed in the Attorney-General's chambers in Tanzania and was later a law lecturer in Zambia University.

On Christmas Eve, 1981, the Chirwas were arrested. They were charged with treason contrary to Section 38 of the Penal Code in that they had "prepared, endeavoured or conspired to overthrow the lawfully constituted Government of... Malawi by force or other unlawful means". This included allegations of entering Malawi in order to assassinate President Banda, intending to "take over the Government in one swoop", conspiring with others to fight with arms to overthrow the Government, and publishing revolutionary words.

The Court convicted Orton and Vera Chirwa and sentenced them to death in May 1983. The National Traditional Appeal Court upheld their conviction by a majority in February 1984. Massive international pressure forced President Banda to commute their death sentences to life imprisonment.

On 25 September 1992 we became Orton and Vera Chirwas' first visitors for 8 years. Our visit was the occasion for their first meeting together in that period - despite the fact that they had been kept only yards apart in the same prison. Their reunion took place not only in front of us but also in front of the Commissioner of Prisons and

three prison officers who were present during the whole meeting. We objected to the presence of these officials, but to no avail. In consequence, we did not ask the Chirwas about political issues, and we noted that their remarks about prison conditions carefully made no critical reference to the period in which the present Commissioner was in charge.

The Chirwas told us they thought they had been forgotten. We assured them the contrary was true. We asked very few questions, but just listened.

ORTON CHIRWA

Orton Chirwa said:

> I was not seen by a doctor from 1985 until 1990, when the current Commissioner was appointed. I have had cataracts in both eyes since 1987. Since 1989 I have only seen outlines. Daytime, when the sun was shining, seemed like dusk to me. Dusk seemed like the night. Two weeks ago, I was seen by an optician who has given me drops, I can see clearer now. But I need an operation and I doubt there is anyone in this country who can do it.
>
> I suffer from high blood pressure. In 1987 I was told I had a swelling of the heart due to hyper-tension. I still take tablets for my heart condition. I have run out of some of these tablets and have become worse. I believe I need to be seen by a specialist. In August, I fainted and a doctor took my blood pressure and said I was OK. The next day I fainted again and the doctor's assistant came and said my blood pressure was OK. I therefore believe they know nothing of these things.
>
> My cell is a match box: it is 5 to 6 feet wide and 9 to 12 feet long. There is a thick, thick door with a small window in it near the ceiling. There is no cross-ventilation. I am in a "condemned cell ". Twice a year, when the condemned prisoners come, they are put in my cell and I have to move to another cell. When the prisoner has been hung I can move back to my own cell. Right now, I am in cell no.24. My cell is no.26. It is being occupied by a prisoner waiting to be hanged. When he has been hung on Saturday I will go back to my cell.
>
> There are two other prisoners in my position but their status is a bit lower than mine. I meet them in the yard. They are called Chakuamba (a former Minister and Regional Party Chairman) and Gwede (a former Head of Intelligence).

For 3 months in 1986, and again between January and March 1987 they locked me up and chained me, both arms and legs. Between January and March 1987, I suffered the same treatment again. I was chained all day and night. The handcuffs were attached to a metal peg in the ground, so that I could not stand or move.

There is no furniture in my cell. I now have 8 blankets some of which I use to make a mattress. I have a latrine bucket inside my cell which is removed by a cleaner morning and evening. I have never showered or bathed here. Someone brings water and I am given Lifebuoy soap. I also get toothpaste.

Vera and Orton had a discussion about whether it had been better to use salt or soap to clean their teeth, before toothpaste had been introduced. Orton Chirwa told us about contact with their family.

I have received letters from my daughter Virginia, but when I reply, I get no answer. She wrote in February 1989 and I received it in November 1989. She wrote in December 1989 and I got it in March 1990. Her last letter got to me within one month of writing. I have had two letters in 1985 one from Zengani (who is a doctor in Lusaka) and another from Fumbani (who lives in Canada). Apart from the letters I have mentioned, there have been no other letters from outside. I have not had any visitors in 8 years. This is the first time in 8 years that I have seen my wife. They would have let me meet her when I was very ill and thought I was going to die but I did not want my wife to see me like that. I want to be able to see my wife and children.

In 1984 and 1985 we were allowed 6 books. Those are all the books I have been allowed. I have never been allowed writing paper or pens. They are forbidden.

We are deeply grateful for the concern you have shown and if and when we are able to do so we will give you proof of our gratitude.

We asked if they would like us to explore the possibility of exile. Orton replied:

I love England but I love Malawi better. This is our country. We are pure Malawians. I want to die in Malawi.

VERA CHIRWA

My health now is not good. I feel an aching in my bones, in my left arm. The bone aches. That makes the whole of my body painful. I have been

sleepless for three months; it was really serious last week. the medical officers gave me some pills which caused a general improvement in my body, but has not cured the aches and pains.

I have high blood pressure. I got it on the day of my arrest. We were violently arrested. They way-laid us in Zambia. It was a small road going to the farm where we were staying. They put a police van in the middle of the road. Our driver ran away. Then police appeared from the bush. They hit Orton on the eye, and said "We've got you". More people jumped on me. My hat and necklace worth £90 were taken. They robbed me. I felt many hands touching my neck. They were after my watch. My shoulder was fractured. I first thought that Zambian robbers had got us. They dragged us out of the car, they stole our shoes. Someone hit me with boots in my stomach; I bled and passed motion.

Some shouted "Kill her!" "Tear her eyes out!" and so on. That's how I got high blood pressure. Then they chained me hand and foot. Something rubber was tied round my eyes. My eyes were all red with blood. I had been ill anyway, and I became worse. I was swollen with cuts all over me. I thank the police doctors - they fought with the blood and saved my life then.

The food at first was not very good; but the prison officers were kind enough to help us. But there were always guns pointing at us. I was handcuffed and leg-cuffed when they came to take statements. Then they chained Orton and our son Fumbani to an iron peg, so that they couldn't stand. There was an occasion when they were pumping fumigating smoke into Orton's room, and I demanded that they stop. From there, first they said that we would be released; but the Life President had ordered that we should see developments in Malawi. They showed us the centre and north, and I slept in Blantyre. Then I was taken back to Chichiri, and things changed. Orton was taken away, and Fumbani and I were taken elsewhere. At last I was charged with offences and was asked to go to Blantyre. The judgments against us were perverse.

Things got very much worse in prison when the Chief Prison Officer left in 1986. We used to get bread three times a day; then only twice. They used to bring small rotten fish. I couldn't take these because of my asthma. I became very thin. I was chained up on 19 June 1984, until 1985. Then something happened; I prayed; then after some time, I was unlocked and the chains were taken away. The following morning I was told by a prison officer that I could only be chained up if it was ordered by the President. In February 1987 other officers came and told me that from today I would be

confined in my cell. They confined me in my cell until July. I could not eat; I drank tea without sugar. I wrote a petition to the President, in which I listed a lot of things. I asked him to allow me to write a book. I was finally released from solitary confinement in July 1987.

The Chirwas then, in our presence, extracted promises from the Commissioner that there would be improvements in their conditions. He agreed that the Prison rules would be obeyed. They would be allowed letters and visitors. He denied that the Rules had been broken previously. He claimed incorrectly and cruelly that the Chirwas had had no visits because no-one had come to see them. A Malawian lawyer has now been instructed to represent the Chirwas' interests.

Sadly, Orton Chirwa died in prison less than a month after our visit.

SECTION 2: MACHIPISA MUNTHALI

We met Mr Munthali at Mlowe Village on 22nd September 1992

I am now 67 years old. I was released this July after being in prison for 27 years. In the 1964 crisis I took sides against the policy of President Banda. There was a plot to kill me. I took the side of the ex-Ministers, including Orton Chirwa. I was Chairman of the Elections Commissions and of ADMAC (the Government marketing organisation).

I was arrested and taken to prison, first in Mlowe, then Mzuzu, then Zomba. I was tortured badly, and couldn't walk for five months. My feet were burnt, and I was made to walk on broken glass. I was in custody for seven months before charge. At first I was charged with high treason; then that charge was withdrawn, since there was no evidence. Later I was charged, following a retrospective change in the law, with an offence of carrying a weapon without a licence.

I was sentenced to 5 years imprisonment; I pleaded guilty - it was a trick I played, because I was told it would be very bad if I did not plead guilty - they would kill me. The magistrate took my side, and that's why I was only given 5 years. But the government appealed against the sentence, which was increased to 11 years. I had no lawyer - the government said I could not have a lawyer. My sentence ended on 25 February 1973, but I was held from 1973 until July this year, 1992, before being released. I was just kept in. The special branch told me that the Head of State had said I must be kept in. I was kept in a condemned cell, 3 feet by 6 feet, in Zomba.

From 1977 I was on my own. I was not allowed to speak to anyone. My cell did not have a window. I was given very bad food - uncooked beans. I was beaten up very badly, particularly by a white man who was a regional head of the Special Branch. The first time I was tortured they used whips; then they cut the inner tube of a car. There were four of them beating me the whole night through, from 9.30 pm until the morning. They were trying to get information from me.

I received no letters while I was in prison. My children were not allowed to see me. I did not see my youngest daughter at all until she was 27 years old. I have four children; they were looked after by friends and relatives. I had only one visitor, a man from Blantyre, who fought to be able to visit me. While I was in prison, my father and mother cried all the time. They suffered more than me. My father lived only a short time after my arrest; he died in 1966. My mother, too, died in 1983. People told me of their deaths while I was in prison.

It was pressure from outside Malawi, from the British and American Governments which got me released. I was on Amnesty International's list. As soon as I was released, I spoke on the BBC about what had happened to me. Then the Inspector General called me into Blantyre. He asked me why I said what I did on the radio. I told them that I had simply spoken the truth: that I was tortured, that the food was very bad. They told me that now I had been released, I should not get involved in politics. But I told them that I want multi-party politics.

I was married, but they forced my wife to divorce me. That was typical. My wife is now married to the Minister for Local Government. They told me in prison that my wife had divorced me. The special branch told me that in Malawi, if you are put in prison then you are a dead man, so your wife must divorce you. Three days ago my wife came to see me. She was crying. She told me it was not her fault. They had put her in prison too.

Many people died from beatings and lack of food while in detention. My health is not good now, but there are no drugs in my village, or any proper medical care. I have not seen a doctor. I do not even have a radio.

CHAPTER III - THE GOVERNMENT

SECTION 1: MEETING WITH PRESIDENT BANDA, THE MINISTER OF JUSTICE, THE MINISTER OF STATE, AND THE MINISTER WITHOUT PORTFOLIO, Lilongwe

His Excellency the Life President Ngwazi Dr H Kamuzu Banda, who unites the posts of President, Head of the Security Services, and Minister of Agriculture and many others is the sole decision-maker in respect of many important political and legal matters. We had a 2 hour audience with the President. Also in attendance were the Minister of State at the Office of the President, the Honourable John Tembo; the Minister without Portfolio, the Honourable Wadson Deleza; and the Minister of Justice, the Honourable Friday Makuta.

Geoffrey Robertson QC, speaking on behalf of the delegation, saluted Malawi's record in helping refugees. He reminded the President that British and Malawian lawyers share a common legal heritage, and said that we had come to build links with Malawian lawyers. Malawi had 97 law society members to serve nine million people - one of the lowest proportion of lawyers to a country's population anywhere in the world. The delegation represented British professional bodies which wished to encourage the development of Malawi's legal profession, because lawyers were essential in any country if citizens were to assert legal remedies against abuses of state power.

Mr Robertson expressed the delegation's concern about the Government's lack of respect for basic human rights, notably freedom of expression and association and the independence of the judiciary. He drew attention to the recent constitutional amendment which allowed the President to remove any judge in the national interest, and said that reforms of the sedition laws and the public order laws would need to be made before Malawi could be said to be a nation where freedom of speech was protected. He described our concerns about the rule of law, and in particular about the exclusion of representation in "traditional courts" and the recent examples of detention without trial and police failures to obey court orders. He raised the Chihana case as a glaring example of persecuting the peaceful expression of political opinion. Mr Robertson stressed that the delegation offered these thoughts in due humility, well aware of the defects in the English legal system which Malawi had inherited, but in the hope that British and Malawi lawyers could work together in future in an effort to reform them and bring about a situation where citizens were able to exert remedies against abuses of state power.

The President invited the three Ministers present to address us.

Mr Friday Makuta, Minister of Justice

Mr Makuta, the Minister of Justice, told us that Malawi had gone far to respect human rights, as shown by recent changes to the Preservation of Public Security Act, the Forfeiture Act and the Penal Code. It was a very well-known fact, he said, that of late the Court's orders were followed by the police although he conceded that there had been some problems. He quoted the case of Mr Chihana who had been released on bail after a Court Order. He stressed that Malawi was constitutionally a one party state.

Mr Wadson Deleza, Minister Without Portfolio, and Secretary of the Malawi Congress Party

Mr Deleza told us that he was grateful to have listened to our introduction. But he wished to explain about the system of the one-party state. Malawi as a state had a tradition and a history. After independence, the African population opted to go for the Malawi Congress Party. Four or five parties contested the first General Election. All voters were free to go to the polls and use the Constitution bestowed by Britain. However, the MCP won all the seats.

The MCP was therefore the only Party voted into government in 1963, led by Dr Banda. It changed the constitution so it would remain the only party. Mr Deleza told us that as a sovereign state Malawians have the MCP which formulates policy. It goes without saying that once laws are passed, anyone who interferes must be tried according to the law.

People can preach, he said, about multi-party ideology, but after 28 years, people know the benefits of the MCP. As to Mr Chihana, Mr Deleza said he knew that he was guilty. For Malawians he had committed a crime, that of using abusive language towards the government, outside the meaning of freedom of speech. For Malawians the Life President was the symbol of unity.

Mr John Tembo, Minister of State

Mr Tembo assured us that he had heard with great interest what Mr Robertson had had to say. He appreciated the historical connections with Great Britain, in particular the Scottish missionaries and the British administration. The educational and legal systems were largely based on British models.

It was the drive for human rights, said Mr Tembo, which had brought Dr Banda to Malawi. When he came back and demanded human rights, he was arrested by the British and jailed for more than a year. They took him away from his country, and

imprisoned him in Rhodesia. The British brought in troops, and killed and arrested people.

Mr Tembo added that any country must evolve. Malawi had been independent for only 28 years. It took over the laws of Britain, but also took into consideration traditions and customs. Preseident Banda brought into his Cabinet Orton Chirwa who was the first Minister of Justice. He worked with the Secretary to the Cabinet, Bryan Roberts, who told us that we should not copy everything from Britain. It was Orton Chirwa who introduced the Traditional Courts, to try people charged with murder, in view of the suspicions of witchcraft still prevalent. These things were not understood by ordinary western trained Judges.

Mr Tembo told us that President Banda is a highly educated, civilised man, who is very generous in accommodating other peoples' views. The best thing was to discuss matters openly. Mr Tembo reminded us that we came from the country well known for the Birmingham Six, the Guildford Four, and the Maguires. These miscarriages of justice had not been brought about by Traditional Courts.

Mr Tembo criticised us for thinking that we could go straight to the Head of State. Malawi had one Head, and one Leader: His Excellency the Life President. He was absolutely and fully in charge. He told us that we should have seen the crowd singing and dancing two days previously when Dr Banda opened a new dam in Lilongwe.

His Excellency the Life President, Ngwazi Dr H Kamuzu Banda

Jane Deighton told President Banda that we recognised his act of mercy in commuting the death sentence passed on Vera and Orton Chirwa, but would now like to see them released. She reminded him of the international speculation that they were not well, and pointed out that we had been refused permission to see them. Would he grant us permission? The President replied:

> You are most, most, most welcome. I am very pleased that you have brought Mbumba ("woman" in the Chichewa language) with you in your delegation. I am Nkhoswe ("man" who is authorised to mediate in disputes between the Mbumba in Chewa society, in the Chichewa language) and I like Mbumba! All Mbumbas in Malawi love their Nkhoswe. They love me, and I love them. Wherever I go in Malawi the women sing and dance for me!
>
> As for the Chirwas, they were sentenced to death. I commuted their sentence to life imprisonment because I did not want to see a woman hang. I cannot commute their sentence any further.

When it was pointed out that our request was to see them, the President said that he had no objection, and his ministers were directed to arrange our visit.

I must tell you that Malawi did not start as a one party state. In the 1963 elections the Malawi Congress Party was opposed by the parties of Mr Katsonga, of Mr T D T Banda, of the Catholic Archbishop, and the United Federalists of Sir Roy Welensky. Mr T D T Banda could not find anyone to nominate him and Katsonga had won no seat. For the first few years of self-government there were two parties. But when the Federation was dissolved in 1963, there was only the MCP. No-one had decreed a one party state, least of all me. It was just born. The other parties died a natural death.

Malawians are organised in tribes. I am a Chewa. The Minister of Justice is a Longwe, and the Minister of State an Ngoni. Malawi is one of the few African countries where tribalism is no longer a factor. I lived abroad for 40 years, in South Africa, the United States, and the UK. Then I went to Ghana, until I was recalled to fight against the Federation.

I then insisted that Malawians stop thinking in terms of tribes. Fortunately for me, people listened. They did not argue. I insisted on unity and hard work. Malawi has no minerals; its wealth is the earth itself. Within a few years of my taking over power the country became more prosperous. After five years the previous Governors came back and asked me how I did it. The country is now much more prosperous than it was under the British. Even parts of the country which knew no agriculture, such as Nkhata Bay, now produce maize.

I am Minister of Agriculture. The UN's Food and Agriculture Organisation put Malawi as Number One, and the IMF and World Bank were full of praise. They said that in Africa, Malawi is a Star Performer. What made me very happy was when the IMF and World Bank praised Malawi. They praised Malawi on the basis of the money in the Reserve Bank. Every year the country's reserves go up. We now have twenty times more reserves in the Bank. Our reserves are rising. This country used to be one of the poorest in Africa. No-one now can call Malawi poor. Malawi is now one of the most prosperous countries in Africa.

Most of the money goes to ordinary men and women in the villages. Kwame Nkrumah took land away from people. I however left the land to the people, as was the customary law. Each villager can use as much land as he or she likes around the village. People are rich in Malawi: not the Ministers, but ordinary people in the villages, who are growing maize, which is their food, tobacco and groundnuts. As a result, the villages are prosperous. There is no poverty. Money is in the hands of the villagers. They are the majority. It is

right that money should go into the pockets of the villagers. Former Governors have asked me how I have done it. I said I appealed to the people, and they agreed with me. This is my policy. Fortunately for me, my policy is working. People have cars and new houses.

You are very welcome here because you have brought a Mbumba with you. You are most welcome. You would not have been here without her.

As to the law, in Malawi there are two different laws. The villagers know nothing of law. The British were very wise. They advised us to leave African life as it was. They allowed the Head Chiefs to be the Judges. Certain cases were not tried by lawyers, but dealt with by the Chiefs according to tradition. All Europeans and Indians were tried in European courts. But purely African crimes, brawls and killings, were tried by the Chiefs. And it is working very nicely. The British come here and say it is working even better than when they were in power. Sir Bryan Roberts came back and congratulated me on how our legal system is working.

The majority of people who are villagers must be looked after first. Then the town-dwellers. The villagers are priority number one for me. I must satisfy their needs. Food, decent clothing, housing with roofs that do not leak when it rains - glob! glob! glob! (the President indicated with his hands how the water would drip down) because in Malawi when it rains it pours down! These are the three essential things. My people cannot be happy with no food, no decent clothing and sleeping with leaks, drip! drip! drip! That's my policy, and my people are happy. They dance for me and they sing for me.

Geoffrey Robertson replied. He acknowledged that it was important to ensure that people had food. It was equally important to ensure that they did not suffer from fear. Yet the delegation had found that fear was extensive in Malawi. It was a fear amongst the people that they would suffer violent reprisals if they spoke critically of the Government, or even thought critically of the Government. The fear came from lack of human rights, and it meant that they were not happy, however often they might be organised to dance and sing for the President. Malawi may have become a one-party state because the MCP had won all the seats at its first election, but that does not mean it should forever remain a one-party state or that citizens should be detained and prosecuted merely for expressing that opinion. He said our concerns about Mr Chihana in this respect had been increased rather than allayed by Mr Deleza's comments on the case. He stressed that we has not come to impose "British" solutions, because human rights were not just fundamental, they were elemental to any civilised society. He hoped that the day would come when Malawi's lawyers would join an international delegation to visit Britain to analyse its human rights record.

After the audience with President Banda, who bade us farewell as effusively as he had greeted us, the delegation had a further short meeting with the Ministers who had been in attendance.

Mr Tembo told us that the President had welcomed dialogue. We suggested that the mission should be followed up, and he agreed our suggestion of a further mission next year.

Asked about prison conditions Mr Tembo stated that he had never been in a Malawian prison and was unaware of conditions there. If accounts given to the mission of violence and bad conditions were accurate the situation would be corrected. In any event, he said, he was not responsible for prisons. Who was, we asked him? He replied that the Inspector General of Police and Prisons was responsible for prisons and reported directly to the President. He said that Malawi was a peaceful place.

SECTION 2: MR FRIDAY MAKUTA, MINISTER OF JUSTICE; Mr E SINGINI, SOLICITOR GENERAL, Lilongwe,

The Minister of Justice had been Director of Public Prosecutions, a Judge of the High Court, Attorney General for 8 years, Secretary General of the Cabinet, Chief Justice for 7 years and had become Minister of Justice in 1992. The Solicitor General acted as a parliamentary draftsman and acted for the Government in civil litigation and dealt with amendments to the law. He acted as principal secretary for the Traditional Courts departments.

New amendments to existing legislation

The Solicitor General outlined recent changes in legislation. First, he told us, under the *Preservation of Public Security Act* there had been provision for review of detention cases by the Minister for Public Security (who was the life President) every 6 months. Under the new law a Tribunal was to be established. A High Court judge (who had not yet been appointed) was to be chairman and there would be four other members. The President would nominate the judge and appoint the other members. The Tribunal would be an advisory body which would make a report with recommendations to the Minister. There was no provision for the report to be furnished to the detainee. The law had come into force in August. There was no provision requiring publication of the names of detainees or the numbers held or notification to relations. There was no provision for appeal to the Courts.

Second, he said, legal reform had related to the *Penal Code*. There had been a general complaint that the penalty for publishing information prejudicial to the country was too high. This had been reduced from life imprisonment to five years. As to the use

of censorship, recommendations for the censorship of publications were made by the Censorship Board which consisted of churchmen and members of the party. It acted under the office of the President. The Ministry of Justice was responsible for drafting relevant legislation.

The third legal reform had related, he said, to the *Forfeiture Act*. In the past if there had been suspicion that a person was acting in a manner prejudicial to the economy an order could be made for the forfeiture of his property, including houses and businesses. Under the amended law, before that could happen the suspect must be told what was intended and given 21 days to file a defence. There were three grounds for making an order: damaging the interests of the country's economy; acting subversively and theft by a public servant. There was no intention to make the operation of the Forfeiture Act dependent on a Court conviction of the suspect. The matter would go to the High Court which would give an opinion and could make recommendations to the President. The President would decide the matter but must have regard to the opinion of the High Court. The Solicitor General provided us with copies of this new legislation, and we comment upon it below.

Traditional Courts

The Minister of Justice told us that there had been some thinking along the lines of change to the Traditional Courts system in view of Malawi's ratification, in 1990, of the African Charter of Human Rights, but no decision had been taken. We put it to him that pursuant to Art 7(1) of the Charter a defendant was entitled to counsel, which was not permitted in the Traditional Courts. But he said that the Traditional Courts had served their purpose and it would be wrong to abolish them completely. He was responsible for deciding which cases should be tried in the High Courts, and which in the Traditional Courts. He did not deal personally with each case in which a decision had to be taken on the forum for a prosecution although some cases had come to him for decision. The police decided in most cases. The President himself would decide where security cases should be tried. The President exercised overall authority on matters of that kind, and had, for example, decided that Mr Chihana should be tried in the High Court. We comment on the Traditional Courts below.

Human Rights

On the legal protection of human rights the Minister said that when he was Chief Justice no case had arisen involving that aspect of the constitution. He took the view that the Universal Declaration of Human Rights (UDHR) enshrined in Article 2 of the Malawi Constitution was binding, but subject to the broad exception that laws could be made to protect public security; for example the Preservation of Public Security Act, and the offence of sedition. We comment on the problems of the present constitution below.

The Minister accepted that there was an urgent need to improve the protection of human rights. He could not state the number of political detainees who were held. On the use of the death penalty, he said that death sentences were very often passed. It would be possible to find out the number of executions which took place. There was a "prerogative of mercy committee" presided over by the President himself. The Minister sat on it. When all court processes had been completed a meeting would be convened. Some three to eight cases might be considered at each meeting. Two or three persons might be reprieved. Criteria applied included the question whether the accused had intended to kill and the circumstances of the case. There were no plans for a review of the death penalty. The Minister told us that he was not aware of any government response to the formation of the new organisation promoting a change to multi-party democracy. However Malawi was a one-party state and persons who attempted to establish political parties could well be at risk.

Judicial Independence

On the question of judicial independence the Minister said that he had never had any directive as to how to decide a case when he was a judge. He had himself when he was Chief Justice decided cases against the Government, particularly Miscellaneous Applications (the Malawi equivalent of habeas corpus). As to the implementation of Court decisions, he would not be happy if there were a situation where a Court ordered release and the person concerned was taken back into custody. The Office of the President was responsible for the police. He promised that he would take up with that Office the cases of 20 people in Mzuzu who had been reported to the delegation as having been detained following their release after trial. He was aware of the 1985 amendment to the Constitution, which allowed the President to remove any judge if he deems it in the national interest to do so, but could not recall this power being exercised as yet.

SECTION 3: CHIEF JUSTICE RICHARD BANDA, SC, High Court, Blantyre.

The Chief Justice is a barrister of Gray's Inn, having been called to the Bar of England and Wales in 1966. He had previously worked as a Chief Resident Magistrate, as Director of Public Prosecutions, as Attorney General, and as a High Court Judge. He had been the first Malawian to be made a Senior Counsel by the President.

The Traditional Courts

The Chief Justice told us that the High Court enjoys concurrent jurisdiction, but as a matter of government policy certain cases, in particular capital crimes, are dealt with in the Traditional Courts. This was seen as a matter of fairness to the community, the

conventional Courts being "too technical". Cases were transferred to Traditional Courts at the election of the prosecution. All homicide cases were heard in the Traditional Courts. The rules of evidence were not strictly enforced in the Traditional Courts. This did not mean there were miscarriages of justice. In a case he had dealt with as Attorney General he had felt there was sufficient evidence to justify a prosecution but the Traditional Court had ruled that there was not, and acquitted the defendant. He thought that the High Court could not entertain an application for judicial review of a decision of a Traditional Court as they are separate hierarchies. However the High Court had never had to deal with an application for judicial review of such a decision, or of a decision to prosecute in the Traditional Courts. It would be open to someone to apply to the High Court and he could not say how the High Court would look at the matter. In certain urban Traditional Courts (up to Grade A1) counsel had rights of audience. Otherwise they did not, and in capital cases they certainly did not have rights of audience.

Human Rights

As to the status of the Universal Declaration on Human Rights, the Chief Justice said that this was referred to in the constitution. But judges did not often have regard to it; however, counsel were beginning to raise it in applications to the Court.

Judicial Independence

The Chief Justice did not accept that the courts were not independent of the state. He insisted that in his career as Attorney General and Chief Justice there had been no single incident where the Government had interfered with the courts. The President himself had ordered that no Minister should interfere with the courts. He said that when he had been appointed DPP the President said to him personally that no ministerial colleagues were permitted to interfere. Asked about the case of Stanford Munyabe, a Chief Resident Magistrate who had been dismissed following a verdict of acquittal he had delivered, the Chief Justice said that it was sad that he should have lost his job. It was not right and eroded judicial independence. As to the legal protection of judicial independence, the Chief Justice told us that he regretted the 1985 change in the Constitution which, he said, had removed the necessity for Parliamentary approval of a Judge's removal. Judges could now be removed by the President. He would have preferred the old rule to continue. He insisted that no Judges had in fact been removed.

Enforcement of Court Orders

He accepted that there was a problem about the enforcement of court orders. The courts would only deal with a contempt if moved to do so. While there was power for a court to deal with a contempt of its own motion (Order 52, Rule 5 of the English

Rules of the Supreme Court, which are applied in Malawi), consideration had not been given to using this power. The courts could be made to look ridiculous if they made a contempt order which was ignored. He had tried to raise the problem with the Minister of State. The Minister of Justice had raised it with the Minister of State. It was not possible to say whether this approach had had any impact, but Chihana had been released on the order of the Court.

Detention

As to the law on extra-judicial detention, the Chief Justice told us that this had been reviewed in great detail in the *Soles* case. It had been held that a reasonable time must be given for a decision to be made on whether the Minister should make a detention order. No specific period was laid down however. Under new legal provisions a detention review board had been established. The chairman was a High Court judge. The board was advisory only but the Minister was required to take its recommendations into account. There had been no applications for judicial review of permanent detention orders. If such applications were made the courts would consider them.

Criminal Procedure

Commenting on various aspects of civil and criminal procedure, the Chief Justice said that delays in proceedings were a problem. The Court did not monitor the progress of civil proceedings. In criminal appeals from the Magistrate Courts there were delays in the preparation of records of the proceedings in the Magistrates' Courts. Sometimes an appeal could be rendered academic by delay - the accused would have served his sentence by the time it was heard. The Courts were reluctant to grant bail pending appeal after a person had been convicted. This would be very rare. Cases involving first offenders and sentences over 2 years imposed by the Magistrates' Courts automatically came to the High Court for confirmation. Delays affected these cases too.

SECTION 4: THE MAGISTRATE, Mzuzu

While in Mzuzu, the capital of the north, we were able to speak to the magistrate who was hearing the case of Ismail Khan (see above).He had just completed a course for magistrates. He had graduated in 1986 and become a Resident Magistrate straight from University. He was asked about the independence of magistrates, and said that magistrates were civil servants, and were controlled by the Office of the Presidant and Cabinet. "If we do the wrong thing we are sacked." He added that Magistrates had the impression that the executive did not respect the judiciary, and as a result it did not respect the law.

The Magistrate was concerned that court orders were not respected. We discussed with him the court's powers to penalise the prosecution for failing to obey court orders. He said that although magistrates did have the power to discharge the accused if the prosecution or their witnesses did not turn up, there was no set formula for doing so, and many magistrates were lax.

We also discussed the detention of prisoners without the authority of the court. He said that detention orders were apparently made in Blantyre, and that it was claimed they were made under the Security Provisions. There was a lot of confusion about detentions. The Magistrate did not consider that he had judicial power over them. He did have powers to visit detainees. He objected to their being thwarted by the authorities. Magistrates have the power to visit prisons when they want. The Magistrate had not been allowed to visit political detainees. In addition, the authorities complained if he turned up at a prison with no notice, as is his right. The Annual General Meeting of magistrates had recently expressed concern about the restrictions on their access to prisons.

Defence lawyers complained on occasion that they had no access to their detained clients facing criminal charges. He had made orders that the police grant access, and on one occasion when that order was disobeyed he had granted the defendant bail. However, he complained, there was no guarantee such an order will be obeyed.

The Magistrate told us of 20 defendants who faced trial for riotously damaging a building or machinery in the Nkhata Bay area, two weeks before our visit. They had been discharged by the Magistrates Court halfway through the case against them, as having no case to answer. As they tried to leave the court, they were all immediately detained again by the police. The Magistrate gave us the names of these defendants.

Three days later we presented the 20 names to the Minister of Justice and asked if he could think of a lawful explanation. He could not, but agreed to find out what had happened. A week later the Solicitor General of Malawi telephoned Jane Deighton in London and read her a Memorandum from the Attorney General to the Secretary to the Cabinet. It said that "I have been informed that the persons were taken into protective custody because of threats from the people whose property they destroyed. They were subsequently released, and are now in their homes". The Solicitor General added that that was the official version, and he could only take the Secretary to the Cabinet at his word, however we might wish to contact our informants to check whether everyone had in fact been released.

This explanation amounted to an admission that the prisoners had been detained on the basis of allegations rejected by the Courts. We have written to the Minister of Justice asking him to explain the basis of these detentions, but he has not replied. We are still trying to establish whether the 20 are in fact free.

SECTION 5: THE LEGAL AID ADVOCATES, Blantyre 18 September 1992

We met lawyers whose salaries are paid by the State in order to provide representation for poor people. We visited the offices of the Legal Aid Advocates, a statutory, government-funded body. We met Gaston Minene Lipembe, a Senior Legal Aid Advocate; Robert Mazoye, a Legal Aid Advocate; and Torbens Mhone, the Chief Law Clerk. We were told that their office was established under the Legal Aid Act 1964, Chapter 4, and is paid for by the Government. The Chief Legal Aid Advocate heads the office; his boss is the Attorney-General, who appoints him. The advocates are supposed to assist the poor. They are not allowed to take murder or treason cases, which are tried in the Traditional Courts. The advocates can only appear in Traditional Courts if they get special permission from the Minister. Permission has been obtained twice, in civil cases (breach of contract), where difficult issues of law were raised. They cannot take cases of theft by a public servant, although they would be able to take on a case of violence against a public servant. But most of their work is civil work. In the Traditional Courts they can assist the accused to get bail.

The potential importance of the office is demonstrated by its recent success in obtaining reinstatement for a number of university students. There had been riots at Chancellor College in Zomba in May. The College was closed, and the University Council met. The Council concluded that 11 students were responsible for the riots, and those students were expelled in July. Fortunately for the students, one was employed at the advocates' office on vacation. He spoke to the Chief legal aid advocate, to find out if he could be assisted. The Chief took the view that the expulsions were unfair, because the students were not informed of the charge against them; and because there was no opportunity for them to argue their case.

The student was asked to bring his colleagues to the office, but some of them had already left the country. Four students were assisted by the legal aid advocates, and one by a private lawyer. Judicial review proceedings were brought in the High Court, on the ground of breach of natural justice. The relief sought was a declaration that the expulsions were unlawful; and mandamus ordering reinstatement. The 5 students were reinstated as a result of this action.

There are legal aid offices in Blantyre and Lilongwe; there is no office in the North. There are six advocates out of an establishment of ten; and supporting staff. We asked about the problem of detention without charge. Mr Lipembe told us that in 1988 he interviewed a prisoner and advised him that it was not possible to do anything about it. At that time, judicial review was not considered possible.

The hierarchy of authority in the office is as follows: The Attorney General can intervene to tell the office to cease to act in a matter; the office then stops work on the

case, and hands the case over to the Malawi Law Society. There was one particular case where Polytechnic students were charged with unlawful assembly and malicious damage, allegedly committed during the April riots. The legal aid advocate applied for and obtained bail for the students; but was then told by the Attorney General to cease acting. The Attorney General telephoned the Chief and advised him not to proceed. If the Chief wanted to proceed, and did so, he could not be dismissed, but his future career would be frustrated.

The Malawi Law Society have created an embryonic Legal Aid scheme. Many Malawians in outlying areas cannot obtain representation. It is difficult for the advocates to do work in the Magistrates Courts. It is mainly in political cases that they are told to stop. However, it is possible for people to sue Ministers using the advocates; in such cases, the Attorney General does not intervene. For example, Mrs Sisera, a Deputy Minister, was involved in a road accident. The advocates are assisting the injured party in suing her.

SECTION 6: THE REGISTRAR

We met the Registrar of the High Court and Supreme Court at his office in Blantyre, and discussed the resource problems which beset the higher court system. There were two in particular which require urgent remedy in terms of our concerns about human rights.

The first is the non-availability of up-to-date textbooks on human rights law. The judge's library, which we inspected, is in a shocking state. The most recent textbook on constitutional and administrative law was a student "crammer" published in 1973. This is the area of public law which governs citizens' actions against the state, and English law doctrines in this respect have advanced enormously since 1973. Yet this was the book being taken out by judges deciding cases involving police powers brought in 1992. We noted a similar deficiency in books on criminal law. We consider it a priority to equip the Malawi judges and lawyers with modern textbooks and law reports in the human rights field.

The other serious gap in legal provision is the absence of the transcripts of Malawi court decisions. Routine law reporting stopped over 10 years ago, although a few cases have been published by a law reporting project at Cambridge University. It is, in our view, essential that important decisions handed down by Malawi courts are published, both to ensure the operation of precedent and to enable them to be subjected to international jurisprudential critiques. This is an area in which British aid schemes could be of assistance.

CHAPTER IV: ANALYSIS

SECTION 1: DETENTION WITHOUT TRIAL

"I've no idea how many detainees there are", Friday Makuta, the Minister of Justice told the delegation; and he had no way of finding out. This confirmed our impression that detentions were the province of the police.

The use of detention is oppressive and long-term. Detention means being arrested without warning, without explanation, without trial and without limit. The testimony of Mr Munthali, released after 27 years incarceration, 16 years of which were served after the completion of the sentence of 11 years imposed by the Court, is recorded in Chapter II above. The evening before leaving Malawi we were telephoned by a frightened Reverend Longwe. He had heard that one of his congregation was chained to a hospital bed, very sick, with no access to family or lawyers. Why was this? He had been detained some 4 days before after saying, in a bar, that there should be a referendum on multi-party democracy.

Our firm belief is that the power to detain without trial should be abolished. It contravenes the most basic of human rights standards. Its exercise is oppressive and open to abuse.

The statutory basis for detention without trial, *The Preservation of Public Security Act 1960*, stems from British Rule. It provides for the Minister to make regulations for the preservation of public security if at any time he is satisfied that it is necessary to do so. President Banda made the regulations in 1964 during the uncertainty of the transition to independence. They have remained in force to date. Regulation 3 enables the Minister, "if he considers it to be necessary for the preservation of public order so to do," to make an order against any person directing that he be detained. Until this year, that order was only subject to a six month review by the very same Minister who made it. There is no provision for the detainee to be given an explanation or to argue against the detention or their family to be told of the detention.

The subject of a detention order is liable to arrest without a warrant, not just by the police but also by the military, any administrative officer or member of the Young Pioneers (a quasi military organisation of staunch Malawi Congress Party members).

The police have even greater powers. An officer can detain anybody when he has "reason to believe that there are grounds which would justify his detention" under an order "pending a decision" whether such an order should in fact be made (Regulation 3 (7)). In 1965 these police powers were limited to a period not exceeding 28 days. Constant abuse, and renewals of the period by the police, led to a flurry of "habeas corpus" applications. The Courts upheld the limit of 28 days. The Government

responded, in 1977, by amending the regulation - to delete the 28 day limitation altogether.

Lawyers have challenged the length of time people are held for, under 3(7). *Soloman Soles v The Republic* (1981) is the leading case. Skinner CJ said that:

> "the period during which a person may be held in custody can be no longer than would be reasonably necessary to obtain a decision from the appropriate authority as to whether a detention order should be made...the police having had an opportunity to carry out some investigation".

The Courts have interpreted this to give them power to detain people for periods of several months. Recently increasing numbers of detainees have been applying for "habeas corpus". Mr Mhango quoted these figures to the High Court in a submission in the case of Mr Chihana: only 2 cases were brought in the 70s, but 155 in the 80s and 36 in 1991 alone. 85% of applications in the 80s and 95% in 1991 resulted in unconditional release orders.

But it did not follow from the success in the Courts, that the detainees were released. Mr Mhango concluded that "these orders have usually either been ignored or disobeyed by the police".

Mr Mhango's submission, on 6 May this year, made legal history. It was the first time the status of the Security Regulations had been challenged. His client had been arrested a month before the application, no explanation had been given. Mr Mhango argued with force that the regulations are void as contravening both the Constitution and international law. He pointed out that section 2(1)(iii) of the Constitution asserts that:

> "the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the Universal Declaration of Human Rights and adherence to the law of nations"

Articles 3 and 9 of the UDHR read:

> "Everyone has the right to life, liberty and security of person" and "No one shall be subjected to arbitrary arrest detention or exile"

Mr Mhango accepted that the Malawi Constitution provides for derogation but only where reasonable and in the interests of defence, public health, public order or the national economy. None of those situations existed. To some extent the African Charter on Human and Peoples Rights, to which Malawi became bound in May 1990, assists Mr Mhango's argument. Article 6 reads:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"

The Court declined to rule on Mr Mhango's submissions, but released his client.

Criminal suspects have in law far greater rights than detainees. The Criminal Procedures Evidence Code requires the suspect to be brought before a Court within 24 hours, if practicable. But lawyers told us that in practice the police rarely obey that provision. The lawyers argued that there was little point in challenging the police to produce their clients, as the police would then simply detain their clients under the security provisions.

We consider that such detention of criminal suspects under the security provisions would be an abuse of power, since it would involve the misuse of security legislation for the purpose of overriding procedural safeguards specifically provided by the criminal law.

Future legal challenges to detention

The use of judicial review is a new and hot topic for lawyers. Areas ripe for legal challenge include:

1. The reasonableness of the decision to detain. If the maker of the order cannot justify it to a Court then the decision itself could be quashed. The test for the Minister making a detention order is quite rigorous, as the regulations require him to be satisfied that the detention is necessary for the preservation of public order.

2. The status of the Regulations. These may be ultra vires, outside the powers conferred by the enabling legislation. That legislation required the Minister to be "satisfied that it is necessary for the preservation of public security" to make the regulations. Public security is defined as including

> "the securing of the safety of person and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation disorder and crime, the maintenance of the administration of justice and the prevention and suppression of mutiny rebellion and concerted defiance of and disobedience to lawfully constituted authority and the laws in force in Malawi."

The Regulations enable the Minister to make a detention order if necessary for the "preservation of public order". This is a far wider, and a far lower test than "public security".

SECTION 2: THE "HUMAN RIGHTS REFORMS"

Three "human rights reforms" came into operation in Malawi in August. Their purpose was to meet the requirements of aid donors that human rights be improved. They were explained at our meeting with the Solicitor General, and we have analysed the text of these new provisions. We comment as follows:

A. Detention Tribunals

The Preservation of Public Security Act is a draconian piece of legislation as it stands. This amendment at least provides for a detention tribunal to review cases of individuals who have been detained without any prospect of trial, because the Government thinks that a trial would be "prejudicial to national security". We do not consider that it is proper to jail persons without the prospect of any trial, merely by virtue of an "opinion" of the Government. Internment is only justified, according to international human rights law, in time of war or serious public emergency. The "detention without trial" process is not so limited in Malawi legislation, and it follows that this reform is only slightly ameliorating a wholly unsatisfactory law. Moreover, the tribunal is to be appointed by the Government, and sits merely in an advisory capacity: it has no power to order release. Nor is its report to be made available to the detainee. The reform entitles soldiers, police inspectors, and anyone "authorised" by the Government to detain citizens for a period prior to the signing of a detention order. This dramatic power is extended to much too wide a range of persons and is again not subject to review by the courts.

B. Penalty for Sedition

The second reform reduces the penalty for sedition and related offences from life imprisonment to 5 years imprisonment. This is an improvement but does not address the central problem of the over broad definition of sedition in Malawi law. Moreover, as the proceedings against Mr Chihana demonstrate, the reform can simply be side-stepped by the device of charging more than one offence, and subjecting offenders to consecutive sentencing. Thus Mr Chihana was charged with seven sedition offences, permitting a maximum sentence of 35 years.

C. Forfeiture Act

This reform seeks to ameliorate the notorious law which permits the Government to seize the private property of persons suspected of subversion or of damaging the

country's economy. Once again, the amendment does not address the evil constituted by the existence of the law in the first place. Nor does it provide for any right of appeal against a Government order: it merely enables the victim to seek an advisory opinion from the courts as to the correctness of the facts upon which the order is made. The Government is not even bound by the factual findings of the court, and it may decide to implement the forfeiture on whatever facts are left after the court's findings, or on other facts which are subsequently alleged.

It follows that although the three reforms made in August 1992 mark a welcome beginning, they do not significantly alter the legal balance in human rights issues, which comes down heavily against the citizen and in favour of the State. In particular, they do not affect the basic problem of Malawi law and practice, which is that so many major decisions are left, at the end of the day, in the unfettered hands of the President and his office, and cannot be altered by bodies which are independent of that office.

SECTION 3:. CONDITIONS OF DETENTION

To be taken into detention is to be dropped into an abyss. Detainees are powerless in their captors' hands. The delegation found no evidence of effective legal or procedural checks on the captors. Those with rights in law to challenge the conditions of detention, simply do not. Some people did not know they could, or that they had rights; others, perhaps wisely, did not dare.

The lack of accountability was emphasised to us by the Minister of State. The delegation challenged him on the extent of torture in prisons. The challenge was misdirected, he said, he had never been into a prison and was not responsible for them. The Inspector General of Prisons and Police was in charge and he reported directly to the President. So concerned was the Government by our mistake that the Minister of Justice telephoned us that afternoon to ensure we now understood who was responsible for prisons. The next day we met the Commissioner of Prisons and asked him the chain of command. He reported, he said, to the Minister of State and on occasion to the President.

A recent check on prisons has been the Red Cross, who have started working their way through the prisons this year. They have complete access to all prisons and prisoners. They were introduced at the demand of Malawi's aid donors. Several ex detainees, who had recently been released, believed that their release came about because the Red Cross were due in their prison. It is too early to say whether the fears of many, that conditions will be left to deteriorate and new detainees introduced after the Red Cross have passed through, are well founded. The Red Cross is required to work under conditions of strict confidentiality, and to report solely to the

Malawi Government. It follows that the state in which the Red Cross finds Malawi's prisons does not become public knowledge.

We concluded that prison conditions breached Malawi's own national law, as well as international standards in innumerable ways. We list a few.

Assault and torture

We heard accounts of assaults and torture from victims in different circumstances. They ranged from apparently gratuitous violence of individual officers, such as those who beat the prisoner chained to Ismail Khan; to the systematic use of torture by three intelligence officers on office workers in Blantyre in May, June July 1992 to extract information from them; to the wide ranging use of leg-irons and handcuffs on those already in prison. The assaults and torture are clearly criminal under Malawi's Penal Code, and unlawful under Malawi's civil law, entitling the victim to sue for damages. Both Articles 5 of the UDHR and the African Charter prohibit torture and cruel or degrading treatment or punishment. We know, however, of no prosecution or civil action for assault or torture.

In some circumstances the use of leg-irons and handcuffs is unlawful. The Prison Act (S70) and Regulations (S67) allow the officer in charge to confine a prisoner in handcuffs, leg-irons or a strait jacket only if he considers it necessary for the safe custody of that prisoner; and requires him to release the prisoner as soon as circumstances permit. Leg-irons may not be used as a punishment. Both Orton and Vera Chirwa were held in leg-irons for two periods of three months each. It is difficult to see how that could be justified by these regulations. Leg-irons cannot be used when a prisoner is being transferred between prisons. One office worker we spoke to was shackled in leg-irons and handcuffs to be moved from Chichiri to Zomba Prison, and kept in them while he was tortured at a police station en route. Full records must be kept of their use and the medical officer, visiting justice and Commissioner must be told.

Overcrowding

The conditions of all the detained office workers we spoke to, some so cramped that they could not lie down to sleep, revealed gross overcrowding.

Diet

All prisoners are entitled to daily rations, prescribed under the Prison Regulations (S53) of meal, peas or beans, fresh vegetables, chilies, dripping, salt and fruit in season; some are entitled to meat or fish, cocoa or coffee and sugar additionally.

The food described to us varied from prison to prison. But only once did we hear of a diet approaching the required standard being provided; and often heard that the food that was served, was rotten or infested with weevils.

Visits and letters

The minimum entitlement to visits is one visit of a maximum of 30 minutes every four weeks in the sight and hearing of officers. The Chirwas were allowed no visits in eight years. Some of the office workers were allowed very brief daily visits. The minimum entitlement to correspondence is to write and receive one letter every four weeks. Letters will be stopped by the censor if "objectionable" or "inordinate in length". The Chirwas received four letters in eight years - the family having written regularly.

Medical Help

The regulations require a medical officer to examine and treat all prisoners who complain of illness (S33). Denial of medical treatment was one of the most common complaints by ex prisoners.

Administrative Checks

The Prison Act entitles Judges and Magistrates to visit a prison at any time to inspect it and enquire into prisoners complaints; and provides for official visitors to inspect each prison and speak to each prisoner once every two months (ss.33, 35, 36 and 39). On the face of it these are extremely wide powers.

None of the prisoners or ex-prisoners we spoke to said that they had been seen in prison by either a Judge, Magistrate or official visitor.

A Magistrate we spoke to complained that his powers to inspect were in practice hampered by the authorities, and told us that the Magistrates Association had passed a resolution this year condemning this.

Legal Proceedings

The regulations entitle legal representatives to see any prisoner on legal business, for reasonable periods at all reasonable times. (S 151) The visit must be in the sight of an officer, and unless the business is about proceedings to which the prisoner is a party, in the hearing of an officer.

Only two of the prisoners and ex prisoners we saw were allowed access to their lawyers at all. We encountered a widespread, and inaccurate belief that convicted prisoners were not entitled in law to see a lawyer.

The regulations permit prisoners to exercise any rights conferred by the Prison Act, regulations or "any other law". The right is restricted by the requirement to obtain the Commissioners permission to the issue of legal proceedings (S 60(2)). It is therefore open to prisoners to challenge in the courts the failure of the Commissioner to comply with the regulations on their conditions of detention in the Courts. We know of no such challenge. The Commissioner's power to restrict the issue of proceedings is arguably ultra vires the Act, would have in any event to be exercised reasonably, and if used to prevent the issue of proceedings would contravene Articles 8 and 10 of the UDHR which provide the right to an effective remedy and to a fair hearing by an impartial tribunal.

We know of no prisoners taking proceedings.

SECTION 4: ENFORCEMENT OF COURT ORDERS

A number of Judges and lawyers we met seemed determined to uphold and enforce the rule of law. Judges have been making orders that persons be released from detention, and seen those orders flouted by the Malawian security services. The Chief Justice, Mr Richard Banda, frankly accepted that he had on occasion found it practically impossible to ensure that his own orders were enforced. His expressed concern was that if he proceeded to attempt to commit a police or security services officer or authority for contempt of court, that would bring the Court as well as the Judge in for ridicule.

The Chief Justice admitted that he had attempted to raise this problem with the Minister of State, Mr Tembo. Even the Minister of Justice himself had, it seems, tried to tackle Mr Tembo, but apparently to no avail.

The rule of law and vindication of human rights are not achievable unless the judiciary are, and are seen to be, independent of the Government. We were told of a number of specific circumstances which make it hard for the Judges to be independent.

We were told that Judges are civil servants. Judges are selected from the civil service, not from private practice. The Minister of Justice, Mr Makuta, had been Attorney-General, Director of Public Prosecutions, Secretary of the Cabinet and Chief Justice before his appointment as Minister in 1992. The Chief Justice, Mr Banda, had also been Attorney-General and DPP. As civil servants, the Judges are liable to be

dismissed by the Government; although the Judges to whom we spoke insisted that they were never subject to interference.

In 1985 there was a change in the Constitution, with the effect that High Court Judges could now be removed by order of the President, without the approval of Parliament. There is no legal protection against the removal of Magistrates and traditional Court Judges. There had been at least one recent case, that of Stanford Munyabe, a Chief Resident Magistrate, who had been dismissed following his verdict of not guilty.

From time to time, the Government of Malawi has interfered directly with the due process of law. Appendix 4 to this Report is a copy of a letter dated 28 February 1989, from the Registrar of the High Court of Malawi to all practising lawyers. Legal proceedings had been brought to challenge dismissals and suspensions from Blantyre and Lilongwe City Councils in 1987 and 1988. The letter shows that President Banda, by Proclamation issued through the Chief Justice, ordered that where such dismissals or suspensions had been "carried out in the public interest upon the specific instructions" of the President himself, then all suits relating to them were to be "deemed closed, and if contemplated shall not commence".

SECTION 5: TRADITIONAL COURTS

Lawyers informed us that, despite their name, the Traditional Courts bear little relation to traditional legal systems. They are creatures of modern statute. Their operation is governed by the Traditional Courts Act 1962. The Courts are established by ministerial warrant (S3). They consist of a Chairman and members appointed by the Minister (S4). The Minister has power to revoke those appointments "from time to time" (S4(5)), and power to dismiss or suspend any member "who shall appear to have abused his power or be unworthy or incapable of exercising the same justly, or for other sufficient reason" (S5).

Jurisdiction

Traditional Courts' jurisdiction extends only to cases where the parties are "Africans". Africans are defined as members of an indigenous race of Africa and persons residing in Malawi as members of such a race (S2, 8 and 9). Territorial jurisdiction over crime extends only to cases where the act charged was committed "wholly or in part within the jurisdiction of the Court" (S9). Regional Traditional Courts hear serious cases including murder, treason and sedition. Whether a case should be tried before a Conventional or Traditional Court is decided by the prosecution. In practice the decision is often taken by the police. Since about 1970 all homicide and most sedition and treason cases have been tried in the Traditional Courts. Orton and Vera Chirwa were tried in the Traditional Court on treason charges in 1983. The case this year

against Chakufwa Chihana in which he faces sedition charges in the High Court is understood to be the first such case to be tried in the High Court for many years.

The Regional Traditional Courts were first set up in about 1970 following a number of controversial acquittals in homicide proceedings in the conventional Courts. Prior to 1970 homicide and other serious cases were dealt with in the conventional courts. It seems therefore that the Minister of State, was wrong when he suggested to us that Orton Chirwa had responsibility for extending jurisdiction in such cases.

The National Traditional Appeal Court has held that a Traditional Court may derive jurisdiction from "tradition", even where it has no jurisdiction under the statute setting it up. In the case of Orton and Vera Chirwa decided in 1984, the accused were charged with treason. The acts in question had allegedly been committed wholly outside the territorial jurisdiction of the Regional Traditional Court which tried them. The Appeal Court held unanimously that the trial Court had not had jurisdiction "in law". A majority of the Court however held that the position "at tradition" was different and that "by the very nature of the Traditional Courts, the lower Court had jurisdiction". The majority reached this view despite the provisions of Section 12 of the Traditional Court Act which provides for the application of "customary law prevailing in the area of the jurisdiction of the Court" only insofar as not repugnant to "any written law in force". The majority view on that section was expressed as follows:

> "The overwhelming view in the face of Section 12 is that that provision is not good law as it detracts a lot from the powers of a Traditional Court".

The nature of the "tradition" from which jurisdiction was derived was not set out in the judgment and cannot be discerned. Jurisdiction to try and sentence to death was thus asserted in that case on the basis that statutory limitations on jurisdiction could be overridden by "traditions" of an unspecified nature.

Sentencing

The death sentence is routinely imposed in homicide cases. Death sentences were imposed, though later commuted, on Orton and Vera Chirwa on their conviction for treason in 1983. We were told of 70 men awaiting execution being held in Mikuyu prison. We were unable to obtain the complete list of condemned persons. The Traditional Courts also have the power to impose sentences of imprisonment, public work, corporal punishment or a fine (S14).

Representation

No lawyer may appear in the Traditional Court unless the Minister has authorised such an appearance. The Minister has never authorised lawyers to appear in the Regional Traditional Courts. Effectively this has meant that for over 20 years the most serious offences have been tried, and the most serious penalties available in law have routinely been imposed, in Courts were legal representation is prohibited. At least 70 men await execution following a trial in which they were denied access to lawyers. We were unable to find out how many women have been similarly condemned.

Evidence

We were told that the rules of evidence were not strictly adhered to in Traditional Court proceedings. In the case of Orton and Vera Chirwa an unsigned police statement allegedly made by Orton Chirwa, but repudiated by him, was allowed and accepted in evidence. The National Traditional Appeal Court held, on appeal, that although the statement was inadmissible at law it could be admitted "at custom". They reached this conclusion not withstanding their finding in the same paragraph of the judgment that "the dangers and extent to which a rule of law sanctioning such admission would be open to abuse cannot be overly emphasised".

The Chirwa judgment contains other examples of departures from the laws of evidence. For instance the trial court refused to allow the defence to call a witness on handwriting from Tanzania on grounds of "jurisdiction". The appeal court held that this was an error in law, jurisdiction being no ground to refuse to summon a witness who is willing and able to come to court. It also said that a refusal to call a witness for an accused is deemed to be "a failure of justice in law". Nothwithstanding this "failure of justice in law" the majority of the appeal court held that the refusal did not "occasion a failure of justice, since they did not see how the witness could have contradicted the opinion of the prosecution "expert "witness on handwriting. The prosecutions evidence was itself given by a witness who did not fulfil the legal requirements to be an "expert".

Appeals

An appeal lies from the Regional Traditional Court to the National Traditional Appeal Court (S34). The scope for appeal is strictly limited. The act provides that no proceedings are to be varied or declared void on appeal solely by reason of any defect in procedure or want of form. The competent appellate bodies are to decide all matters "according to substantial justice without undue regard to technicalities". In the Chirwa case the Appeal Court held that in law the prosecution handwriting expert had not been of sufficient independence and impartiality to be called as an expert witness, because that handwriting expert was also the officer in charge of the

prosecution. They ruled that another expert should have been called but that in their "considered view the questions of independence and impartiality are curable technicalities, as in any event they are of the view that the handwriting is by one and the same person".

Legal Challenge to the Traditional Courts

The Conventional and Traditional Courts are regarded as separate hierarchies by many Malawian lawyers. They consider that the proceedings of the Traditional Courts are not susceptible to the jurisdiction of the High Court in proceedings for judicial review. Their analysis is supported in the constitution. The High Courts' powers of review set out there make no reference to the Traditional Courts. We know of no attempt to challenge the proceedings of a Traditional Court in the High Court.

However, the matter has never been tested in the High Court. There is a body of legal opinion in Malawi that considers that judicial review is possible. The High Court may thus have jurisdiction to entertain an application for judicial review, particularly in a case, such as the Chirwa case, where the Traditional Courts expressly asserted a right to try a case, which they held not to be within their own jurisdiction "at law". Similarly a decision of the prosecution to prosecute in the Traditional Court as opposed to a Conventional Court might be susceptible to judicial review.

Conclusions

We make the following findings about the Traditional Courts system:-

1. Under the legislation the establishment of Traditional Courts is a matter of ministerial discretion and the Minister has unrestricted powers to revoke the appointments of members. There is effectively no legal protection for the judicial independence of these Courts.

2. To the extent that legal representation is not permitted in criminal proceedings in Traditional Courts the system contravenes Article 7(1)(c) of the African Charter on Human and People's Rights which expressly provides that: "Every individual shall have .....(c) the right of defence, including the right to be defended by Counsel of his choice".

3. It is a matter of particular gravity that legal representation should be prohibited in cases where the accused faces the death penalty or lengthy imprisonment and that the death penalty should be routinely carried out after proceedings in which the accused's rights of defence have thus not been observed.

4. The practice of the traditional Courts, evidenced in the *Chirwa* case of resorting to unspecified "traditions" or "customs" to extend their jurisdiction and override the laws of evidence conflicts with the principle that human rights should be protected by the rule of law which is recognised as an essential principle in the Universal Declaration of Human Rights, enshrined in the Constitution of Malawi.

SECTION 6: THE LAW OF SEDITION

There is in Malawi a fear of expressing political opinions. The fear is generated by the laws of sedition, the associated Section 5 of the Public Security Regulations, and the detenation without trial. These laws are regularly invoked by police and government against political dissent. The Malawian sedition law bears little relation to sedition as it exists as a crime in England today. Its scope and application is directly contrary to international guarantees for freedom of expression. There will be no adequate protection for free speech in Malawi until these laws are abolished, or substantially amended so as to punish only incitements to violence.

Under Section 50 of the Penal Code, sedition is merely a form of defamation, directed against the President or the Government or the administration of justice. It may be committed by bringing these institutions "into hatred or contempt", or by "raising discontent" against the President. The law specifically deems that any person who has been charged with sedition "intends the consequences which would naturally follow from his conduct" irrespective of his actual intentions. Section 5 is even wider, punishing every person who acts or who publishes literature "likely to undermine the authority of, or the public confidence in, the Government".

The most recent and authoritative consideration of the English law of sedition was in *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] QB 429. This was an application for judicial review of the refusal of a magistrate to issue a summons against Salman Rushdie on the grounds that his book "Satanic Verses" was either blasphemous libel or seditious libel. The Divisional Court refused to grant relief. It held that the common law of sedition had been accurately stated by the Supreme Court of Canada in *Boucher v The King* [1951] 2 DLR 369, namely that the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or to create public disturbance or disorder against the Government.

Words may be calculated to incite violence in the sense of having a tendency to produce that result but not be intended to have that effect. As Cave J pointed out in *R v Burns* (1886) 16 Cox CC 355 at 364:

> "In order to make out the offence of speaking seditious words there must be a criminal intent upon the part of the accused, they must be words spoken with seditious intent; and, although it is a good working rule to say that a man must be taken to intend the natural consequences of his acts, yet, if it is shown from other circumstance, that he did not actually intend them, I do not see how you can ask a jury to act upon what has become a legal fiction."

The Malawi penal code does require its courts to act on this "legal fiction".

Malawi is not a signatory to the International Covenant on Civil & Political Rights (ICCPR). However as a member of the United Nations, Malawi has pledged itself to take joint and separate action for the achievement of (inter alia) "universal respect for, and observance of, human rights and fundamental freedoms for all" (see Articles 55 and 56 of the UN Charter). Section 1(2)(iii) of the Malawi Constitution refers to the Universal Declaration on Human Rights (UDHR), which is acknowleged to be an authoritative exposition of the human rights principles of the UN Charter:

> "The Government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the UN Universal Declaration of Human Rights, and of adherence to the Law of Nations".

Quite what this means, if anything, for the law is open to endless argument. The Minister of Justice and the Chief Justice were of the view that the courts were therefore bound by the UDHR. But there has been no judicial decision on the issue.

In condemning South Africa for its policy of apartheid in Namibia, the International Court of Justice held that the human rights provisions of the UN Charter do impose legally binding obligations (*Legal Consequences for States Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution* (1971) ICJ Rep 16, 57). In addition the fact that the ICCPR has been accepted by so many states means that it can be regarded as part of customary international law and therefore of importance even for those states who are not signatories to it. Paragraphs 2 and 3 of Article 19 of the ICCPR read:

> "2. Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights and reputations of others;
(b) For the protection of national security or of public order, or of public health or morals."

While the Covenant thus permits interference with freedom of expression, the restrictions must be "provided by law", they may only be imposed for one of the purposes set out in sub-paragraph (a) and (b) of paragraph 3 (such as national security) and they must be justified as necessary for that state party for one of those purposes (see the Report of the Human Rights Committee to the General Assembly, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annex VI, General Comment 10).

Moreover, the European Court of Human Rights has repeatedly stressed that freedom of expression is a fundamental right in a democracy. It is not absolute, but subject to Article 10(2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Castells v Spain* (1991) 14 EHRR 445 para 42).

Freedom of expression is not one interest to be balanced against the competing demands set out in Article 10(2). Rather freedom of expression is the fundamental right which is subject to limited derogations and this must be strictly construed *(Sunday Times v UK* [1979] 2 EHRR 245). As with the permitted exceptions to the right of freedom of expression under Article 19 of the ICCPR, interference with free speech will only be compatible with Article 10 if: (a) it is prescribed by law; (b) it is imposed for one of the purposes set out in Article 10(2); and (c) it is necessary in a democratic society.

There has been considerable development by the European Court of the concept of "necessary in a democratic society". It has been seen to involve at least two subsidiary principles. The first is that the restriction must not only be for one of the categories of interest set out in Article 10(2), but it must also be justified by some "pressing social need". Furthermore, even if the need is pressing the response (the restriction on freedom of expression) must be proportionate to that need (see *Handyside v UK* [1976] EHRR 737). In *Castells*, referred to above, the Court stated:

> "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the pre-occupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of a democratic society."

The Court recognised that Governments, in any free country, must be prepared to have themselves subjected to criticism:

> "The limits of permissible criticism are wider with regard to Government than in relation to a private citizen, or even a politician. In the democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly when other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."

In Nigeria, a statutory offence of sedition has been held to be incompatible with the Nigerian Constitution's protection of free speech so far as it went beyond publications which incited violence (*State v Ivory Trumpet Publishing Co Ltd* 31st January 1983 91984 5 NCLR 736). The publication here accused the state governor of corruption and misuse of party funds. The court held that it had no tendency to create public disorder and concluded:

> "And moreover, insofar as the information and the evidence led in this case had been specifically directed to the issue of bringing hatred of contempt of exciting disaffection to the person of the Governor who is admittedly a politician, I am in no doubt whatsoever that any law which restricts the freedom of expression guaranteed to the accused persons under Section 36(1) of the Constitution is not reasonably justifiable in a democratic society, and that pursuant to S274(3)(d) of the Constitution, I am not obliged to uphold the validity of such law. I feel, no doubt, that any constitution of the law of sedition in this country should be against the background of a profound national commitment to the principle that debate on public issues should be uninhibited robust and wide open, and that it may include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials".

A similar conclusion was reached by the Court of Appeal, Enugu Division in *Chief Arthur Nwankwo v The State* 27th July 1983 (1985) 6 NCLR 228 in the course of which Olatawura JCA said:

> "What is therefore in issue here is whether seditious publication as defined in our criminal code is reasonably justified in a democratic society more so where S41(1)(9a) gives the conditions. What is in issue is public order... It is my view that the law of sedition which has derogated from the freedom of speech guaranteed under this constitution is inconsistent with the 1979 Constitution more so where this cannot lead to public disorder as envisaged under s41(a) of

the 1979 Constitution. We are no longer the illiterates of the mob society our colonial masters had in mind when the law was promulgated. The whole of Cap. XXXIII which deals with defamation is sufficient guarantee against defamatory libel. The safeguard provided under s50(2) is inadequate more so where the truth of what is published is no defence. To retain s51 of the criminal code in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our constitution will be a deadly weapon to be used at will by a corrupt government or tyrant."

The jurisprudence of Nigeria, of the European Court of Human Rights and of the United Kingdom conjoins in establishing that sedition laws of the kind being currently activated in Malawi have no place in a democratic society.

CONCLUSION

We have painted the picture of human rights in Malawi as we found them in September 1992, and we have analysed some of the legal problems which in our view conduce to their diminution.

We conclude that it is imperative that Malawi's law and Constitution should be brought into conformity with the Universal Declaration of Human Rights and the African Charter.

We urge Malawi to abolish the death penalty; abolish the jurisdiction of the Traditional Courts for serious crimes; abolish access to justice on the basis of race; extend the right of defendants to be represented by a lawyer of their choice to all cases; outlaw detention without trial; reform the sedition provisions to go towards internationally accepted standards of freedom of expression and association; introduce open, effective and independent checks on prisons and police officers; institute effective human rights training; and introduce measures to protect the independence of the judiciary.

We can only hope that the evidence collected in this report will make the Government, and those who care about the country, aware of the need for change, and will accept our analysis of that evidence as pointing to the directions in which change might be made.

We are aware that the subject of governmental aid to Malawi, including humanitarian aid, is under review by Western donors and that withholding that aid is being used as an incentive for the country to improve its human rights record. We were told that some British aid has been helpful and some has been positively harmful; they told us that one misguided British scheme, for example, was designed to bolster the powers of Traditional Courts, which should on any view be diminished. The US has recently funded a legal aid project which has been welcomed by the Law Society. Although the broader questions relating to aid were outside our remit, we do urge that professional bodies in Britain, after taking advice from the Malawi Law Society, should ask to examine proposed UK Government aid to Malawi in the justice sphere in order to ensure that future projects do in fact serve the cause of promoting human rights.

We entirely accept that many of the problems we have spot-lighted stem from law inherited or advised from Britain at the time of independence, or subsequently drafted by British lawyers. The failure of these laws to protect human rights is not a matter in which this country's profession can take pride. What it can and will do, however, is to support the members of the Malawi Law Society in their courageous struggle to improve access to justice and civil liberties.

Pastoral Letter from the Catholic Bishops in Malawi, to be read in every Catholic Church on Sunday March 8 (the First Sunday of Lent). All the Bishops will be in their Respective Cathedrals on this day.

Dear Brothers
and Sisters in Christ,

As we commence this time of the Lord's favour, we, your Bishops, greet you in the name of Our Lord and Saviour Jesus Christ,

Introduction

As a community journeying in faith and hope we recognise and accept the Lord's invitation proclaimed again in this time of Lent. On Ash Wednesday we receive ashes with the prayer *"Repent and believe the good news"*. This prayer introduces the period of Lent when we shall enter once more into the mysteries of the Lord's death and resurrection.

Christ began his public ministry by proclaiming: *"Repent and believe the Gospel" (Mk 1.15).* In this proclamation he states the programme of his ministry; to call all humankind in and through His life, death and resurrection to conversion and witness. People in every age and culture are called to this conversion and to respond in commitment and faith.

In this conviction we, your leaders in the faith, come to share with you what this faith invites us to as a church in the Malawi of to-day. We place this exhortation under the guidance of the Holy Spirit and the patronage of Mary, Queen of Malawi and of Africa.

1. The Dignity and Unity of Humankind

Man and woman, created in the image and likeness of God *(Gen 1.26)* carry in themselves the breath of divine life. Each created person is in communion with God. He or she is *"sacred"*, enjoying this personal protection of God. Human life is inviolable since it is from God, and all human beings are one, springing as they do from a single father, Adam, and a single mother, Eve, *"the mother of all those who live" (Gen 3.20).*

2. The Church and Society

Because the Church exists in this world it must communicate its understanding of the meaning of human life and of society. As Pope Paul VI says: *"the Church is certainly not willing to restrict her action only to the religious field and dissociate herself from man's temporal problems." (The Evangelisation of Peoples, no.34).*

In this context we joyfully acclaim the progress which has taken place in our country, thanks in great part to the climate of peace and stability which we enjoy. We would, however, fail in our role as religious leaders if we kept silent on areas of concern.

3. The aspiration to greater equality and unity

In our society we are aware of a growing gap between the rich and the poor with regard to expectations, living standards and development. Many people still live in circumstances which are hardly compatible with their dignity as sons and daughters of God. Their life is a struggle for survival. At the same time a minority enjoys the fruits of development and can afford to live in luxury and wealth. We appeal for a more just and equal distribution of the nation's wealth.

Though many basic goods and materials are available, they are beyond the means of many of our people. One of the reasons for this is the deplorable wage structure which exists. For many, the wages they receive are grossly inadequate, e.g. employees in some estates, some domestic workers, brick-makers, etc., and this leads to anger, frustration and hopelessness. Another example of glaring injustice is the price paid to producers, especially subsistence farmers, for some of their crops. We wish to state that every person has the right to a just reward for work done, a wage which will ensure a dignified living for his or her family.

Not only has the worker a right to be paid justly by his employer, but he also has a duty honestly and responsibly to do the work for which he is employed. We would like to remind all Christian workers that their first duty on receiving their earnings is to look to the adequate support of their family. All too often workers spend their salaries for selfish purposes.

Bribery and nepotism are growing in political, economic and social life. This causes violence and harm to the spirit of our people. Honesty, righteousness, respect, equal opportunity for all: these must be the qualities which guide our nation as it grows and develops into the future.

On of the cornerstones of the nation is "unity". This reflects the will of our Creator that we live in mutual respect and oneness. Tribalism, apartheid (whether economic or social), regionalism and divisions are contrary to the call and truth of humankind. We call on all the faithful to celebrate our common birth and destiny in mutual respect, acceptance, justice and love.

4. The right to an adequate education

A society which values its future affords the highest priority to providing education for all its young people. As it is commonly put: *"Young people are the future of the nation."* A sound education will aim at the following:

i) creating an environment favourable to the physical, emotional, intellectual, relational and spiritual development of pupils.
ii) developing in each student a respect for others and a recognition of civic responsibilities
iii) promoting the creative potential of students. The unique and diverse talents of every individual are recognised and encouraged.
iv) instilling an appreciation of the students' cultural; heritage, i.e., the linguistic, musical and artistic legacy inherited from the past.
v) providing the students with appropriate training and skills which will equip them to make a living in the actual circumstances of our country.
vi) seeking excellence, while aiming to provide education for everyone.

5. Problems of our educational system

At the outset, we wish to record how greatly we esteem and applaud the efforts which have been made by the government to provide education at all levels. The work of the Churches in this field has also contributed greatly to the advancement of our people.

Nevertheless we feel it necessary to draw attention to some of the problems which beset our educational institutions at present:

a. Illiteracy

Illiteracy is one of the principal causes of poverty and lack of development. It cannot be said that we have succeeded in promoting the creative potential of our citizens while there remains a large scale problem of literacy in our society. It must be recognised that there is a problem which cannot be solved by state initiatives alone. Since a great responsibility lies with parents, we urge them to recognise their duty by sending their children to school.

b. Falling Standards, Overcrowding and Shortage of Teachers and Materials

It is more and more widely recognised that standards of education are not only not rising, but are actually falling. Clearly there can be little hope of creating an environment favourable to the emotional, intellectual and spiritual development of pupils when schools are grossly overcrowded and suffer from a serious lack of teachers. While the present acute shortage has been made much worse by the policy of requiring all teachers to remain in their own regions, final solutions to these problems will also demand enormous increases in the resources made available to education. This will have very practical implications for the way in which our national priorities are established and the budget distributed.

c. Unequal Access to Education

The criteria used in selection of pupils for secondary schools and third-level institutions should be known to all and be seen to operate fairly. Nor should they work to the disadvantage of particular individuals or groups. access to education should not depend on whom the candidate knows nor on how much money he possesses.

d. Discipline

We believe that indiscipline is a major problem in secondary schools. It will not be solved by threats of punishments. There is a need to examine the underlying reasons for this state of affairs. Among them are:

i. failure of parents to exercise their responsibility towards their children as they grow older.
ii. lack of co-operation between parents and school authorities.
iii. frustration due to poor or uncertain job opportunities.
iv. manipulation of the selection process to include undeserving students.
v. lack of support from higher authorities when action has been taken, or needs to be taken, by the school.

6. Church-State Partnership in Education

Improvements will come about in the educational system only if there is mutual trust and genuine partnership between the different interested groups in society, i.e. parents, teachers, the Church and the State. In particular, we recognise the importance of Church-State participation in this area. On the one hand, the Church has a responsibility to support in every way possible the educational goals of the government. On the other, the government has a duty to respect the rights and legitimate aspirations of the Churches. Only through such a mutual recognition of rights and responsibilities will a fruitful partnership between Church and State be realised in practice.

7. Adequate Health services for all

Equality among citizens and the demands of justice call for policies which aim to provide adequate health care for all without distinction. The following principles have always guided us in this vital area of concern:

i. Life is sacred. It is a gift from God to be valued from the moment of conception until death.
ii. Human beings can never be reduced to the status of objects. We recognise that our bodies are temples of the Holy Spirit.
iii. Every person is of equal dignity. The value of life is not to be measured by one's age, possessions or position in society.

8. Difficulties experienced by our health services

We wish to pay tribute to the achievements of the government of Malawi in extending health services with the aim of providing the best possible care for all. Particularly worthy of mention has been the establishment of an excellent system of primary health care. The notable contribution of the churches through their extensive network of hospitals and health centres is deserving of special praise.

At the same time we are aware of the severe difficulties which the health services are experiencing at present.

a. Overcrowding and Lack of Personnel

Without doubt the most serious problem is the acute shortage of health centers to cater for the population. One cannot claim to uphold the principle of the sanctity of life if provision has not been made for even minimal health care for every person. This is a priority which a society cannot ignore if it wishes to be a caring and compassionate community. It must be recognised that if this problem is to be tackled, it will demand the allocation of more resources from the State.

b. The Vocation of Caring for the Sick

Caring for the sick is a calling from God of a special dignity and importance. It can never be seen as just another job or another way of earning one's living.

While we greatly value the generous dedication to service of many of those who work in the medical field, we cannot ignore that the quality of medical care is often seriously inadequate, e.g. patients being unattended to for long periods of time, the lack of commitment on the part of some personnel, the failure to recognise each patient as one's brother or sister in need, etc. We therefore invite all health workers to serve every patient without exception with responsibility and true dedication.

c. Inequality in Medical Treatment

Absolute equality of access to health care for all citizens is difficult to achieve. However, this is an ideal which must always be striven for. The guiding principle determining whether a patient will receive priority treatment ought not to be his apparent usefulness or his position in society. Rather, every person, whether rich or poor, educated or not, blood relative or not, has equal right to receive health care. The practice of stealing and re-selling medicines seriously threatens this right.

9. The tragedy of AIDS

It is heartening to note the extensive health education programmes currently in operation in the state. One cannot fail to stress the importance of preventive measures particularly in respect of contagious diseases. The current epidemic of AIDS is a case in point. All recognise that in the present circumstances where no cure for AIDS is available, prevention in the form of health education is the only way of combatting this problem.

We want to encourage the efforts undertaken in that direction and hope they can still be intensified: true facts about the disease should be made public more readily; information made available to all; personnel and resources freed for the treatment and counselling of the victims and their families.

However, preventive methods must respect God's law and enhance the dignity of the human person. It is most regrettable that little attention has been paid to the fact that faithfulness to the Gospel's teaching on conjugal fidelity is the single most effective method of preventing the spread of this tragic illness. We strongly object to the dissemination of the view that the use of condoms is the remedy against this epidemic.

Besides the immorality involved in the indiscriminate distribution and use of condoms, we must be aware how much they contribute to spread a false sense of security and encouraging a promiscuity which can aggravate the existing problem. We appeal to Christian parents to counsel their children against such practices and to guide them into true Christian understanding of sexuality.

10. Participation of all in public life

In their writings to the Christians, both the apostles Peter and Paul noted how the Holy Spirit grants the members of the Christian community gifts of all sorts for the benefit of the community. *"On each one of us God's favour has been bestowed in whatever way Christ has allotted it. To some his gift was that they should be apostles to some prophets; to some evangelists; to some pastors and teachers."* Whatever the gift, the purpose is one: *"to knit God's holy people together for the work of service to build up the Body of Christ" (Eph 4.7-16; cf Pet 4.10-11).*

African society has traditionally recognised that what is true of the Church is also true of any society; its strength resides in recognising the gifts of all and in allowing those gifts to flourish and be used for the building up of the community. *"Musu umodzi susenza denga".* No one person can claim to have a monopoly of truth and wisdom. No individual - or group of individuals - can pretend to have all the resources needed to guarantee the progress of a nation. *"Mtsinje wopandi miyale susunga madzi."* The contribution of the most humble members is often necessary for the good running of a group. *"Wapusa anaomba ng'oma wachenjora navina."*

11. Freedom of expression and association

Moreover human persons are honoured - and this honour is due to them - whenever they are allowed to search freely for the truth, to voice their opinions and be heard, to engage in creative service of the community in all liberty with the associations of their own choice. Nobody should ever have to suffer reprisals for honestly expressing and living up to their convictions: intellectual, religious or political.

We can only regret that this is not always the case in our country. We can be grateful that freedom of worship is respected: the same freedom does not exist when it comes to translating faith into daily life. Academic freedom is seriously restricted; exposing injustices can be considered a betrayal; revealing some evils of our society is seen as slandering the country; monopoly of mass media and censorship prevent the expression of dissenting views; some people have paid dearly for their political opinions; access to public places like markets, hospitals, bus depots, etc., is frequently denied to those who cannot produce a party card; forced donations have become a way of life.

This is most regrettable. It creates an atmosphere of resentment among the citizens. It breeds a climate of mistrust and fear. This fear of harassment and mutual suspicion generates a society in which the talents of many lie unused and in which there is little room for initiative.

12. Fostering participation

We urgently call on each one of you to respond to this state of affairs and work towards a change of climate. Participation in the life of the country is not only a right; it is a also a duty that each Christian should be proud to assume and exercise responsibly. People in positions of authority, in government and administration, have a particular duty to work for the restoration of a climate of trust and openness. However participation will remain a fiction without the existence of adequate channels of expression and action; an independent press; open forums of discussion; free association of citizens for social and political purposes, and the like...

13. "The truth will set you free"

A first step in the restoration of the climate of confidence may be taken by recognising the true state of the nation. *"The truth will set you free" (M 8.32).* These words of Christ do not have an exclusively religious meaning. The also express a deep human reality.

For too long we have refused to see that, besides the praiseworthy achievements of the last decades, our country still suffers from many evils: economic and social progress does not trickle down to the mass of the people; much still remains to be achieved to make adequate education and health services available to all; the AIDS problem presents an incredible challenge; recurrent unfavourable climatic conditions often account for poor crops and subsequent misery for the people...

People will not be scandalised to hear these things; they know them. They will only be grateful that their true needs are recognised and that efforts are made to answer them. Feeding them with slogans and half-truths - or untruths! - only increases their cynicism and their mistrust of government representatives. It gives rise to a culture of rumour mongering. Real progress can only be attained when the true problems and the real needs are identified and all resources are channelled towards solving them.

Let us add here that people in positions of responsibility have an obligation to know the actual conditions in which their people live and to work tirelessly for their betterment. They should be willing to allow their performance to be judged by the people they serve. Accountability is a quality of any good government. People are entitled to know how their representatives fulfil their duties. No disrespect is shown when citizens ask questions in matters which concern them.

14. A system of justice which works fairly

We would like to draw your attention to another area of life in our society. We cannot ignore or turn a blind eye to our people's experience of unfairness and

injustice, for example those who, losing their land without fair compensation, are deprived of their livelihood, or those of our brothers and sisters who are imprisoned without knowing when their cases will be heard.

In a just society, a citizen must have easy access to an independent and impartial court of justice whenever his rights are threatened or violated. In particular, before a penalty is imposed, it is in the interests of justice and human dignity that the accused be informed in good time of the charge against him and be granted opportunity for a fair trial, and where necessary, the possibility of legal counsel. We call upon all and particularly those responsible for the administration of justice to ensure not only that procedures are respected but also that impartial judgment is rendered to the accused person. This will only be possible if the administration of justice is independent of external influence, political or other. Our bond of brotherhood and sisterhood in the one body of Christ and our solidarity as a people should, in love, compel us to hunger for the justice and righteousness of the Lord in our society.

In this context, we recall the words of Jesus at the beginning of his ministry:

> *"The Spirit of the Lord is on me, for he has anointed me to bring the good news to the afflicted. He has sent me to proclaim liberty to captives, sight to the blind, to let the oppressed go free, and to proclaim a year of favour from the Lord." (Luke 4, 18-19)*

This appeal for fair treatment should also be heard within the Church. We want to recall the importance of adhering to procedures which have been instituted to promote justice and protect the rights of the faithful. Our Church communities do need well established and competent forums for hearing various cases, complaints and grievances of their members. Those of us who have to pronounce judgment on persons and situations are to view the exercise of their authority as a service of the truth for the common good as well as for the well-being of the individual. In particular, we exhort the people of God to respect the right of defence of those accused of having committed offences.

Conclusion

16. "Love tenderly, act justly, walk humbly in your God" *(Micah 6.8)*

The issues raised in this letter will obviously require an ongoing and more in depth reflection. It is the Church's mission to preach the Gospel which reflects the redemption of the human race and its liberation from every oppressive situation, be it hunger, ignorance, blindness, despair, paralysing fear, etc. Like Jesus, the advocate of the poor and the oppressed, the believing community is invited, at times obliged in justice, to show in action a preferential love for the economically disadvantaged, the voiceless who live in situations of hopelessness.

The human rights and duties identified in this pastoral letter for our reflection are only some of the issues that our God invites us to consider seriously. In our response to God, we humbly recognise that though a gifted and blessed people, we are not a perfect community. If some of our personal weakness, biases and ambitions are not purified by the word of God and just laws, they can very easily destroy peace and harmony in our societies and communities. We hope that our message will deepen in all of us the experience of conversion and the desire for the truth and the light of Christ. This will prepare us for the worthy celebration of Easter, the feast of the risen Lord in whom we see ourselves as a risen people with dignity restored.

Archbishop	J. Chiona
Bishop	F. Mkhori
Bishop	M. A. Chimole
Bishop	A. Assolari
Bishop	A. Chamgwera
Bishop	G.M. Chisendera
Monsignor	J. Roche

APPENDIX 2

MALAWI: PROSPECTS FOR DEMOCRACY

SEMINAR AT LUSAKA, ZAMBIA, MARCH 20-22, 1992

KEYNOTE ADDRESS BY CHAKUFWA CHIHANA
FRIDAY, MARCH 20

Dear Brothers and Sisters,
It is my privilege to welcome you here to this conference, a unique and historic conference.

To the best of my knowledge, it is the first time that a gathering such as this has taken place and I think before I say anything, we should thank the government of Zambia, the Frederick Ebert Foundation, the Southern Africa Regional Institute for Policy Studies in Zimbabwe and the United Front for Multiparty Democracy, for enabling this meeting to take place.

I would also like to thank all of you for coming. Some of you have come a long distance. It is unfortunate that some of our friends and colleagues have not been able to attend this meeting. But we know they are with us in spirit. It is, I think, a wonderful thing that we can sit here in Zambia and discuss politics openly and freely in a peaceful environment. If only we could do that at home!

This brings me to the subject of my address and the purpose for which this conference has been convened. That of exploring the prospects for democratic change in Malawi.

The lessons of our immediate past

There is, understandably, an overwhelming temptation to look back, remember and reflect on the events which brought our country to where it is now. We end up taking stock of bitter and painful experiences, which for once encourage no one, I repeat no one, to ever leave things to chance again.

The immediate history of our country shows the gross abuse of basic human rights, growing poverty and mass starvation, personalised rule and total tyranny by the leadership that brought independence to Malawi. We cannot but remember that the emergence of the one-party dictatorship in Malawi is essentially an outcome of the misfortunes of what was the nationalist movement, which culminated in the cabinet crisis of 1964.

The events leading to the crisis are well known to all. But we should not forget that the biggest blame for those unfortunate events squarely lies on our shoulders. We allowed greed for power, narrow personal interests and personal aggrandisement to overcome our rational and sober approach to national issues. The greatest folly, for which Dr Hastings Kamuzu Banda and his

Malawi Congress Party, should be held responsible, is their determination to usurp the plurality of views, organisation and expression that existed in the struggle for independence.

From 1964 to 1992, the history of our country has been that of the struggle between the forces of greed and the forces for progressive change. The independence of the judiciary was stifled by the 1971 constitutional amendments which created kangaroo traditional courts. Freedom of the press, association and speech have all since been muzzled in the name of "nation building and national unity". The trade unions have all but been destroyed and the diversity of our culture and language has been undermined by the Malawi Congress Party and Dr Banda's myopic world view.

It should be understood that neither Dr Banda and his party ever had a sincere commitment to the interests of the nation. Their grand project has been to achieve total hegemony over all aspects of national life. But has personal rule, hero worship, destruction of the opposition and the gross abuse of basic human rights delivered the country from the state of backwardness? Obviously not, or else we would not be here.

Twenty-eight years after independence, Malawi still remains the poorest country in the region, where mass poverty, starvation, nepotism, tribalism and fanatical mob-politics remain the order of the day. Rampant intimidation, detentions without trial and torture are part of the Malawi Congress Party's approach to politics - they will even resort to cross-border political assassination. Fear, terror and suspicion has become a culture of its own. The MCP is truly a party of darkness and death.

There have been attempts to promote Malawi as a model of development. It is true that the kwacha may not have lost its value as dramatically as some other currencies. It is true that Malawi has developed a tobacco industry that was small at independence. It is also true that there have been developments in transport and communications. But we should ask this: who has this development benefited? And at what cost?

Lets look at the facts as they stand. As the Catholic Bishops pastoral letter stressed - income disparities are acute, there is a growing gap between the rich and the poor. Yet the poorest are expected to donate their hard-earned tambalas to Dr Banda and his party - this is 20th century feudalism. Those whose land and property has been taken away have not been compensated at all. Peasant tobacco farmers have had their profits creamed off by a corrupt marketing system. The tenants on the estates are perpetually indebted. Malnutrition is chronic on apparently productive commercial farms. Only few have access to telephones, few can afford the exhorbitant bus fares. Again, as the Bishops have pointed out, there is over-crowding in schools, and health

care has collapsed. Basic housing, too, is in short supply. Yet while the people suffer these daily hardships, precious resources are wasted in building luxurious palaces and Etons in the bush.

The poor are weeping, but Banda and his ruling elite are wallowing in luxury.

Even the World Bank and other aid donors have acknowledged these deep-seated inequalities. It was only after World Bank pressure that Dr Banda agreed to restructure Press Holdings, his huge personal business empire, which threatened to bring about the collapse of Malawi's financial system.

So how do we face the future? As an individual I have no mandate to prescribe the nature of the political system that should emerge, neither can I define in concrete terms what economic framework there should be. This is a matter which should be discussed by all Malawians.

The Catholic Bishops have started the ball rolling. Their pastoral letter calmly and accurately reflected the deep social, economic and political problems our country faces and which require thorough consideration and resolution. These issues must not be left in the hands of Dr Banda and the Malawi Congress party alone. They have demonstrated for all to see, not only their inability but also their unwillingness to face up to the problems facing our country in a realistic and honest way.

To give one example. In May, Malawi's aid donors meet in Paris to finalise financial assistance for the coming year. They have made it abundantly clear that they will severely cutback their aid unless the government improves its human rights record and makes moves towards democracy. Yet the way the Catholic Bishops have been treated amply demonstrates the intransigience of the regime. They are even prepared to risk the country's economy, to ensure their own personal political survival. Is this a responsible government?

I believe that there is an alternative, a way out of this mess. And I take it by your presence here at this conference, that you also believe there is a way out.

A common strategy for a common goal

So where do we go from here? What should happen when we all leave this meeting and go back to the places where we live?

Brothers and sisters, if we leave this place with no concrete plans of action, we would be failing in our duty to the people of Malawi. We would be sending a message to the old man in Sanjika palace in Blantyre that he is safe where he is. If we fail to come up with a firm programme for democratic change, we would be telling the rest of the world that Malawians are not courageous enough, not capable enough, not determined enough, to stand up

to one of the worst dictatorships in Africa. Worse still, we would be telling *our own people*, in the villages and compounds at home, that we have failed to find a way out of their suffering and misery. This would be a disaster.

Brothers and sisters, thousands of Malawians are looking to us to deliver them from the grip of the Malawi Congress Party and all undemocratic forces once and for all. During this short conference here, we must all put our heads together and devise a strategy to bring about the changes that we, the people of Malawi, all want to see in our country - that is the birth of true and genuine democracy.

For many years, Malawians have heard of various groups based in neighbouring countries and elsewhere. News of these organisations has filtered back into the country from Zambia, from Mozambique, from Tanzania, Botswana, Zimbabwe and even Europe and America. These groups and the people who have organised them have made great sacrifices - we all know the ruthless way in which Dr Banda's security agents have pursued and harassed Malawian exiles who have tried to resist his regime and speak out about human rights abuses. These men and women deserve our respect. They all fought for one thing, they had a common goal - that of changing the system in Malawi.

Now, their time has come. They must go back to Malawi, and together with their brothers and sisters inside the country, create an environment in which their dreams can be realised.

Some of you who have been out of Malawi for many years, may be looking at those living inside the country and asking yourselves - "what have they done all this time? Why have they been so silent, so passive?" This is understandable.

But I don't need to tell you the way people have suffered at the hands of Banda's regime. I don't need to tell you the way people have stood up to his dictatorship, quietly and courageously, without being noticed by the world's media. You don't need me to tell you that the spirit of Malawians has not been broken. Their resolve to resist oppression - however silently - has been a constant source of strength to those of us who have always hoped that one day, the time for change would come.

Brothers and sisters, that time is now and all of us must unite and change things for the better.

Whatever we do at this conference, it must be taken back to Malawi - to the people of Malawi. It must be a rallying point for the start of something new, but building on the past. I would like to throw out this idea for delegates to this conference to discuss. That is this. We must establish inside Malawi an organisational structure to carry forward all our demands for democracy. This organisation should not be a political party. No. It should be an

interim committee to mobilise a national conference of democratic forces inside Malawi. I stress interim, and I stress democratic forces. Out of this conference should emerge a larger, more representative organisation, which should then press ahead with demands for an end to the one-party, one-man dictatorship and ultimately free and fair general elections in which any political parties which might emerge can participate. If we agree, we should all put our names to a resolution endorsing this approach.

I believe there are many Malawians, both inside and outside the country, who are ready to take up this challenge, to come out in the open, to stand up and be counted and say: "we want change, and we want it now."

We all have our ideas about how change should be achieved, and what form the future Malawi should take. We must respect each others' views. Some of us may have high expectations and political ambitions. Others may be cynical and fearful of what the future holds. Let us sit together, get to know each other, reassure each other and at the end of the day emerge from this conference with a clear vision of what needs to be done. Let us not only share a common goal, but share a strategy for achieving that goal. If we can do that, then we will be sending a clear signal to Dr Banda and his MCP that the time has come for them to step aside so that a new and vibrant, democratic Malawi can be built.

Delivery of prohibited publication to administrative officer or police station

48.—(1) Any person to whom any publication the importation of which has been prohibited under section 46, or any extract therefrom, is sent without his knowledge or privity or in response to a request made before the prohibition of the importation of such publication came into effect, or who has such a publication or extract therefrom in his possession at the time when the prohibition of its importation comes into effect, shall forthwith if or as soon as the nature of its contents have become known to him, or in the case of a publication or extract therefrom coming into the possession of such person before an order prohibiting its importation has been made forthwith upon the coming into effect of an order prohibiting the importation of such publication deliver such publication or extract therefrom to the nearest administrative officer or to the officer in charge of the nearest police station, and in default thereof shall be liable to a fine of £200 and to imprisonment for two years and such publication or extract therefrom shall be forfeited.

(2) Any person who complies with subsection (1) or is convicted of an offence under that subsection shall not be liable to be convicted for having imported or having in his possession the same publication or extract therefrom.

Power to examine

49.—(1) Any of the following officers, that is to say—

(*a*) any police officer not below the rank of assistant superintendent;

(*b*) any other person employed in the public service authorized in that behalf by the Minister,

may detain, open and examine any package or article which he suspects to contain any publication or extract therefrom which it is an offence under section 47 to import, publish, sell, offer for sale, distribute, reproduce or possess, and during such examination may detain any person importing, distributing or posting such package or article or in whose possession such package or article is found.

(2) If any such publication or extract therefrom is found in such package or article, the whole package or article may be impounded and retained by the officer and the person importing, distributing or posting it, or in whose possession it is found, may forthwith be arrested and proceeded against for the commission of an offence under section 47 or section 48, as the case may be.

Seditious intention

50.—(1) A "seditious intention" is an intention—

(*a*) to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government;

(*b*) to excite the subjects of the President to procure the alteration, otherwise than by lawful means, of any other matter in the Republic; or

(*c*) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Republic; or

(*d*) to raise discontent or disaffection amongst the subjects of the President; or

(*e*) to promote feeling of ill-will and hostility between different classes of the population of the Republic.

But an act, speech or publication is not seditious by reason only that it intends—

(i) to show that the President has been misled or mistaken in any of his measures; or

(ii) to point out errors or defects in the Government or Constitution or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(iii) to persuade the subjects of the President to attempt to procure by lawful means the alteration of any matter in the Republic; or

(iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Republic.

(2) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances which he so conducted himself.

Seditious offences

51.—(1) Any person who—

(*a*) does or attempts to do, or makes any preparation to do any act with a seditious intention;

(*b*) utters any seditious words;

(*c*) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;

(*d*) imports any seditious publication, unless he has no reason to believe that it is seditious,

shall be liable for a first offence to a fine of £400 and to imprisonment for five years and for a subsequent offence to imprisonment for seven years; and any seditious publication shall be forfeited.

(2) Any person who without lawful excuse has in his possession any seditious publication shall be liable for a first offence to a fine of £200 and to imprisonment for three years and for a subsequent offence to imprisonment for four years; and such publication shall be forfeited.

APPENDIX 3

(3) It shall be a defence to a charge under the preceding subsection that, if the person charged did not know that the publication was seditious when it came into his possession, he did, as soon as the nature of the publication became known to him, deliver the publication to the nearest District Commissioner or to the officer in charge of the nearest police station.

[Subsidiary]

Public Security Regulations

Acts, words or writings prejudicial to public safety or public order

5.—(1) No person shall do any act or publish anything likely—

(*a*) to be prejudicial to public security;

(*b*) to undermine the authority of, or the public confidence in, the Government;

(*c*) to promote feeling of ill-will or hostility between any sections or classes or races of the inhabitants of Malawi; or

(*d*) to promote, or shall attempt to promote, industrial unrest in any industry in Malawi in which he has not been *bona fide* engaged for at least two years immediately preceding.

(2) Any person who contravenes this regulation shall be guilty of an offence.

(3) For the purposes of this regulation, the word "publish" includes any publication by means of words written or spoken, pictorial representations, gramophone records and cinema films, including sound tracks.

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High Court of Malawi
P.O. Box 30244
Chichiri
Blantyre 3

Ref. No. CONF/45

28th February 1989

ALL LEGAL HOUSES IN MALAWI

CC : The District Registrar
Private Bag 15
Lilongwe

: All the Magistrates in Malawi

PROCLAMATION ON CERTAIN SPECIAL CIVIL SUITS

I have been directed by the Honourable the Chief Justice to bring to your attention notice of a Presidential Proclamation this Court is in possession of, affecting certain suits hitherto before this Court and certain suits some of you may lately have just filed or may be about to file on behalf of your clients before this Court or Courts subordinate to it.

You are to note that by virtue of this Proclamation all suits pertaining to dismissal, suspension, or other forms of lay-off, of employees of the Blantyre City Council and the Lilongwe City Council in the years 1987 and 1988, against the Government, the Local Government Service Commission, the Blantyre City Council, the Lilongwe City Council, or any member or officer thereof, which dismissals, suspensions, or lay-offs were carried out in the public interest upon the specific instructions of His Excellency the Life President, are deemed closed, and if contemplated shall not commence.

A.C. Chipeta
For REGISTRAR OF HIGH COURT OF MALAWI

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