

Advancing Commonwealth Fundamental Values

INDEPENDENCE, QUALITY AND STATUS OF THE JUDICIARY IN COMMONWEALTH COUNTRIES

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BACKGROUND:

1. The 1991 Harare Commonwealth Declaration noted that: "The special strength of the Commonwealth lies in the combination of the diversity of its members with their shared inheritance in language, culture and **the rule of law**" and pledged the Commonwealth and its member countries to work with renewed vigour, concentrating especially on a number of areas including: "the protection and promotion of the fundamental political values of the Commonwealth:

- democracy, democratic processes and institutions which reflect national circumstances, **the rule of law and the independence of the judiciary**, just and honest government;
- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief; ..."

2. The Declaration also noted that: "To give weight and effectiveness to our commitments we intend to focus and improve Commonwealth co-operation in these areas. This would include strengthening the capacity of the Commonwealth to respond to requests from members for assistance in **entrenching** the practices of democracy, accountable administration and **the rule of law.**"

3. The 1995 Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration noted the pledge to work for the protection and promotion of, *inter alia*, **the rule of law and the independence of the judiciary** and adopted an action programme to fulfil more effectively the commitments contained in the Harare Commonwealth Declaration.

4. Part (i) of the Action Programme related to "Advancing Commonwealth Fundamental Political Values" and provided that, as "Measures in Support of Processes and Institutions for the Practice of Harare Principles": "The Secretariat should enhance its capacity to provide advice, training and other forms of technical assistance to governments in promoting the Commonwealth's fundamental political values, including:

- assistance in creating and building the capacity of requisite institutions; ...
- **strengthening the rule of law and promoting the independence of the judiciary through the promotion of exchanges among, and training of, the judiciary; ..."**

5. These issues have been reflected in a number of other statements from Commonwealth meetings. For example, the 1992 Lusaka Statement on Government Under The Law noted that: "We express our joint belief in **the central place enjoyed by an independent, impartial and informed judiciary** in the realisation of just, honest, open and accountable government" and went on to state that: "In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This included ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all."

6. At the Meeting of Commonwealth Law Ministers at Grand Baie, Mauritius, in 1993, Ministers considered a number of papers of relevance to these general themes, including:

- "The Lusaka Statement on Government Under the Law" - Memorandum by the Commonwealth Secretariat and a paper prepared by the Hon. Rodger Chongwe, SC, MP, Minister of Local Government and Housing, Zambia;

- "The Harare Declaration: The Role of the Judiciary and the Protection of the Rule of Law" - Paper prepared by the Hon. Justice P. Nnaemeka-Agu;
- "The Commonwealth and the Promotion of Human Rights" - Memorandum by the Commonwealth Secretariat; and
- "Independence of the Judiciary in Canada" - Paper submitted by Canada.

PROPOSAL

7. It is a principle commonly accepted by all members of the Commonwealth, and consistently reflected in the declarations and utterances of the Commonwealth, that national interests and aspirations will be enhanced by the reality and perception that the judiciary in each country is able to exercise its judicial functions in a way that is independent of any undue influence of the executive, and that the members of the judiciary are and are perceived to be of a status commensurate with the fundamental role of the judiciary in supporting and entrenching the rule of law, to which all member countries are fully committed.

8. These desirable characteristics of independence and status are not capable of quantitative measurement and many subjective judgements are required on a range of difficult issues before any sustainable opinion can be confidently reached.

9. The developmental stage attained in the establishment, maintenance, preservation and safeguarding of the independence and status of the judiciary varies from one Commonwealth country to another. Additionally, a number of varying methodologies have been tested in a variety of Commonwealth countries with a view to achieving these important aims.

10. It is a matter of fundamental importance that each sovereign country is free to so structure its judiciary as it sees fit within national constitutions and laws, and it is accepted that there does not need to necessarily be uniformity between countries on matters affecting the status and independence of the judiciary.

11. At the same time, a comparative study of such matters amongst Commonwealth countries may well be of assistance to those member countries who seek to advance and accelerate the development of their

own judiciaries beyond their present state of development.

12. It may also point to various best or preferable practices on certain matters which some countries may choose to adopt, and may assist others contemplating change or experimentation to assess how various methodologies have operated in other member countries.

13. Finally, that comparative study and a review of relevant action taken to date may also point to those areas in which concerted future action by the Secretariat and individual member countries may give more concrete form to the Millbrook Commonwealth Action Plan and the various other commitments noted above.

14. Accordingly, it is proposed that Ministers agree: that the Commonwealth Secretariat should convene a Working Party, comprised of member countries to be agreed by Ministers, which should provide an interim report to the next meeting of Senior Officials and a final report to the next meeting of Ministers in accordance with the following terms of reference:

1. to identify those matters which fundamentally affect the reality or actuality of **independence** of the judiciary, including but not limited to the following:
 - constitutional or statutory entrenchment of courts;
 - constitutional or statutory entrenchment of persons appointed to the judiciary;
 - the terms and conditions upon which members of the judiciary are engaged or appointed;
 - the processes by which members of the judiciary are selected;
 - the circumstances in which a member of the judiciary may be removed from office;
 - the nature and extent of accountability of the judiciary to the Parliament and Government; and
 - the nature of other offices which might be contemporaneously held by members of the judiciary;

2. to identify those matters which impact upon the actual and perceived **status and quality** of the judiciary and the rule of law, including but not limited to the following:
 - the criteria by reference to which potential members of the judiciary are identified;
 - the comparative level of remuneration received by members of the judiciary vis a vis other national holders of public office, the method of determination of that remuneration, and the process for adjustment of the level so determined over time;
 - ongoing educational and professional development opportunities for members of the judiciary;
 - the extent of development and acceptance of standards for ethical behaviour amongst members of the judiciary; and
 - the level of public education about, and knowledge of, the role and function of the judiciary;
3. to compare the **present state of the law and administration** amongst Commonwealth countries on such matters as fall within 1 and 2 above;
4. to suggest those criteria by which **best or preferable practices** in relation to such matters might be identified by the governments of member countries;
5. to propose, as considered appropriate, any **programme of further work** considered desirable beyond the undertaking of the comparative study commissioned in accordance with 1-4 above; and
6. to review practical steps that have been taken to date to promote the independence of the judiciary generally (and in particular by **exchanges** amongst, **and** by providing **training opportunities** for, the judiciaries of member countries) and if considered appropriate, to propose new or increased initiatives in these fields.