

## THE MAKING AND REMAKING OF COMMONWEALTH CONSTITUTIONS

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I am not writing a system, but a history, and . . . not obliged to reconcile every matter to the received notions.

Fielding, *Tom Jones*

ON the passing of its Empire, Britain left some 50 specific legacies: to every Commonwealth State, a written constitution, or the means of obtaining one. The earlier constitutions, of Canada, Australia and New Zealand, not fully sovereign States at the time, were enacted by the Parliament of the United Kingdom. The post-war constitutions were formed in a different way. Parliament passed an Independence Act; but the constitutions either were drawn up in Whitehall, and made law by Order in Council, or were indigenous. We have something of a phenomenon: Whitehall lawyers must have drafted at least 33 complete and final independence constitutions during the period, to say nothing of a deluge of intermediate instruments.<sup>1</sup> And this from almost the only country in the world to be itself without a written constitution. Many of the constitutions made in London have been unmade, and made again, in far-away capitals; and a similar fate has overtaken some of the indigenous constitutions. But many have lasted. This article will attempt an assessment of the successes and failures of Commonwealth constitution-making during the past 40 years or more.

### A. *The Whitehall Constitutions: Monarchical, Presidential*

The constitutions drafted in Whitehall were drawn up with meticulous care, in a style owing much to the style of an Act of Parliament, with the object—at least at first—of reproducing the features, in detail, of parliamentary democracy as it obtains in Britain. A Governor-General was to

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1. McPetrie recorded that during a little over one year, ending in June 1960, 92 constitutional instruments were drafted by the Colonial Office: J. N. D. Anderson (Ed.), *Changing Law in Developing Countries* (1963), p.29.

be the Queen's representative, a legislature—or one House of it—was to be freely elected by the adult citizens, a cabinet of ministers was to be responsible to the House, and there were safeguards for an independent judiciary. Dicey's Conventions of the Constitution were often given statutory form. But it would be wrong to regard these constitutions as forced on the countries. In the words of an authoritative participant in the process:<sup>2</sup>

It is not as if independence constitutions enacted in the United Kingdom are imposed upon the country. They are always the outcome of full consultation and discussion and in the majority of cases independence constitutions have been preceded by one or more full-scale conferences. It can justly be claimed that the constitution gives the people what they ask for, remembering that by "the people" one does not necessarily mean only the majority. If safeguards are provided for particular communities or minorities, that, surely, makes the constitution more one which is wanted by the people than if it contained nothing except that which would satisfy a majority?

Further, to see the true picture it is necessary to remember that the new constitution did not represent an abrupt metamorphosis into a state of freedom. On independence there was a new emperor, but his suit of clothes was far from new. The weavers in the Colonial Office had begun work on the cloth, and taken out their tailoring shears, long before. The final constitution was the last of a series providing for increasingly responsible government, so much so that at the end the tailoring was often largely a matter of scissors and paste—paste which, it was hoped (but often vainly), was "pasted close", to borrow from Dickens.<sup>3</sup> All this represented long-established policy: to develop self-government. Trinidad and Tobago may be taken as an example. In 1925 the Legislative Council of the colony was reformed to include elected members, and in 1946 these became equal in number to the official and nominated members. By 1950 elected members were in the majority. The Constitution of 1961 provided for a wholly elected House of Representatives and a Senate, and cabinet government. When Trinidad and Tobago became independent the following year, it did so with a constitution which substantially reproduced the existing provisions, with additions for human rights and citizenship.

The pace was sometimes less gradual, particularly in Africa. But it may be said that the Whitehall offices probably sought to establish the British system of government for three reasons: (1) it was the one they knew, (2) they thought it the best, (3) the instalment system; and that the representatives of the countries concerned were similarly motivated.

2. Roberts-Wray, in Anderson, *op. cit.* p. 61.

3. Martin Chuzzlewit, chap. XIII.

Until 1964 the Whitehall constitutions (except that for the Federation of Malaya) provided for a monarchical form of government, with a Governor-General as the sovereign's representative, who would perform the monarch's functions on the spot. But rather more than that lay behind monarchy. It was recognised before the Second World War that George VI was King of Canada, for example, as well as King of the United Kingdom, and the terms of his coronation oath were such as to acknowledge that the sovereign had a relationship with each of his peoples which was "direct and immediate".<sup>4</sup> There was no constitutional difficulty over dividing—or, it would be more accurate to say, multiplying—the monarch. The Queen could therefore become Queen of Trinidad and Tobago, and that is what the 1962 Constitution made of her. If visiting the country she would do so as Queen, exercising certain functions there.

But ten years after independence the government of Trinidad and Tobago set up a commission to review the Constitution. It was under the chairmanship of a former Chief Justice of the country, Sir Hugh Wooding, and we thus have the benefit of a judicial review. By then there had already been movements elsewhere on the Commonwealth constitutional front, some of them cataclysmic. But it is of advantage to begin this account at the bottom of the seismic scale, as it were, with the measured reflections of the Wooding Commission. It recommended that Trinidad and Tobago should become a republic, with an elected president as head of State, and a prime minister as the head of government. "Independence", the Commission said, "must involve the creation of indigenous symbols of nationhood. Among young people in particular the British Sovereign has no symbolic meaning." A new identity must be discovered which involved "leaving behind the colonial heritage of subjection, imitation and external dependence". The Governor-General's oath required him to be faithful and bear true allegiance to the Queen, whereas the oath should be "faithfully to serve the people of Trinidad and Tobago and to defend and uphold its Constitution". No change in the political culture would be involved; the country should remain within the Commonwealth and thus retain the symbolic link with the Queen as head of the Commonwealth.

The Wooding Commission said, further, that the Westminster political system, with its powerful executive, had a "propensity to become transformed into dictatorship when transplanted in societies without political cultures which support its operative conventions". Restraints on the prime minister operating in Britain, especially "a vigorous press, powerful interest groups and an alert public opinion", did not operate in

4. See the writer's *The Modern Commonwealth* (1983), pp. 28, 36, 113.

Trinidad and Tobago, where the political culture was highly bureaucratic. The colonial tradition of political involvement on the part of the "better off" had been replaced by a belief that policy-making was for the government, not for the people. The president should have some powers of his own, including power to appoint to certain offices of a national character (such as Chief Justice, Attorney-General and chairmen of some commissions), and power to refer back for reconsideration, once, a bill passed by the Parliament. This was to be unicameral (the National Assembly), the nominated Senate being abolished; and half the members should be elected on the British system, the other half by proportional representation. Before debate in the Chamber, Standing Committees of the National Assembly should examine and report on all bills, at hearings at which public officers and the public could give their views. The prime minister's powers to secure a dissolution should be limited; the Attorney-General should not be a political officer.

India had set the example of a republican State, remaining within the Commonwealth by virtue of the Declaration of London of 1949.<sup>5</sup> Not all the Wooding Commission's recommendations were accepted, but Trinidad and Tobago became a republic in 1976—not a revolutionary step, for by that time the Commonwealth contained a score. Some of the republics—Zambia was the first, in 1964—had been born with a republican constitution, thus breaking the Whitehall pattern; others had become republics at a later stage, remaining within the Commonwealth by the tacit consent of its members.<sup>6</sup> Of the 50 members of the Commonwealth (Canada, Australia and New Zealand included), 29 are now republics,<sup>7</sup> and ten of these—India, Pakistan, Bangladesh, Ghana, Trinidad and Tobago, Malta, Western Samoa, Dominica, Vanuatu and Mauritius—are so near to the monarchical prototype as to retain under their constitutions a president with, for the most part, formal powers only. The other republics confer governmental powers on their presidents, mostly full powers.<sup>8</sup> Sixteen countries have retained the Queen, and five (Malaysia, Lesotho, Swaziland, Tonga and Brunei) an indigenous ruler, as head of State.

### B. Indigenous Constitutions

Tonga and Brunei have indigenous constitutions of long standing. Mal-

5. *Idem*, p.39.

6. *Idem*, p.62.

7. With the change made by Mauritius in March 1992, the Queen is no longer head of State in any country in the African region. The Parliament of the Solomon Islands has now called for a change to republican status ((1991) 17 C.L.B. 1107), the Prime Minister saying that the Constitution is "lousy and inadequate".

8. In Singapore the Constitution Amendment Act of 1991 altered the nature of the presidency, giving the president many important governmental powers.

dives too has an indigenous constitution; and Vanuatu, which had been administered as a condominium by Britain and France, under the name of the New Hebrides, became independent under a constitution (now under review) drawn up in the country with the assistance of British and French advisers. It is the shortest in the books, showing the influence of the French.

Three countries—Papua New Guinea, Western Samoa and Nauru—formerly administered not by Britain but the first and the last by Australia, the second by New Zealand, entered on independence with constitutions drawn up by constituent assemblies or the like.<sup>9</sup> The Constitution of Papua New Guinea is remarkably thorough, and is probably the longest in the books, except for India.<sup>10</sup> It is being revised.

But first of the new and indigenous constitutions were those of India and Pakistan. Undivided India, an empire in itself, and so described in the coronation oath, was never regarded or treated as a colony. A series of Government of India Acts had provided for an increasing degree of self-government. Then the Indian Independence Act of 1947 set up "two independent Dominions . . . to be known respectively as India and Pakistan", and left it to a Constituent Assembly in each country to draw up a constitution. The resulting Constitution of India of 1949 has been commendably described by an Indian judge thus:<sup>11</sup>

The law of our Constitution is partly eclectic but primarily an Indo-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions—basically a blended view of the British parliamentary system, and the Government of India Act 1935, and near-American, nomenclature-wise and in some other respects.

The Constitution has been amended many times, but it has been remarkably robust. So solid is it that the Supreme Court has declared that the Parliament's power to amend the Constitution by a special majority does not include power to amend its basic structure or basic features.<sup>12</sup>

The republican Constitution of India's twin "Dominion", Pakistan, has not met with a similar success. The country began independence under the great handicap of a geographical division into two regions, or "wings", 1,000 miles apart. In 1971, after fierce fighting, the eastern wing broke away and became the independent State of Bangladesh. The new country was accepted as a member of the Commonwealth, and this

9. The Constitution of Malta (1964), though drawn up in Whitehall, was submitted to a referendum of the people and approved.

10. By the "books" is meant primarily Blaustein's loose-leaf volumes of *Constitutions of the Countries of the World*, to which every searcher into constitutions is greatly indebted.

11. Krishna Iyer J in *Samsler Singh v. State of Punjab* A.I.R. 1974 S.C. 2192, 2212.

12. *Kesavananda Bharati* 1973 (4) S.C.C. 225; *Minerva Mills v. Union of India* 1980 (2) S.C.C. 59.

caused Pakistan to leave it. Neither country has had a stable constitutional history, or a record of democratic government. Pakistan has had six constitutions since independence, and more years of military rule than democracy. The situation was pessimistically described in 1973 as "a gloomy picture of political blunders, military adventures, growing tension, a mounting crisis and eventual disintegration".<sup>13</sup> But Pakistan has since returned to parliamentary democracy, and to the Commonwealth (1989). The Shari'ah Act 1991 now makes the Shari'ah the supreme law of the country, but still within the framework of the Constitution.

Again, in spite of autochthony, a breakdown occurred in Cyprus. The independence Constitution of 1960 was the product of a conference between representatives of the Greek and Turkish peoples of the island and the governments of the United Kingdom, Greece and Turkey, held at Zurich in 1959, followed by a further conference in London. But the troubles between the two communities grew and in 1975, after fighting, the Turkish Cypriots set up a separate administration in the northern part of the island, and the "Turkish Federated State of Cyprus", recognised only by Turkey, has a constitution of its own.

### C. Presidential Power, and the Constitutional Conventions

The first colony in Africa to become independent was Ghana, in 1957; and the first ruler to throw off the suit of clothes with which he had been fitted by Whitehall was Kwame Nkrumah, Prime Minister of Ghana, in 1960. He did it wholly, and wholeheartedly. A new constitution was enacted and approved by plebiscite, providing for a republican form of government with a president as head of the government. Other novel features in the Constitution were that the president had no obligation to accept the advice of his cabinet, or accept bills passed by the legislature. In 1964 a one-party system was established. Here therefore was a complete severance from Westminster principles; and since this is our departure point for considering an increasing separation from those principles, in Africa especially, it may be well to remind ourselves what they are. The elements of the Westminster system are:

- (1) at least one chamber in the legislature freely elected by the adult citizens by secret ballot,
- (2) from one or more political parties;
- (3) executive power (vested in the head of State but) largely exercised by a cabinet of ministers headed by a prime minister, who is
- (4) chosen from the party (or parties) having the support of the majority in the elected chamber and answerable to that chamber;

13. Tassadeq H. Jilani, *Towards a Dynamic Constitutional Order*.

- (5) a recognised opposition;
- (6) a set of constitutional conventions.

As to this last, the "mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised" is governed in Britain, not by the law, but by usage—the conventions of the constitution. The Whitehall draftsmen, following the example set by the Irish Free State Constitution of 1937, tended to set down the conventions in their constitutions in the form of rules.<sup>14</sup> They thus reproduced a fully working Westminster model, but as law. The conventions are in principle equally applicable where the head of State is a president with largely formal powers. India had not applied them. There was a provision for a council of ministers with the prime minister at its head "to aid and advise the President in the exercise of his functions", but nothing was said on the question whether he was bound to act in accordance with the advice he should receive. The question was much debated, and ultimately answered by the courts in the affirmative.<sup>15</sup> The Constitution was amended in 1976 to provide that the president should act in accordance with the advice he received.

The constitutions of the monarchy of Malaysia, and of the republics of Trinidad and Tobago, Malta, Western Samoa and Dominica, all contain detailed rules similar to those in the constitutions described above (as did that of Singapore until the modifications made in 1991). But "in the end it is the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated".<sup>16</sup> Commonwealth courts have shown themselves—and rightly—to be reluctant to import constitutional conventions from outside for the purpose of clouding constitutions which are clearly drawn, and stand in their own right.<sup>17</sup>

In the republics where the president is head of the government of the country, the situation is very different from that in India and the other republics like it. The executive power is vested in him, and there is little room for the application of the Westminster conventions. Zimbabwe, however, changing in 1987 to an executive president, required him to follow cabinet advice, subject to important exceptions (as, for example, dissolution or prerogation of Parliament, appointment or removal of ministers).

14. For a full treatment of the matter see Dale, *op. cit. supra* n.4, at pp. 131 *et seq.* For the UK conventions see Marshall, *Constitutional Conventions* (1984).

15. *Samsler Singh*, *supra* n.11, at p.2199; and see Basu, *Constitutional Law of India* (1977).

16. Lord Radcliffe in *Adegbenro v. Akintola* [1963] A.C. 614, 632.

17. *Lincoln v. Governor-General* (1975) 2 C.L.B. 30 (Mauritius) and *Reference by the Queen's Representative* [1985] L.R.C. (Const) 56 (Cook Islands).

Nonetheless, some of the republican constitutions, though not requiring the president to exercise his powers as head of the government in accordance with the advice of his ministers, seek to impose ministerial responsibility. In Sri Lanka, for example, the president appoints a cabinet of ministers who are members of Parliament, with a prime minister most likely to obtain the confidence of Parliament, and he presides over it. The cabinet is "charged with the direction and control of the Government", and it is "collectively responsible and answerable to Parliament". If Parliament rejects the statement of government policy made by the president at the beginning of every session, or rejects the Appropriation Bill, or passes a vote of no confidence in the government, the cabinet of ministers stands dissolved. But nothing happens to the president, and he has the right to dissolve Parliament, and to remove the ministers at any time.

Again, the Constitution of Kenya provides for a cabinet of ministers appointed by the president (there is no prime minister), and the cabinet is required to "aid and advise the President in the government of Kenya"—the equivalent of the Indian non-amended formula. The cabinet is further declared to be "collectively responsible to the [Parliament] for all things done by or under the authority of the President or any Minister". But there is no indication in the Constitution of any intention to require the president to act as advised by the cabinet. Nor is there any reason to suppose that the courts, if the matter were to come before them, will say that the requirement is to be implied. Under such constitutions, therefore, the president appears to be in the fortunate position of the King of Tonga, who—the Constitution declares—"governs the country but his ministers are responsible".

#### D. The Electors and the Elected

The French Declaration of the Rights of Man and of the Citizen of 1789, reaffirmed by the present Constitution of 1958, declares that: "The law is the expression of the general will. All citizens, personally or through their representatives, have the right to take a part (*concourir*) in making it." Echoing and extending this, the Universal Declaration of Human Rights of 1948 (Article 21) declared that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives", and "the right of equal access to public services". "The will of the people shall be the basis of the authority of government . . . expressed in periodic and genuine elections . . . by universal and equal suffrage . . . held by secret vote or by equivalent free voting procedures."<sup>18</sup>

18. See also the European Convention on Human Rights 1950, Protocol I, Art.3, the American Declaration of the Rights and Duties of Man 1948, Art. XX, and the American Convention on Human Rights 1969, Art.23.

Post-war constitutions lay down principles. The Federal Republic of Germany (Article 38 of the Basic Law) stipulates that:

The deputies to the German Bundestag shall be elected in general, direct, free, equal, and secret elections . . . Anyone who has attained the age of eighteen years shall be entitled to vote; anyone who has attained full legal age shall be eligible for election. Details shall be regulated by a federal law.

Article 26 of the Austrian Constitution is to the same purport, except that there is a requirement of proportional representation, and the age is 19. Sweden (Instrument of Government, Chapter 3, Article 2) requires "free and direct elections with use of secret ballots", and the right to vote is given to "every Swedish national who is resident in Sweden", and 18.

The British habit being to eschew principle and stick to the operational, statements of that kind are not a feature of Commonwealth constitutions. But the same end is achieved by more particular statements. The standard Whitehall constitution gives the citizen the right to vote at 18—sometimes a later age—fixes the number of constituencies, and establishes an independent machinery for controlling their alteration. If circumstances have required, they have gone further. The Fiji independence Constitution (1970), for example, provided for a division into constituencies, and separate voters' rolls, according to race. The 1980 Constitution of Zimbabwe was on similar lines, but separate voters' rolls have been abolished there now. Countries which have since independence redrawn their constitutions—for example, Zambia and Nigeria—have kept to the more concrete provisions.

Australia, in the Senate, and some of the States, and Northern Ireland, have a system of proportional representation. The Wooding Commission recommended for Trinidad and Tobago, particularly in the light of the multiracial society there, an electoral system in which the principles of proportional representation and the first-past-the-post system (to use the customary sporting term) were mixed. Guyana and Vanuatu have followed this course in their constitutions of 1980. Guyana requires 53 out of 65 members of the Assembly to be elected by means of proportional representation. In Malta the seats are filled by means of proportional representation, but an amendment to the Constitution made in 1991 provides for additional seats for "under-represented parties". In Mauritius candidates for election must declare to which of the communities they belong. Sixty-two of the seats in the Legislative Assembly are filled by candidates returned by the three-member constituencies (two members for Rodrigues); and then, "to ensure fair and adequate representation" of each community, eight additional seats are allocated by the Electoral Supervisory Commission among the unsuccessful candidates, in accordance with elaborate rules. In Africa there is some decline in the proportion of members elected by constituencies. In Malawi, for example, the president may appoint, as members of the single chamber,

up to 15 persons to "enhance [its] representative character . . . or to represent particular minority or other special interests". In Tanzania a substantial proportion is in effect nominated by particular groups, such as women's groups.

The Whitehall constitutions, at least to begin with, built on the party system. The pre-independence, and the independence, constitutions of Trinidad and Tobago, for example, required the appointment, out of the members of the opposition party or parties in the House of Representatives, of a leader of the opposition. The requirement remains in the constitutions of the countries of which the Queen is monarch, except in Tuvalu, where, together with Swaziland and Tonga (with local monarchs), and Kiribati, Maldives and Nauru (republics with executive presidents), there is no party system.

The constitutions of seven States with executive presidents—Bangladesh (1972), Kenya, Malawi, Seychelles, Sierra Leone, Tanzania and Zambia—followed sooner or later the example of Ghana, and allowed the existence of only one political party in the country, named or otherwise identified, and provided that only a member of that party might be elected to the legislature. But Bangladesh, Kenya and Zambia have now ceased to be one-party States, and Seychelles, Sierra Leone (one hopes despite the coup in 1992) and Tanzania are likely soon to follow suit. In a one-party State, though the constitution may grant to the people "universal and equal suffrage", there is no choice of representative in the Westminster sense, in that there is no choice of party; but there may be a choice between individuals.

In the 29 countries of the Commonwealth which are republics, the president must be chosen by some form of election. Ingenuity has been shown in devising a suitable form. About half of the constitutions provide for election by popular vote, and half for election by members of the legislature. But there are variations in these basic methods. In Kiribati the candidate must first be nominated by the legislature. In India an electoral college is formed of the members of both Houses of the Central Legislature and the Legislative Assemblies of the States; in Trinidad and Tobago and in Zimbabwe by the members of both Houses of the legislature; in Vanuatu, by the members of the legislature and the chairmen of the local government councils. In the one-party States the president is elected from the party by popular vote.

#### E. Second Chambers

In 15 Commonwealth States<sup>19</sup> the legislature includes a second chamber, called the Senate except in the United Kingdom and India. Its powers are

19. In Zimbabwe it has been abolished.

invariably restricted over money bills, but over other bills they are usually delaying powers only (not in Canada), and provision is made for joint sittings in India and Swaziland. A group of parliamentarians from Australia, Britain, Canada, Barbados, India, Malaysia and Zimbabwe studied the role of second chambers in 1982, and concluded that "the two-chamber system offers great advantages over any other, and especially in a federation or union of States where the rights and the legitimate demands of the people in regions widely disparate in geography, social make-up, traditions and sometimes language, can be effectively represented".<sup>20</sup> The group also found scope for committees of a second chamber, especially for the early scrutiny of draft bills, and the protection of human rights (instancing Zimbabwe as to the latter).

Such considerations of difference of interest as those above represent common sense, and are obvious enough. That a second chamber can also have a valuable function as a revising chamber—to improve draft bills both in substance and in their drafting—may be accepted. But the Wooding Commission, after 12 years' experience of the functioning of the Senate in Trinidad and Tobago, recommended that it should be abolished, on the ground that there were "no considerations of democratic principle, of convenience or of tradition" to justify its existence there, whether "nominated or elected". (But in the end it was retained.) The difficulty may indeed be, in a more or less homogeneous State not of great size, to find a rational basis for membership of a second House. If there is a firm traditional element of peers as in Britain, or chiefs as in some other countries, that may form the core. In Barbados the Senate is a mix of 12 senators appointed on the advice of the prime minister, two on the advice of the leader of the opposition, and seven representing "religious, economic or social, or such other interests as the Governor-General considers ought to be represented". Other Caribbean countries have similar provisions. The requirement in Malaysia is more specific: 40 members are to be appointed who have "rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or Social Service or are representative of racial minorities or are capable of representing the interests of aborigines". Swaziland has a somewhat similar formula.

#### F. Armed Strife: Necessity

The constitutional history since independence of some of the Commonwealth countries illustrates the varying degrees of truth, or falsity, lying in the maxim *inter arma leges silent*. In Africa especially there have been a number of military coups, in which the constitution was subverted or

20. See *The Parliamentarian* (1982) LXIII No. 4, p. 201.

suspended. In 1966 there were three: in Ghana, Nigeria and Uganda. The 1960 Constitution of Ghana was suspended and a new constitution enacted. Further coups and constitutions followed, and from 1981 the country was governed by a National Defence Council. Now, however, constitutional government and a multi-party democracy are being restored, under a new constitution.

Ghana was followed by Nigeria: an independence constitution (1960), a republican constitution (1963) adapting the first with few changes, a military coup in 1966, the civil war over Biafra, prolonged military government, in 1979 a new constitution for the Federal Republic of Nigeria, on American lines; and again, in 1983 and 1985, coups. A new constitution (on 1979 lines) providing for civilian government will come into force on 1 October 1992. Political activity is no longer banned, and elections have been contested by two political parties. The story of Uganda is well enough known. A constitutional commission is now sitting to work out a "free and democratic system of government".

There have also been coups by military forces in Bangladesh, Fiji, Grenada and Lesotho, the constitutions largely suspended; and a recent coup in Sierra Leone. Fiji has a new constitution, but is outside the Commonwealth.

Nevertheless, throughout these turbulent events, an independent judiciary has for the most part functioned. Even during the absolutism of Idi Amin the courts continued to dispense justice. The law has been far from silent, as Commonwealth law reports show. There is, rather, another maxim, of a positive character, which can, and sometimes must, be set up against the negative one: *salus populi est suprema lex*. A constitution cannot well provide for its own failure; there is a gap which only the judges can fill. Commonwealth courts have added much to the jurisprudence legitimating necessity as a plea. Cases have come out of Cyprus, Grenada, Lesotho, Malta, Nigeria, Pakistan, Rhodesia (as it was), Seychelles and Uganda.

It is not possible to do more in this article than indicate lines of authority. In the great Grenada case of *Mitchell v. DPP* the judges of the Court of Appeal of Grenada, dealing "extensively and eruditely", as the Judicial Committee of the Privy Council said, with the constitutional points at issue, reviewed such slender English authority as there is, and considered the cases from the other Commonwealth countries just mentioned, and many more.<sup>21</sup> *Mitchell* and others were challenging the competence of the High Court of Grenada to try them for murder. The

21. A new series of annual *Law Reports of the Commonwealth* began in 1985, edited by Prof. James S. Read and Dr Peter E. Sian, and published by Professional Books Ltd. They are in three volumes: Commercial (from 1980); Constitutional and Administrative; and Criminal. *Mitchell v. DPP* is reported in [1986] L.R.C. (Const) 35.

Court had been set up by proclamation of a revolutionary regime which had in 1979, in a bloodless coup, suspended the Constitution. In 1983 this regime was itself overthrown in another coup, the prime minister murdered, and a "Revolutionary Military Council" assumed power; but it was routed after a few days—US forces and forces from some Caribbean States having intervened—and after that no government was in existence to exercise executive or legislative authority. The Governor-General then, to restore law and order, legislated by proclamation, for which he had no express power. He continued the jurisdiction of the High Court set up by the 1979 proclamation. The Grenada Court of Appeal, dismissing the appeal, held that the Court had jurisdiction. There was then a petition for special leave to appeal to the Judicial Committee, but the Committee decided they had no jurisdiction to hear it.

The Grenada judges, finding Kelsen's concept of the *Grundnorm* of limited persuasive value only, said that they must be satisfied that principles of that kind were "right and acceptable to Caribbean jurisprudence and, in particular, socially acceptable to the regional society". For *de jure* recognition of a revolutionary regime the conditions were that "(a) the revolution was successful, there being no other rival; (b) its rule was effective; (c) the conformity and obedience of the populace was not mere tacit submission due to coercion or fear of force; (d) it must not appear that the regime was oppressive and undemocratic". The Court of Appeal had not sufficient evidence to decide whether conditions (c) and (d) were met, and therefore could not give *de jure* recognition to the regime. The Court fell back on necessity; and on this basis the acts of the revolutionary regime, and the subsequent proclamations of the Governor-General, were validated.<sup>22</sup>

There are quieter forms of necessity than those presented by a coup or a revolution. In *Adams v. Adams*<sup>23</sup> the English High Court felt unable to grant a declaration of divorce to a wife who had been granted a decree by a Rhodesian judge appointed under the illegal Constitution of 1965. But, taking a hint from what had been said by Lord Reid in *Madzimbamuto v. Lardner-Burke*,<sup>24</sup> the English judge, though unable to grant the declaration, was sympathetic towards some consideration of the ground of necessity, or, as he preferred to describe it, the public interest.

The line was pursued with success in the Solomon Islands, in *Re Nori's Application*.<sup>25</sup> The court made a declaration that the Governor-General

22. Another striking case is the Lesotho case of *Mokoto v. King* [1989] L.R.C. (Const) 24. In *Nigerian Union of Journalists v. A.-G. of Nigeria* [1986] L.R.C. (Const) 1 the Court of Appeal of Nigeria upheld the existence of a *Grundnorm* or fundamental law there, but in very different circumstances. The question of necessity did not arise.

23. [1971] P. 188.

24. [1969] 1 A.C. 645.

25. [1989] L.R.C. (Const) 10.

had, through inadvertence, not been validly appointed, and therefore the appointment was null and void. Nevertheless it accepted as valid all the acts the Governor-General had performed under the Constitution—and that for many months—on the basis of “considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected”.<sup>26</sup>

### G. Conclusions

Broadly speaking 14 of the Whitehall constitutions, ten of them monarchical, have lasted more or less intact. They appear to have anticipated the needs of most of the Caribbean countries,<sup>27</sup> and the Pacific Islands, but not to have suited the people of Africa, with the exception of Botswana. Of the independence constitutions originating indigenously, or near to it, all but those of Pakistan and Cyprus have been successful. The Caribbean and Pacific Island countries are mostly small, with a population of around a quarter of a million or less: nine have a population of less than the 100,000 said to be that of the city-state of ancient Athens. The Caribbean countries have had large numbers of Europeans settled there for centuries, with British-type constitutions. The countries of Africa, on the other hand, tend to have large populations, some very large (Nigeria with over 100 million is by far the largest), with deeply rooted tribal rivalries, and a system of indirect rule by chiefs; they were distant culturally and politically, and their relations with Britain were comparatively recent. It is hardly likely that a form of parliamentary government, evolved through three centuries of political and social development by an island on the fringe of Western Europe, could be successfully transplanted there. In almost all of the independent countries below the Sahara, including the Francophone countries, “free political competition was eliminated either by the establishment of the one-party state or the complete replacement of civilian politicians by military rulers”. But the “constitutional proscription of political activity other than through the medium of the single party, at least as far as the Commonwealth African States were concerned, was intended not to deny but to enhance the democratic process by providing a less divisive mechanism for popular political participation”.<sup>28</sup> And so it turned out. The one-party States of

26. The judge was quoting from Field J in *Norton v. Shelby County* (1886) 118 U.S. 425, 444.

27. See A. Ralph Carnegie, *Flourish the Westminster Model? A Commonwealth Caribbean Perspective*, a paper given at a meeting of Law Officers of Small Commonwealth Jurisdictions, Bermuda, 1988.

28. (1991) 35 (1 and 2) Jo. African L. 1-2. This special number of the Journal, entitled “Recent Constitutional Developments in Africa”, contains some frank and illuminating articles, including the introductory article by Dr Peter E. Slinn quoted above, and articles on Nigeria’s New Constitution by Professor James S. Read, and an Overview of the Constitution of Namibia by Jill Cottrell.

Commonwealth Africa have had on the whole a solid period of constitutional and political stability, and are now returning to multi-party systems; and military rule is tending to diminish.

It would be rash, impertinent, for the writer of this article to attempt, uninvited, to frame a constitution for any country, except conceivably his own. But a few conclusions may be drawn from the history above, which is not a system; and it may be allowed to the writer to embody them in a sketch of a constitution, purely platonic, for an imaginary country called “The Wise Islands”. It has a population of mixed races of a million or so. In fact, 24 Commonwealth countries do not reach that figure. In such cases some form of political union can be contemplated, as now planned for the Windward Islands (Dominica, Grenada, St Lucia and St Vincent and the Grenadines). But here are a few suggestions for an independent State aiming at a secure form of parliamentary democracy.

#### 1. Head of State

A choice lies between a monarchical and a presidential system of government. The monarchical system has the advantage of providing a head of State, or a head of State’s representative, who is somewhat aloof, “above the clash of race and class and ideology which makes up politics”, as the Wooding Commission put it, and as events in Grenada and Fiji proved, to say nothing of Australia.<sup>29</sup> This gives a quality of separateness and steadiness to the role. Such a figure will have largely formal powers. His oath of office will include an undertaking to uphold the constitution. The people of the Wise Islands may, because of links with Britain, or the monarchy, or other reasons, wish to have as their monarch the British sovereign, the succession following British rules.<sup>30</sup> The monarch’s functions under the constitution will be exercised by the sovereign’s representative, who will be a citizen of the Islands and appointed in accordance with local advice.<sup>31</sup> He may even, as in the Solomon Islands, be elected by the legislature. He need not be called “Governor-General”, for he does not govern, nor has “General” any meaning here.<sup>32</sup> Simply “sovereign’s

29. See Dale, *op. cit. supra* n.4, at p. 137, on the 1975 crisis in Australia. See also, more generally, Sir Zelman Cowen, “The Crown and Its Representative in the Commonwealth” (1992) C.L.B. 303.

30. A Very Wise Islander might possibly call to mind Gibbon’s famous passage on Rome’s golden age, and his supposition that “if the elder Brutus could be permitted to revisit the earth, the stern republican would abjure, at the feet of Theodosius, his hatred of kings; and ingenuously confess that such a monarch was the most faithful guardian of the happiness and dignity of the Roman people”: *Decline and Fall of the Roman Empire*, chap. XXVII.

31. Dale, *op. cit. supra* n.4, at p. 113.

32. The term has long constitutional use behind it. Curiously, the earliest example of its use given by the *OED* has an entomological flavour: the spider is apostrophised as “governor-general” of the flies (1556).



representative"? (In the Cook Islands he is called the "Queen's Representative".) Or, to adopt a Roman usage, "First Citizen"?

Or it may be possible for the people of the Wise Islands to possess, if they prefer, a sovereign of their own, as five Commonwealth countries do, either for life, or on a rotating basis as in Malaysia. If there is in existence a system of partial rule by chiefs, organised into a council of chiefs or the like, it may be possible to look in that quarter for a monarch; or, if the British monarch is chosen as head of State, for a "Sovereign's Representative".

The other choice is that of a republic, the choice of 29 Commonwealth countries, and of a large majority of countries in the world. Suitable machinery for electing a president must be devised, by popular vote, or by the legislature, or by some combination.

#### 2. *Electors and elected*

The Wise Islanders will probably prefer to state in the constitution itself, and not to leave it to law to prescribe, who may vote in elections to the legislature. The constituencies will be fairly delineated, and the alteration of their number and boundaries controlled by an independent commission. The voting system will be laid down, to include at least some element of proportional representation. Political parties will be allowed, and electors given a reasonable choice of representatives among them. But they may well hesitate to give a position under the constitution to a leader of the opposition.

#### 3. *A second chamber*

There will be a second chamber if the circumstances of the country call for it as a check on, or to balance, the powers of the elected House, and there are rational bases for its composition. As a producer of second thoughts, or as a mere revising chamber, the usefulness of the institution, weighed against the expense, may be debated. It will be well to think about the two recommendations of the Wooding Commission, as alternatives: that the president's (or Governor-General's) assent to a bill should not be automatic, but that he should have the right to refer it back once to the legislature; and that every bill should, before it goes to the debating chamber, be referred to one of a number of standing committees of the House, for scrutiny and report.

#### 4. *A standing army*

There is no evidence that those who made the Whitehall constitutions in the home image gave any thought to one of the cardinal principles of the British Constitution, and that in the Bill of Rights of 1689. It prohibits the raising or maintenance of a standing army in time of peace without the

consent of Parliament. That remains the law of the United Kingdom, the consent of Parliament having been given until 1955 by annual Act, since then every five years, with an annual Order in Council under the Act.<sup>33</sup>

On the contrary, the existence of military strength was implied by the designation of commander-in-chief conferred by the constitutions on the Governor-General, and it is also applied to some presidents. There have been military coups, overturning the government and the constitution, in several Commonwealth countries. The army ladder, kindly left in place by Whitehall, is not the democratic way to climb to power. Botswana dispensed with an army until threatened from without. A police force, their weapons regulated by Parliament, is likely to be enough at all ordinary times. The Wise Islanders decide, at any rate, to consider Article 12 of the Constitution of Costa Rica, which states:

The army as a permanent institution is proscribed. For vigilance and the preservation of the public order, there will be the necessary police forces. Only through continental agreement or for the national defence may military forces be organised; in either case they shall always be subordinate to the civil power; they may not deliberate, nor make manifestations or declarations in individual or collective form.

Horace Walpole, whose father Robert is regarded as Britain's first prime minister, said: "It is *Time* that composes a good constitution: it formed ours." True as that is—and we shall do well to remember it, for ourselves as well as for others—dependent territories were not able to wait on the passage of the years for the formation of their new constitutions. This article contains merely a few thoughts deriving from a glance over a period of not much more than 40 years. The Whitehall operation of constitution-making, now almost ended, was a remarkable one; its like has not been seen in the world before, and will probably not be seen again. It succeeded in its main object: bringing to political independence, with written constitutions, countries that comprise nearly a third of the world's States. The future is up to them.

33. Armed Forces Act 1986, s.1.