

## CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

### Paper by the Commonwealth Secretariat

#### Introduction

1. In its report to the Commonwealth Heads of Government Meeting (CHOGM) in Coolom 2002, the Commonwealth High Level Review Group noted that there was a need to intensify efforts to assist members in strengthening democracy and democratic institutions through the provision of constitutional, electoral and legal assistance.
2. The Group recommended that priority should be given to supporting member governments in the review and strengthening of democratic institutions including constitutions, judiciaries and judicial processes, the training of legislative drafters and public service reform.
3. Globalisation has transformed the political and economic dynamics in the world bringing with it new challenges. With a wide spectrum of stakeholders and interest groups rising to play a role in devising their own constitution there is an emerging focus on the process by which a country's constitution is made. There is a demand for the process to be inclusive, accessible, empowering, open and transparent.

#### Consideration by Senior Officials

4. Senior Officials had before them at their meeting in October 2004, a paper by the Commonwealth Secretariat on Constitutional Developments in the Commonwealth: **Annex A**.
5. In their discussion of the paper, Senior Officials made specific reference to mechanisms for constitutional reform and amendment, the 'basic structure' doctrine and the issue of ethnicity and minority rights.
6. Senior Officials asked the Legal and Constitutional Affairs Division (LCAD) to continue work on the topics covered in the paper.

#### Constitution-making process

7. LCAD, has, on request from countries, rendered assistance by reviewing draft constitutions in the light of the Commonwealth Harare principles or provided advice to proposed amendments to specific provisions of a Constitution. The Division has also sourced appropriate experts to advise on the constitution-making process and to draft constitutions.
8. In July 2005, the Division in collaboration with the Constitution Review Commission of Zambia, organised a workshop on the constitution-making process for Commonwealth SADC countries, which was held in Livingstone, Zambia. After identifying underlying principles, the workshop developed Guidelines for the constitution-making process and formulated strategies to implement those Guidelines. For the information of Law Ministers, the Guidelines from the workshop are at **Annex B**.

### **Action for Law Ministers**

9. Law Ministers may wish to endorse the request by Senior Officials to LCAD to continue work on topics covered in the paper which include the following issues:

- (a) the mode of making constitutions in the Commonwealth;
- (b) the mode and effectiveness of mechanisms for amending constitutions;
- (c) mechanisms for protecting constitutions against retrogressive amendment;
- (d) monitoring and advising on the development of appellate court structures and systems;
- (e) reviewing bills of rights in Commonwealth constitutions;
- (f) capacity building in establishing sound constitutional structures.

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### INTRODUCTION

1. The object of this paper is to identify key issues of constitutional governance for the purpose of providing a future agenda for Commonwealth Law Ministers, Senior Officials and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat.

2. In Abuja in 2003, Heads of Government re-affirmed their commitment to the fundamental political values of the Commonwealth set out in the Singapore and Harare Declarations and elaborated on in subsequent CHOGM communiqués. Specifically, they adopted the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* (set out in the Appendix hereto) and the *Aso Rock Declaration on Development and Democracy*. The latter identifies key priorities for the promotion of democratic governance, including participatory democracy characterised by free and fair elections and representative legislatures, an independent judiciary, a well-trained public service, a transparent and accountable public accounts system, machinery to protect human rights and active participation of all elements of civil society. It is widely acknowledged that building democracy, in the words of the Aso Rock Declaration is a "constantly evolving process".

3. This process in terms of constitutional reform is in train in countries in many parts of the Commonwealth, both rich and poor, large and small, including those countries with a long-established tradition of constitutional governance and those where the foundations are still being laid. All however can learn from the shared experience of the 53 member states. We are also mindful of the situation in Zimbabwe, which was a central concern of the Abuja Meeting and remains a Commonwealth concern in the hope that Zimbabwe's return to membership will not be too long delayed.<sup>1</sup>

4. Most countries of the Commonwealth share in the "Westminster" constitutional tradition although the model exported at the time of de-colonisation has always differed in certain fundamental respects from the original United Kingdom version. The latter has been characterised by a unitary state structure with an unwritten constitution controlled by the conventions of responsible government based on the accountability of the executive to a sovereign parliament. The "export model" was based on the supremacy of a written constitution, with an entrenched bill of rights supported by judicial review and express provision for the separation of powers. In a number of countries, the model, following the pattern of Australia and Canada, took a federal form.

5. The survival rate of the export model has varied sharply across the regions of the Commonwealth. For example, the constitutions of the Caribbean are essentially unchanged since independence whilst most Commonwealth African countries have seen fundamental constitutional, and indeed in some cases unconstitutional, change.<sup>2</sup>

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<sup>1</sup> Cf Commonwealth involvement in the transition in South Africa (particularly the Eminent Persons Mission: see *Communiqué of Commonwealth Heads of Government Review Meeting*, Commonwealth Secretariat, 1986). South Africa was absent from the Commonwealth from 1961 until 1994 but the situation there remained on the CHOGM agenda throughout that period.

<sup>2</sup> Botswana and Mauritius are exceptions to the African pattern. Of course, as noted below, unconstitutional change has not been restricted to Commonwealth Africa.

6. Of particular interest today is the extent to which British constitutional reforms, the most far-reaching of their kind since the 19th Century development of responsible government, are now moving nearer to the export model - away from a unitary state with an unwritten constitution and a sovereign parliament. The "unwritten" constitution is thus increasingly being reduced to writing. Lord Bingham has counted 18 statutes of constitutional import since the election of the Labour administration in 1997<sup>3</sup>; the doctrine of parliamentary supremacy has been modified, some would say undermined, by the supremacy of European Union law in certain matters and by the incorporation of the European Convention on Human Rights into United Kingdom law, with a power of disallowance of incompatible legislation; moves towards the formal separation of executive, legislative and judicial powers are reflected in the prospective replacement of the Judicial Committee of the House of Lords by a supreme court, the removal of judges from legislature and the abolition of the venerable office of Lord Chancellor; the removal of the hereditary element from the upper house of the legislature removes one of the most startling, if equally venerable anomalies in a democratic constitution.

7. The creation of devolved government for Scotland, Wales and Northern Ireland<sup>4</sup>, particularly the devolution of exclusive legislative power in devolved matters to a Scottish Parliament, while not formally affecting the unitary character of the United Kingdom state, is likely to create by convention a system which the sovereign Westminster parliament will be unable to undo in practice.<sup>5</sup> While the position of the Crown remains unchanged, and government is still carried on in the Queen's name by a Prime Minister and other ministers accountable to parliament, the old fabric of the British constitution has been transformed in the name of a modern perception of democratic governance, bringing government closer to the people and enhancing the transparency and accountability of government.

## THE METHODOLOGY OF CONSTITUTIONAL CHANGE

8. Since 1990, a significant number of Commonwealth countries have introduced new, autochthonous constitutions. In some cases this has caused, and continues to cause, considerable controversy. For example, in Kenya the Constitutional Review Commission process has proved difficult and is still subject to challenge in the courts.

9. Thus there may be useful lessons to be learned from a comparative study of the various methodologies adopted for constitutional change.

### Devising and adopting a new constitution

10. Since 1990, constitution-making efforts in many Commonwealth countries have focused on seeking to provide a consultative procedure that gives popular legitimacy to the new document. In many cases this was effected by the establishment of a constitutional commission whose function was to seek the views of the people. In some countries, the commission was then responsible for drafting the new constitution, whilst in others, the matter was left to a popularly elected constitutional/constituent assembly. This has raised several controversial issues.

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<sup>3</sup> "An old constitution in a new world", lecture given to the Commonwealth Lawyers' Association, London, 10 June 2004.

<sup>4</sup> In the Northern Irish case, currently in suspense.

<sup>5</sup> Compare the constitutional history of the 'old' Commonwealth: the subordination of the national legislatures of Australia, Canada, New Zealand and South Africa to the "imperial" parliament, expressly asserted by the Colonial Laws Validity Act, 1865, was not formally removed until the Statute of Westminster, 1931. However, long before the 1931 enactment, the convention was well established that the Westminster parliament did not legislate for what became the self-governing dominions without their consent.

- How are commissioners appointed? By means of a popularly elected commission (e.g. Uganda) or a commission appointed by the Head of Government (e.g. Zambia).
- To whom is the commission answerable? For example, should the commission make its report to a popularly elected constitutional assembly that is tasked with drawing up the final document or should it report to the Head of Government?
- How are the views of the people distilled into the new document? A recurring problem concerns the incorporation of the views of the "people" into the new constitution. Experience has shown that with thousands of submissions, it is possible to draft a number of versions of a constitution and still find justification in the submissions made to the commission for each one of them. Here there may be merit in considering the South African approach in which consultation took place following the building of a broad consensus between the various political players on the terms of the new constitution.
- Who approves the final document? There are several possible models here: (a) the legislature; (b) a specially elected constituent assembly; (c) the people in a national referendum.

11. In the United Kingdom, major constitutional changes are made by means of an ordinary Act of Parliament e.g. Human Rights Act 1998. As regards the process for the current Constitutional Reform Bill (see below), this has followed the traditional parliamentary route of discussion papers published by the relevant government department (of "Constitutional Affairs", itself an interesting innovation in the British ministerial pantheon) leading to a Bill currently subject to select committee scrutiny. It is worth noting, however, that the United Kingdom Government has now committed itself to holding a referendum regarding approval of the proposed European Constitution.

### Constitutional amendment

12. Most Commonwealth constitutions contain a special procedure for their own amendment. Typically (and following the Westminster export model) this is the requirement for a two-thirds parliamentary majority. This procedure can raise concerns particularly when the, not uncommon, situation arises of the ruling party enjoying a two-thirds parliamentary majority. In South Africa, concern about the proposed amendment procedure for the new constitution was expressed by the Association of Law Societies. It noted in a submission to the Constitutional Court of 31 May 1996, that the inclusion of a two-thirds majority for constitutional amendment in the draft 1996 Constitution meant the provision left:

"Parliament free the following day (by a mere two-thirds majority) to amend the new Constitution in a way which violated the Constitutional Principles and thus upset the compromises so carefully negotiated".

13. In the event, adverse comment by the Constitutional Court on the proposed constitutional amendment provision led to its being significantly strengthened.

14. Such concerns have led to some constitutions imposing additional requirements for amending the constitution. This is through the requirement for a referendum which, in some cases, has seen the new document rejected (e.g. in Seychelles).

15. The concern expressed by the Constitutional Court highlights the efforts needed to avoid a situation where a constitution can be "undermined" by means of a series of retrogressive constitutional amendments. Thus it may be useful to examine the various mechanisms employed in Commonwealth constitutions for constitutional amendment. It is also worth noting two other devices used to protect fundamental constitutional provisions against amendment:

- *Making constitutional provisions unalterable.* An unusual provision that appears in the Namibian Constitution expressly excludes any repeal or amendment "in so far as such repeal or amendment diminishes or detracts from" the fundamental rights provisions.
- *The basic structure doctrine.* In India in the 1973 case of *Kesavananda v State of Kerala*,<sup>6</sup> the Indian Supreme Court held that the legislature's power to amend the constitution was impliedly limited. Thus an amendment could not alter the "basic structure" of the Constitution. A series of cases have approved the doctrine and courts in other Commonwealth countries have acknowledged its importance.

16. Overall, it may be helpful to consider further work on the following issues:

- the mode of making constitutions in the Commonwealth;
- the mode and effectiveness of mechanisms for amending constitutions;
- mechanisms for protecting constitutions against retrogressive amendment.

## SPECIAL FACTORS AFFECTING CONSTITUTIONAL REFORM

### **Ethnicity and communal tensions**

17. To what extent should the constitution accommodate ethnicity or communal rivalries and tensions? This issue has bedeviled the search for a constitutional compromise in a number of Commonwealth countries, particularly where a minority asserts a claim to a distinct identity, as in Cyprus and in Sri Lanka. The constitutional arrangements have to seek to strike a balance between maintaining the integrity of the national state and providing an adequate "constitutional space" for the minority community. The Republic of the Fiji Islands illustrates the problem in a different way, where the indigenous community's fear of Indian "majority rule" led to the breakdown in 1987 of the original constitutional settlement of 1970.

### **Constitutional breakdown and the restoration of democracy**

18. One of the most difficult problems that Commonwealth countries have had to face is created by the overthrow of the constitutional order itself by intervention of the military or otherwise by force. Beginning with Pakistan in 1958, constitutional breakdown has affected Bangladesh, Cyprus, The Republic of the Fiji Islands, The Gambia, Ghana, Grenada, Lesotho, Nigeria, Seychelles, Sierra Leone, Solomon Islands and Uganda.

19. The Millbrook process, a remarkable Commonwealth innovation, was originally created to assist Commonwealth countries particularly in circumstances of an unconstitutional overthrow of a democratic government. Currently the tidal wave of unconstitutional action has receded, but the lesson remains that bad governance provides a breeding ground for such intervention.

20. There are also useful lessons to be drawn from a comparative study of the manner in which constitutions seek to establish a suitable relationship between the civilian government and the military. This might be based on the view of the ANC in South Africa which declared in its seminal 1992 policy statement, *Ready to Govern*, that the security forces should be:

"Bound by the principles of civil supremacy and subject to public scrutiny and open debate...[and] be accountable and answerable to the public through a democratically elected parliament" (at p.71).

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<sup>6</sup> AIR 1973 SC 1461.

## **Traditional Rulers**

21. It has been often alleged that plural democracy, based on a competitive political culture, is alien to the traditional notions of governance in many Commonwealth countries, particularly in Africa and the Pacific. This argument was used particularly in the 1970s by those seeking to justify the imposition of one-party rule, but it has a long Commonwealth pedigree. Thus the leading practitioners of colonial rule in Africa in the 1930s advocated the nurturing of traditional rulership by a process of "indirect rule" rather than the introduction of parliamentary democracy. Of course constitutional monarchy based on the hereditary principle has a firm place in the Commonwealth constitutional framework, but such traditional rulers fulfil a role which does or should not affect the democratic accountability of elected ministers. However, at all levels of government, from the headship of state through representation in the central legislature to local government, there may be tensions between traditional rulership and democratically elected officials. The problem may be particularly acute where traditional leaders assert claims to title to, or powers of allocation over, land, e.g. in Swaziland and South Africa.

## **Small states and territories**

22. The Commonwealth contains a high proportion of small states that have full membership of the world community. The problems of small states have therefore been a major focus of Commonwealth concern.<sup>7</sup> In terms of constitutional governance, small states have generally a good record. Yet as events in the Republic of the Fiji Islands, Grenada, Lesotho and Solomon Islands have shown, they are vulnerable to unconstitutional action and need support in sustaining democratic institutions.

23. That small states can make a significant contribution to just and honest government has been highlighted by the recent successful criminal prosecutions for corruption brought against several international corporations in Lesotho.

24. The constitutional position of territories which have not proceeded to full independence is a matter primarily for the territory concerned and the Commonwealth member internationally responsible for that territory. However, it may be that consideration should be given to enhancing the status of such territories in the councils of the Commonwealth and of providing support for the development of appropriate governance institutions.

## **Governance and poverty**

25. The Commonwealth has long recognised the link between good governance and development. Thus the Harare Declaration and the Millbrook Action Programme link the advancement of Commonwealth fundamental political values with the promotion of sustainable development. The link between development and democracy as mutually reinforcing goals was recognised specifically in paragraph 6 of the Aso Rock Declaration. Poor countries often lack the resources to sustain the institutions of good governance. A programme of assistance, building on the work already undertaken by the Commonwealth Secretariat and bilateral aid programmes, are called for in this regard.

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<sup>7</sup> The Commonwealth Advisory Group's Report: *A Future for Small States: Overcoming Vulnerability* Commonwealth Secretariat, 1997, provides a detailed analysis.

## SUBSTANTIVE ISSUES OF CONSTITUTIONAL REFORM

### The Judiciary

26. The importance of the independence of the judiciary was recognised expressly in the Harare Declaration and was re-affirmed at Abuja in the context of the endorsement of the Commonwealth Principles. The latter acknowledges that -

“An independent, impartial, honest and competent judiciary is integral to upholding the rule of law”

and identifies key factors in the securing of these aims in relation to mode of appointment, security of tenure and of remuneration, adequacy of available resources and appropriate relationships with the executive and parliamentary branches of government (Principle IV). At the same time, the Principles also acknowledge the importance of the *accountability* of the judiciary in order to ensure public confidence in the judicial system.

#### (1) *The United Kingdom*

27. The most elaborate measure of judicial reform in the Commonwealth is currently taking place in the United Kingdom. Many of the reforms embodied in legislation currently before parliament in July 2004, are designed to remove from the British constitution historical anomalies which, without the buttress of constitutional convention, would appear to bring into question the independence of the judiciary. Thus the Constitutional Reform Bill (CRB)<sup>8</sup> will abolish the office of Lord Chancellor, thus removing from the constitution an office which, while a 1000-year old office, appears to conflict with the relationship between the three branches of government delineated in the Commonwealth Principles in so far as the office-holder is a member of the government, the judiciary (though the present Lord Chancellor has declined to sit in a judicial capacity) and the legislature.

28. The major innovation will be the replacement of the Judicial Committee of the House of Lords with a new Supreme Court of the United Kingdom which will be separate from Parliament. The Government's rationale for the new body is to "put the relationship between the executive, the legislature and the judiciary on a modern footing which takes account of people's expectations about the independence and transparency of the judicial system".<sup>9</sup> The Bill makes elaborate statutory provision for the appointment and discipline of the judiciary. In most Commonwealth countries these matters are prescribed in the chapter on the judiciary in the constitution.<sup>10</sup>

29. The salient features of the scheme relating to the new Supreme Court are as follows:

#### (a) Judicial Independence

The actual independence of the modern British judiciary is not in doubt as is evidenced in recent times by senior judges' public criticisms of the executive where threats to the rule of law are perceived. However, particularly after the incorporation of the European Convention on Human Rights, the perception must be made to coincide with the reality. The protection of judicial independence has traditionally been the role of the Lord Chancellor. Clause 1 of the CRB imposes a statutory duty on the Secretary of State for Constitutional Affairs (SSCA) to have regard to the need to defend the continued independence of the judiciary - a provision which offers little by way

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<sup>8</sup> This may have become an Act by the time that this paper is considered by Senior Officials.

<sup>9</sup> Department of Constitutional Affairs *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003).

<sup>10</sup> See, for example, Chapter VII of the Constitution of Belize.

of effective safeguard in the event of a real challenge to that independence from an ill-disposed government.<sup>11</sup>

(b) Separation of Powers

The new Supreme Court (SC) will be entirely separate from Parliament. Holders of full-time judicial office will be excluded from sitting and voting in the House of Lords.

(c) Jurisdiction

The SC will assume the jurisdiction of the House of Lords and also that of the Judicial Committee of the Privy Council in devolution matters. Otherwise the Privy Council will function as before in relation to appeals from certain Commonwealth members, United Kingdom Crown dependencies and overseas territories. The SC is a purely appellate tribunal and there is no provision for original jurisdiction.<sup>12</sup> The SC will not have the power of judicial review of legislation, except to the limited extent provided by the Human Rights Act.<sup>13</sup>

(d) Appointment, Discipline and Removal

The existing Lords of Appeal in Ordinary will become judges of the Supreme Court. New appointments thereafter will be made by a process involving the recommendation to the SSCA by an *ad hoc* commission (representing the existing senior judges of the SC and the judicial appointments bodies of England and Wales, Scotland and Northern Ireland). The Bill is likely to provide that the SSCA will receive one nomination which the SSCA must then either submit to the Prime Minister who must in turn recommend appointment to the Queen or seek a second name from the commission. Judges of the SC will continue to hold office during good behaviour until the statutory retirement age of 70, but may be removed on the address of both Houses of Parliament.

The appointment of other members of the higher judiciary of the Supreme Court of England and Wales will be in the hands of the Judicial Appointments Commission, an innovation for the United Kingdom but a familiar feature of other Commonwealth constitutions. The membership of such commissions is an issue of abiding controversy. The CRB contains provisions for appointment by the Crown, on the recommendation of the SSCA, after an elaborate statutory process of consultation. The Commission of 15 must contain members of the judiciary, the legal profession and at least six lay members. In an innovative measure, there is a requirement that one member must be a lay justice.

Complaints about the conduct of the appointments process may be made to a "Judicial Appointments and Conduct Ombudsman". There are also to be elaborate statutory procedures for the disciplining of judges. Complaints about the conduct of these may also be investigated by the Ombudsman.

The senior judge of the SC will be styled "President". The Lord Chief Justice will acquire the additional statutory title of President of the Courts of England and Wales and will, in effect, assume the judiciary-related functions of the Lord Chancellor which are not transferred to the SSCA.

(e) Summary

In general, the reforms will bring the United Kingdom closer into line with judicial arrangements in other Commonwealth countries and appear to provide a greater degree of accountability and

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<sup>11</sup> Cf, for example, the entrenched protection of judicial independence in section 165 of the Constitution of South Africa, 1996.

<sup>12</sup> Cf section 167(6) of the South African Constitution, which makes provision for direct access to the Constitutional Court with leave, when required, in the interests of justice. The positive impact made by this Court might also encourage other Commonwealth countries to consider introducing such a body.

<sup>13</sup> *Viz.* the power of the court to make a declaration of incompatibility in respect of primary legislation in terms of section 4 of the Act.

transparency in the judicial process. Concern has been expressed however at the disappearance of the powerful figure of the Lord Chancellor and his replacement (there never has been a female holder of the office!) in the political role by a relatively junior member of the cabinet who may not be a lawyer. Moreover, the pace of reform has caused consideration by persons previously wedded to the unwritten constitution, of more fundamental changes in the constitutional structure of the United Kingdom.<sup>14</sup>

The establishment of a judicial Ombudsman mirrors the approach in some other Commonwealth countries and it might be helpful to assess their organisation and effectiveness.

## (2) *New Zealand*

30. The Supreme Court Act 2003 abolished appeals from New Zealand to the Privy Council in respect of any civil or criminal decision of a New Zealand court made after 31 December 2003 and created in its place a Supreme Court of New Zealand with effect from 1 January 2004. The new court held its first hearings in July 2004, replacing the Judicial Committee as the second tier appeal court for New Zealand.

31. The Supreme Court is presided over by the Chief Justice with not fewer than four nor more than five other judges. The Act contains none of the elaborate provisions in relation to appointments contained in the United Kingdom Bill. Appointments are made by the Governor-General acting, according to constitutional convention, on the advice of the Attorney General, or, in the case of the Chief Justice, the Prime Minister. In fact, the first court consisted of the existing Chief Justice, Dame Sian Elias and the four most senior judges from the Court of Appeal. On future appointments, the Attorney General will be advised by an *ad hoc* committee consisting of the Chief Justice, the Solicitor-General and a former Governor-General, pending a future review of the judicial appointments system. As in the case of the United Kingdom proposals, the new court will be a purely appellate body.

32. Given New Zealand's constitutional arrangement, the court will lack the power of judicial review of primary legislation. Indeed, in the light of the United Kingdom's association with the European Union, New Zealand may now be regarded as the bastion in the Commonwealth of the pure doctrine of parliamentary sovereignty. In order to address concerns that the establishment of the new court would disturb the existing balance between the three branches of government, the independence of the judiciary and the Treaty of Waitangi, the Supreme Court Act contains a "purpose clause" (section 3) referring expressly to the resolution of important legal matters, including matters relating to the Treaty of Waitangi, with an understanding of New Zealand conditions, history and traditions and to the improvement of access to justice. The section also affirms that the Act was not intended to affect New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament. Of course, the recording of constitutional conventions in an ordinary Act of Parliament, as in the United Kingdom case, does not give them the formal protection afforded by inclusion in a constitution which is the supreme law.

## (3) *The Regional Model: the Caribbean Court of Justice*

33. This Court will replace the Privy Council as the final court of appeal for those Commonwealth Caribbean states that are parties to the agreement establishing the court (as well as

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<sup>14</sup> Lord Woolf, the Lord Chief Justice, has expressed his doubts: "What has happened since June last [2003] does raise the issue as to whether or not the time has come when it is necessary at least to consider embarking on the difficult task of establishing a written constitution for the United Kingdom. I have up until now preferred the flexibility inherent in an unwritten constitution. I no longer see a written constitution containing entrenched provisions as not being on the agenda." "Constitutional Reform in the UK: Change for Change's Sake?" *Commonwealth Lawyer*, April 2004, p.21.

having certain functions in relation to the CARICOM Treaty). The creation of the Court has provoked considerable controversy and has been the subject of constitutional challenge in Jamaica. While the creation of a regional court of appeal may appear an attractive option in terms of sharing of judicial resources, there are problems in relation to the appointment of judges to reflect regional balance, the location and funding of the court and the establishment of the authority of the new body.

34. In this respect it is important to build upon the work of the Law Development section of the Legal and Constitutional Affairs Division in advising countries to replace the Judicial Committee of the Privy Council.

35. The regional option might also be appropriate for the Pacific. In particular, it would enable the creation of a second tier appeal process in respect of jurisdictions where it is currently lacking.

### **Promoting human rights**

36. The Westminster export model included a bill of rights based on the European Convention of Human Rights (which the British had played an important role in drafting). This model is retained in many Commonwealth countries, e.g. in much of the Caribbean as well as in Botswana and Mauritius. In the United Kingdom, the Human Rights Act 1998 incorporated the European Convention into domestic law.

37. The new wind of change that swept over much of Commonwealth Africa in the 1990s saw the introduction of wide-ranging and justiciable bills/declarations of right into the new constitutions. In many cases, in addition to the traditional civil and political rights, these also included for the first time, economic, social, cultural and environmental rights. Here the Canadian Charter of Human Rights was influential partly because Canada had a justiciable bill of rights grafted onto an older Westminster model and partly because the Charter served as one of several precedents examined when later constitutions in Commonwealth Africa were being drafted. This move towards expanding the scope of the bill of rights is also in line with the gradual move by Commonwealth countries towards becoming parties to the major international human rights conventions. This significant expansion of the scope of bills of right has also raised significant issues regarding the role of courts in dealing with social policy issues: for example, the jurisprudence from the Constitutional Court in South Africa concerning access to retroviral drugs, the right to health and the right to housing and the response of government thereto.

38. A feature in some countries, such as Uganda, is the inclusion in their constitutions of non-justiciable rights in the form of, in the words of the Ugandan Constitution, "National Objectives and Directive Principles of State Policy". In view of the trend towards making all constitutional rights justiciable, the value of such an approach might need re-considering.

39. The importance of comparative Commonwealth jurisprudence in this field is well known and the Commonwealth Secretariat is already involved in its dissemination via the INTERIGHTS' Commonwealth Law Programme and through links with the *Law Reports of the Commonwealth*. It may be useful to examine the effectiveness of this work and how it might be improved and expanded to benefit all member states.

40. Thus there may be some merit in reviewing the promotion of human rights issues taking into account factors such as:

- the scope of bills of right in the Commonwealth;
- whether or not all rights contained in a constitution should be justiciable;
- the role of judges in the development of social policy issues;

- whether improvements are required in the dissemination of comparative Commonwealth jurisprudence;
- the extent to which constitutions adequately address issues of gender and minority rights.

### Separation of Powers

41. The earlier discussion has noted the position as it has been considered in relation to constitutional reform in New Zealand and the United Kingdom. The Commonwealth's position in general has been stated in the Commonwealth Principles (see the Appendix).

42. Issues that might affect the proper balance between the three branches of government include:

- *effective limitation of executive power*, particularly where there may be excessive accumulation of constitutional and political power in a presidential executive;
- *the securing of judicial independence* on the basis of Part IV of the Commonwealth Principles;
- *the strengthening of the role of Parliament* in terms of training, resources and mechanisms for ensuring the accountability of the executive: as referred to in Part VI (2)(a) of the Latimer House Guidelines from which the Principles are derived. Also mechanisms for protecting the independence of parliamentarians (noted below).

### Developing oversight bodies

43. In the Harare Declaration, Commonwealth Heads of Government recognised that developing appropriate "institutional structures which reflect national circumstances" is a key element for promoting and protecting human rights, good governance and the rule of law. Further, Principle XI of the Commonwealth Principles states that steps which may be taken to encourage public sector accountability include:

"The establishment of scrutiny bodies and mechanisms to oversee Government, [as this] enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,"

44. Thus there may be merit in examining the work and effectiveness of oversight bodies.

45. Offices of the Ombudsman already operate in the majority of Commonwealth countries and are mainly concerned with public sector administrative justice issues. Separate equality and anti-discrimination commissions are also well established.

46. A more recent trend has seen the establishment of human rights commissions designed to promote and protect human rights in both the private and public sectors. Whilst in 1990 only Australia had a fully-fledged human rights commission, today they operate in some 15 Commonwealth countries, with the latest additions being in Kenya and Maldives.

47. Concern about tackling corruption has also encouraged states around the Commonwealth to establish separate anti-corruption commissions e.g. in Australia, Brunei, Jamaica, and Malawi.

48. There is considerable variety in the oversight institutions established by Commonwealth countries. Some have developed a series of single-issue institutions as well as an office of the

ombudsman e.g. England and Wales has an Equal Opportunities Commission, Race Relations Commission and Disability Rights Commission as an ombudsman although there is now a proposal to establish a "one-stop" commission. Others have established a separate office of the ombudsman and human rights commission (e.g. Uganda) whilst yet others have a single institution that combines the work of an ombudsman, human rights commission and anti-corruption commission, e.g. the Commission for Human Rights and Administrative Justice in Ghana.

49. The Commonwealth Secretariat has done much to support such institutions. In particular, the development in 2001 of the *Best Practice Principles for National Human Rights Institutions*. Yet there has been little work done on examining the extent to which these are being put into practice.

50. Thus issues that might require further consideration include:

- what type of oversight bodies exist in the Commonwealth?;
- the benefits of establishing/maintaining a single or multiple institution, particularly in relation to small states;
- the extent to which Commonwealth Best Practice Principles provide a useful template for the organisation, powers and operation of oversight bodies;
- whether countries need to re-assess the role and function of their oversight bodies in the light of privatisation and increasing cross-border issues;
- to what extent oversight bodies help promote and protect human rights and administrative justice. What are the factors that, in particular, impact on the effective operation of such institutions?

## Democratic entitlements and political parties

### (1) *Preserving the independence of members of parliament*

51. This is an issue that provokes some debate. The Commonwealth Principles make it clear that "Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference" (Principle III(a)). However, there are several factors affecting such independence. These include the following:

#### (a) Right of recall

Some Commonwealth constitutions provide for the recall of members. For example, article 84 of the Ugandan Constitution provides for the recall of members by the electorate during their elected term on grounds of incapacity, misconduct or "persistent deserting of the electorate without reasonable cause". However, the Latimer House Guidelines (III(2)(b)) suggest that such provisions "should be viewed with caution, as a potential threat to the independence of members".

#### (b) Floor-crossing<sup>15</sup>

The expulsion of members from parliament as a penalty for leaving their parties (floor crossing) also remains a matter of some controversy.

However floor-crossing can represent a barrier against the corruption of MPs and thus the Latimer House Guidelines III(2)(a) suggest that:

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<sup>15</sup> Such behaviour is a hallowed tradition in the House of Commons at Westminster and the right of sitting members to follow their consciences and switch their allegiance to another party (or simply to sit as independents) is seen as an integral part of a competitive party system. Not surprisingly, the Westminster export model constitution did not seek to regulate the matter.

"[T]he expulsion from parliament as a penalty for leaving their parties (floor crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices."

Of course, an anti-floor crossing provision is seen as a necessary part of any proportional representation electoral system which seeks to provide a quorum of representatives of individual parties as determined by the entire electorate.

(c) Protecting parliamentarians from unwarranted attacks

A traditional mechanism for protecting unwarranted attacks on parliamentarians has been the use of criminal libel laws (see, for example the recent Privy Council decision in *George Worme and Grenada Today Limited v Commissioner of Police*) and contempt laws. However, such provisions have long been viewed with considerable concern. Here Principle III(b) of the Commonwealth Principles seeks to provide a suitable balance:

"Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege."

***Political party funding***

52. State funding for political parties is now increasingly viewed as a necessary part of strengthening democracy and helping to create a level political playing field.

53. Yet enhanced transparency in the financing of election campaigns and political parties is now recognised as being essential to efforts to prevent corrupt practices that can significantly affect the political process (see for example, the provisions of the new United Nations Convention against Corruption). The strategies being undertaken around the Commonwealth to address this issue may merit attention.

(3) ***Utilising the experience of Commonwealth election monitors***

54. The numerous election monitoring exercises since 1980 have enabled the Commonwealth to build up considerable experience and expertise on the key requirements for holding free and fair elections, including the development of a series of important codes of conduct. In view of this, there may be scope for refining and disseminating such information on a Commonwealth-wide basis.

(4) ***Providing for a representative legislature and political system***

55. Note 10 to the Latimer House Guidelines puts the matter succinctly:

"Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance".

56. Yet the record of Commonwealth countries in terms of gender balance is a cause for concern. For example, in November 1996 the Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs recommended that member countries be encouraged to achieve a target of not less than 30 per cent of women in decision-making in the political, public and private sectors by the year 2005. This target is unlikely to be met by most, if not all, Commonwealth countries.

57. However, Commonwealth countries have developed a variety of approaches that might assist efforts to address this issue. These include:

- requiring political parties to have national (rather than simply regional) support;
- providing for the election of persons representing special interest groups;
- providing for members nominated by the President (or other state official);
- providing for regional representatives (often through the use of a bi-cameral legislature);
- using a variety of electoral systems to encourage greater regional representation in the legislature;
- encouraging the selection of women and persons from ethnic or other minorities as parliamentary candidates (for example, the "merit with bias" approach i.e. where if two applicants are of equal merit, the bias should be to appoint a woman or candidate from an under-represented region or background).

58. Thus there may therefore be some merit in studying the mechanisms used by Commonwealth countries to enhance the democratic entitlement of their citizens.

### Headship of State

59. The issue of the move towards a republic in those countries which have retained Her Majesty the Queen as Head of State is a matter exclusively for the states concerned. However, issues of fundamental constitutional importance in connection with the role of the Head of State require consideration. These include:

- (i) the expression in a written constitution of the conventions of constitutional monarchy, most recently attempted in the case of Lesotho and currently an issue in Swaziland's constitutional evolution;
- (ii) the relative merits of systems which may be broadly classified as parliamentary or presidential executive.

60. The parliamentary executive system is derived from the classic Westminster model: i.e. the Head of Government is separate from the Head of State who performs largely ceremonial functions and may be an hereditary monarch or (usually indirectly elected) President; the Head of Government (Prime Minister) and fellow cabinet ministers are responsible to the legislature of which they are normally members. This model remains popular in the Caribbean, Asia and the Pacific and in the "old" Commonwealth (29 countries).

61. The presidential executive system confers executive power on a (usually popularly elected) President who is both Head of State and Government and to whom ministers are accountable rather than to the legislature. This model became popular in Africa where it was said that the separation of Head of State and Government defied local political culture and tradition (24 countries).

62. A history of abuse of presidential power in presidential executives raises the question of a possible return to the classic "Westminster" division of executive power between a largely ceremonial Head of State and a Prime Minister who is a member of and directly accountable to parliament. In Kenya, the Ghai Commission controversially proposed a return to a prime ministerial system with the president playing the role of guardian of the constitution.

### COMMONWEALTH SECRETARIAT MANDATE

63. The *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* and the *Aso Rock Declaration on Democracy and Development* reflect many of the current constitutional and good governance issues and challenges for the Commonwealth. Thus this paper seeks to identify areas that might merit further attention by the Legal and Constitutional Affairs Division. These include:

## **Good Governance**

- (a) Building on existing work on the promotion of democratic governance in areas such as elections and the development of effective oversight bodies.
- (b) Providing advice and assistance to Commonwealth countries to help develop and sustain institutions of good governance.
- (c) Monitoring good practice in the implementation of the Commonwealth Principles working in partnership with the Commonwealth Lawyers' Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association.

## **Constitutional Reform**

- (a) Providing advice and assistance, particularly for small and poverty-hindered jurisdictions, on capacity building in establishing sound constitutional structures, especially where there is experience of constitutional breakdown or ethnic/communal tensions.
- (b) Reviewing bills of right in Commonwealth constitutions.
- (c) Providing advice on mechanisms for constitutional reform and amendment.
- (d) Monitoring and advising on the development of appellate court structures and systems.
- (e) Reviewing the structure, powers and accountability of the executive.
- (f) Ensuring that effective means of disseminating information about current Commonwealth developments are in place.

**Workshop on Constitution Making Process  
Livingstone, Zambia, 18 – 21 July 2005**

**GUIDELINES FOR CONSTITUTION MAKING PROCESS**

<b>A. Agenda Setting</b>	
1	Announcement of the intention
2	Consultation with stakeholders to establish agenda
3	Announcement of process
4	Consultation with interested parties
5	Legal framework for the process
<b>B. Consultative Stage</b>	
1	Setting up the review body <ul style="list-style-type: none"> <li>- Composition</li> <li>- Rules of procedure</li> <li>- Structures and sub committees</li> </ul>
2	Information collection and dissemination <ul style="list-style-type: none"> <li>- For draft committee <ul style="list-style-type: none"> <li>o Experts</li> <li>o Materials</li> <li>o Receiving public submissions</li> </ul> </li> <li>- For the public <ul style="list-style-type: none"> <li>o Media campaign</li> <li>o Civil society outreach</li> <li>o Public submissions process</li> </ul> </li> </ul>
3	Writing the constitution
<b>C. Popularisation of the draft document</b>	
1	Circulation and dissemination of the document
<b>D. Legitimation</b>	
1	Adoption
2	Post adoption <ul style="list-style-type: none"> <li>- Embedding institutions</li> <li>- Civic Education etc</li> </ul>