

countries with pluralistic systems of personal law. Our neighbour, Tanzania, passed a Marriage Act in 1971 which, but for a few alterations, copies verbatim the provisions drafted by our Kenya Commission. Although we may disagree with our neighbour Tanzania on many policies, I do not think anyone can accuse them of being un-African. It would be a great pity if a measure which has received so much support in and outside Kenya were rejected by our Parliament for a fourth time."

#### APPOINTMENT OF TRADITIONAL COURTS CHAIRMEN AND ASSESSORS IN MALAWI

Traditional courts chairmen are persons who preside in the traditional courts in Malawi. They are basically laymen commanding respect, and considered as having considerable knowledge of the customary law of the area where the court is situated. Assisting court chairmen during the trial of cases are members or panels of assessors. The power to appoint a chairman, a member and an assessor is vested in the Minister of Justice, who is at present the President.

For example, in the General Notice No. 647 of the Malawi Government Gazette of 30th September, 1977 it is stated:

"Traditional Courts Act (Cap. 3:03).  
Appointment of Court chairman.  
Mzenga Traditional Court.

In exercise of the powers conferred upon him by section 4 of the Traditional Courts Act, His Excellency Ngwazi Dr. H. Kamuzu Banda, the Life President of Malawi, has appointed Mr. Watson Mwale to be chairman of the Mzenga Traditional Court as from the 8th August, 1977, until further notice.

J. B. V. Nyimba

for Chief Traditional Courts Commissioner."

An example for panel of assessors:

In the General Notice No. 489 of Malawi Government Gazette of 5th August, 1977:

"Traditional Courts Act (Cap. 3:03).  
Membership—Chiradzulu Traditional Court.

In exercise of the powers conferred upon him by section 4 of the Traditional Court Act, His Excellency Ngwazi Dr. H. Kamuzu Banda the Life President of Malawi, has appointed a panel of assessors in respect of Chiradzulu Traditional Court as from 1st July, 1977 which shall consist of:

Mr. Samuel Mlilima—Member/assessor.  
Mr. John Sing'anga—Assessor.  
Group Village Headman Juwa—Assessor.  
Dated 8th July, 1977.

J. B. V. Nyimba

For Chief Traditional Courts Commissioner."

The appointments involve a number of stages and persons before the Minister gives his sanction.

(a) The Chief Traditional Courts Commissioner, who is the official head of the department, is responsible to the Minister through the Secretary for Justice for the administration and policy of traditional courts. He advises the Minister on the constitution, jurisdiction and membership of Traditional Courts. This function is provided for under section 26 of the Traditional Courts Act. As a supervisor, the Chief Traditional Courts Commissioner is able to know the needs of a court chairman or assessors

in a court. Invariably, he bases his recommendations for appointment of a court chairman or assessor to a court on:

- (i) where a new court is established;
- (ii) where the existing post falls vacant; and
- (iii) where there is pressure of work requiring the services of an additional presiding officer to cope with the bulk of litigation.

After all he has to assist him Traditional Courts Commissioners assigned to regions and Traditional Courts Officers assigned to districts responsible to him for the day-to-day running of Traditional Courts in the country. These submit monthly reports to the Chief Traditional Courts Commissioner covering all aspects of administration in every court in the area. Seeing that there is a need for a court chairman or assessors in a court, the Chief Traditional Courts Commissioner consults a regional chairman of the Malawi Congress Party requesting him to conduct nominations for the appointment of a court chairman or member/assessors. There is now a tendency to require higher educational qualifications in addition to the commanding of respect and the knowledge of customary law. This is necessary in view of the elementary legal courses conducted in English to train the lay court chairman.

(b) The Regional Chairman assembles members of the party in the area where the court is situated, to nominate a suitable candidate for chairmanship or assessorship in accordance with the qualifications prescribed by the Ministry. Nominations are informal but very democratic in that the electors are free to disqualify or propose a name without fear or favour. Proposals or disqualifications by electors are backed with sound reasons. Usually reliability in handling disputes in homes is an advantage to nominees. Previous convictions and bad behaviour are a disadvantage.

(c) Nominations are submitted to the Chief Traditional Courts Commissioner who formally recommends them to the Minister. The Minister, though not obliged to do so, may appoint a person nominated to be a court chairman, and the Chief Traditional Courts Commissioner publishes the appointment in the Gazette.

Nomination by the Party Members is not under the Act, but is a development understood by convention or custom. In the past and even today parties to a dispute voluntarily agree to have their disputes settled by a person they trust and respect. The feature of party membership is not a surprising one since every Malawian is a party member. The method of appointment in Malawi is preferable to that of JP's in England. There is an interesting case on objection to Party Members being brought onto the bench.

In *Mwakawanga v. R.* 1968 5 ALR Mal. 14, the accused when on trial for treason objected to the assessors because they were Malawi Congress Party members. The trial court overruled the objection on the ground that to exclude the Malawi Congress Party would be to exclude the entire African population. Supporting the decision of the trial court, on appeal, SOUTHWORTH C. J. said:

"It would clearly be a matter of difficulty to find persons to act as assessors who are not members of the Malawi Congress Party. The position would have been similar in the case of *Joyce v. DPP* [1946] 1 All ER 186, where the accused adhered to the enemy during the last war, if objection had been taken to a juror because he was known to have been a supporter of the British wartime coalition Government or because he had served during the war in the armed forces of the Crown. It was ascertained by the trial court in the case now before us that none of the assessors was in Government service. No

objection to any of them was taken on any ground affecting them individually, but only on the general ground that all of them were members of the Congress Party. I cannot regard the learned trial judge as having been in error when he disallowed this objection.”

[Contributed by Mr. J. B. V. Nyimba]

#### FIFTH COMMONWEALTH MAGISTRATES' CONFERENCE, OXFORD, 1979

The Commonwealth Magistrates' Association, whose first conference was held in London in 1970, is by now well established, with members in a number of Commonwealth African countries. Its Fifth Conference, held at Christchurch, Oxford from 23rd to 29th September, 1979, was open to magistrates and judges from the Commonwealth. Judged on the basis of the number of Commonwealth countries, great and small, represented, this was the most successful of the conferences so far. All Commonwealth African countries were among those with strong delegations.

The Conference had the privilege of being opened by the Lord High Chancellor of Great Britain, the Right Honourable the Lord Hailsham of St Marylebone, who gave a trenchant address directed, as one might have expected, at the concept of justice and the duty of the courts to maintain it. The General Assembly of the Association had the further privilege of being addressed by the Master of the Rolls, the Right Honourable the Lord Denning, in his own inimitable style. Lord Denning is, of course, no stranger to Africa and to the legal profession there; and is in addition an Honorary Life Vice-President of the Association.

The general theme of the Conference was “The Citizen and the Law”, an attempt to look at the work of the courts, and of legal agencies generally, from the point of view of the persons (the “customers”) who make use of them. There were five main topics for discussion, each of which provoked a lively debate as well as an invaluable opportunity to compare notes: the citizen and the police; the citizen and his right to liberty—bail and remand; the citizen and his right to legal aid; the role of the layman as judge, juryman, or assessor in criminal trials; and court standards, which covered both how trials are conducted as well as the physical facilities available for them.

<sup>1</sup> 12 August, 1979.

<sup>2</sup> Resident High Court Judge at Kisumu.

<sup>3</sup> Emphasis added.

<sup>4</sup> Law of Succession Act, No. 14 of 1972.