The Latimer House Principles and Guidelines

Introductory note

Pierré Olivier
Judge of the Supreme Court of Appeal: Bloemfontein

I was privileged to attend the Joint Colloquium on "Parliamentary Supremacy and Judicial Independence: Towards a Commonwealth Model" which was held at the Latimer House Conference Centre on the outskirts of London from 15 to 19 June 1998. The debates between the 60 participants representing 20 Commonwealth countries were stimulating and extraordinarily constructive. It is impossible to overestimate the value for our country and its lawyers to be welcomed back in the ranks of the Commonwealth, with whom we share so much.

The Latimer House Colloquium was the first of its kind. It brought together parliamentarians, ministers, judges, legal practitioners and academics. The idea was to debate the relationship between parliament, the executive and the judiciary and, if possible, to draft principles and guidelines which could serve as an operational manual in every Commonwealth country. The colloquium was sponsored by the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association.

In the course of several plenary sessions, the relationships between the *trias politica* were analysed and debated. In this note, I can only touch upon two of the main debates.

- Firstly, the Lord Chancellor, Lord Irvine of Lairg, in delivering the keynote address, defended a notion which must appear to the South African jurist an unworkable and outdated concept, *viz* the absolute sovereignty of parliament. Time and again he stressed that a court should not act against the will of parliament, "... *but in support of it* ..."; that "... *there is no question of our judges misusing the opportunities presented by judicial review in an attempt to establish themselves as a power to rival the sovereignty of parliament* ..."; that Britain's programme of constitutional reform "... *at its heart remains an unshakeable commitment to upholding parliamentary sovereignty* ..."; and that under the British Human Rights Bill, then under consideration, judges will not be able to review and set aside legislation, but only to make a formal declaration that the Act in question is incompatible with the European convention, and leave it to the Government to act as it wishes.*

I dare say that the general feeling amongst the Commonwealth judges present was that the doctrine of parliamentary sovereignty has not served any country well at all, and that the model of constitutional supremacy with an entrenched power of judicial review (such as in the USA and South Africa) is preferable by far.

- Secondly, a matter causing grave concern was the inroads into the vocational independence of the magistracy and judiciary by parliamentary control of tenure, terms and conditions of service and pensions, and the remuneration of magistrates and judges. The debate centred on the ways and means of achieving judicial autonomy, both in lower and higher courts, by independent judicial budgetary control and administration. In the course of this discussion a number of judges, especially from African countries, complained of inadequate remuneration (a view shared by all judges present!) and also of dismal working conditions and a lack of administrative support. The general *consensus* was that until magistrates and judges are treated, in all aspects, as respected professionals, it is idle to talk grandiosely of judicial independence.

**The proceedings of the Colloquium are now published as* Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach*) eds John Hatchard and Peter Slinn (1999) London: Cavendish. Lord Irvine's address is at pp 29 - 34 and my own speech, putting the other point of view, at pp 53 - 58.*

The Latimer House Guidelines

Principles

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular, the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

Guidelines

I Parliament and the judiciary

1 The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.

2 Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3 Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

4 International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.

5 While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6 People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7 People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8 Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

II Preserving judicial independence

1 Judicial autonomy

In jurisdiction that do not already have an appropriate independent process in place, judicial appointments should be made on merit by a judicial services commission or by an appropriate officer of state acting on the advice of such a commission.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

The judicial services commission should be established by the Constitution or by statute, with a majority of members drawn from the senior judiciary.

Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between women and men.

Judicial vacancies should be advertised. Recommendations for appointment should come from the commission.

2 Funding

Sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided.

Appropriate salaries, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained.

The administration of monies allocated to the judiciary should be under the control of the judiciary.

3 Training

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.

III Preserving the independence of parliamentarians

1 Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:
That the Freedome of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.

2 Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:
(a) the expulsion of members 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;
(b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;
(c) the cessation of membership of a political party of itself should not lead to the loss of a member's seat.

3 In the discharge of their functions, members should be free from improper pressures and accordingly:
(a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;
(b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full

public reporting and discussion of public affairs;

(c) the offence of contempt of parliament should be drawn as narrowly as possible.

IV Women in parliament

1 To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, including the appointment of more women to executive roles within political parties.

2 Pro-active searches for potential candidates should be undertaken by political parties.

3 Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.

4 Where there is no proportional representation, candidate search and / or selection committees of political parties should be gender balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party constitutions; women should be put forward for safe seats.

5 Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national constitutions, whilst useful, tends to be insufficient for securing adequate and long term representation by women.

6 Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

V Judicial and parliamentary ethics

1 Judicial ethics

(a) Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;

(b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its model Code of Judicial Conduct now in development;

(c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

2 Parliamentary ethics

(a) Conflict of interest guidelines and Codes of Conduct should require full disclosure by ministers and members of their financial and business interests;

(b) members of parliament should have privileged access to advice from statutorily established Ethics Advisors;

(c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

VI Accountability mechanisms

1 Judicial accountability

(a) Discipline:

(i) in cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

(A) inability to perform judicial duties; and

(B) serious misconduct;

(ii) in all other matters, the process should be conducted by the chief judge of the courts;

(iii) disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public criticism:

(i) legitimate public criticism of judicial performance is a means of ensuring accountability;

(ii) the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

2 Executive accountability

(a) Accountability of the executive to parliament:

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:

(i) a committee structure appropriate to the size of parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, withing a defined time period, their responses to committee reports;

(ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;

(iii) the public accounts should be independently audited by the Auditor general who is resonsible to and must report direcly to parliament;

(iv) the chair of the Public Accounts Committee should normally be an opposition member;

(v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.

(b) Judicial review

Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

VII The law-making process

1 Women should be involved in the work of national law commissions in the law-making process. Ongoing assessment of legislation is essential so as to create a more gender balanced society. Gender-neutral language should be used in the drafting and use of legislation.

2 Procedures for the preliminary examination of issues in proposed legislation

should be adopted and published so that:
(a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;
(b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber; and
(c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.

3 Model standing orders protecting members' rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.
4 Parliament should be serviced by a professional staff independent of the regular public service.
5 Adequate resources to government and non-government back benchers should be provided to improve parliamentary input and should include provision for:
(a) training of new members;
(b) secretarial, office, library and research facilities;
(c) drafting assistance including private members bills.
6 An all-party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive.
7 Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.
8 It is recommended that 'sunset' legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

VIII The role of non-judicial and non-parliamentary institu tions

1 The Commonwealth Statement on Freedom of Expression (set out in Appendix 2) provides essential guarantees to which all Commonwealth countries should subscribe,
2 The executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising,
3 An independent, organised legal profession is an essential component in the protection of the rule of law.
4 Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.
5 Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.
6 The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.
7 Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule of law issues and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard.

Such institutions should be empowered to provide access to alternative dispute resolution mechanisms.

IX Measures for implementation and monitoring compliance

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government.

If these Guidelines are adopted, an effective monitoring procedure, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines.

Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

The Satchwell Commission: the GCB views

Continued from p 7.

relative absence of such statistical basis to date.

(d) Effective and sustained efforts to curb deaths and injuries on our roads is required and is in fact bearing fruit. Statistics show that road accident casualties in 1998 were reduced to 129 672, compared with 130 773 in 1990, and 138 421 in 1994. This is a real decrease, which can most certainly be improved upon with obvious financial advantages to the Fund and the system of compensation. However, by the same token, the GCB is disturbed by the extent to which the Fund is being required to contribute to the Arrive Alive Campaign (in the financial year ended 30th April 1986, administration expenditure totalled R100 000 000, whereas the Fund's contribution to road safety totalled R44 000 000 i e 2,5% of fuel levy income and 30% of total administrative expenditure).

(e) Apart from making specific proposals as to methods whereby total outgo could be reduced and the system speeded up, the GCB offered its assistance towards training and its willingness to consult improving the system.

(f) Our vigorous objection to the introduction of a no-fault system with all that would entail (effectively a reduction in benefits per victim so that innocent victims of road accidents can subsidise the guilty) and our contention that any abrogation of common law rights would, in all the circumstances, be unworkable, inequitable and unconstitutional.

Although we can by no means predict what the ultimate findings and recommendations of the Commission will be, it must be said that we have been greatly impressed with the energy, meticulousness, care and understanding with which the Commission has gone about its work to date. Having attended a number of hearings we are able to say that the Commission has undertaken its task seriously. Our hearing by the Commission was frank, with full opportunity for discussion. When we look back on the nature of previous hearings that were (and in many cases were not) afforded to us since the White Paper process began in 1996, the openness with which the Commission has gone about its task has come as a breath of fresh air.