World Conference on Constitutional Justice

It is a great honour to be invited to make a short presentation on behalf of the courts of the Commonwealth. In some ways I should be well qualified to do this and in others less well qualified. The United Kingdom is head of the Commonwealth and has been instrumental, as I shall show, in the drafting of the written constitutions of many members of the Commonwealth. And yet, the United Kingdom is almost unique in the world in that it does not have a written constitution and, of course, it does not have a Constitutional Court. Furthermore the United Kingdom displayed, until recently, an apparent disregard for the constitutional principles that are embodied in the constitutions of many members of the Commonwealth.

We had, once, a great Empire, which included the American colonies. These achieved their independence by revolution, and their Constitution was of their own making, albeit that those who drafted it were largely lawyers who had learnt their law in England, most of them at my own Inn, the Middle Temple. But this was the last occasion on which part of the British Empire seceded by force. It is in my own lifetime that most of the British Colonies have negotiated their independence.

Before the Second World War, and I hasten to add before my lifetime, Canada, Australia and New Zealand, achieved virtual independence under constitutions that were enacted by the Parliament of the United Kingdom. Since that war, and in my lifetime, almost the entirety of the remainder of the British Empire achieved negotiated independence. Almost all of them initially continued to recognise the Queen as the Head of State, represented usually by a Governor-General. They were monarchies. And their constitutions were drawn up by British lawyers in Whitehall in London. These constitutions were not imposed by Britain, they were the result of negotiation and agreement with the new independent States. But we nevertheless proceeded to fashion these constitutions in our own image, or to be more accurate, according to our own principles, for our image did not reflect our constitutional principles. What were those principles? First and foremost there was the principle of the separation of powers. This was a principle for which the French can claim the credit, dating from the time of their Revolution, and the principle of the separation of powers was embodied in the United States Constitution. The powers in question are, of course, the legislature, the executive and the judiciary. The principle requires that each should carry out its functions independently of the other, thus achieving a satisfactory system of checks and balances.

The separation of powers and, in particular, an independent judiciary, is the foundation of the rule of law, and the rule of law is absolutely critical if a constitution is to have meaning.

And so, all these constitutions that were drafted in Whitehall made provision for a legislature or parliament that was to be freely elected by adult citizens, a cabinet of Ministers, constituting the executive, responsible to the parliament and a judiciary with safeguards for its independence.

Anyone who looked at the way things were done in the United Kingdom might have been forgiven for concluding that we did not practice what we preached. The Head of the Judiciary, the Lord Chancellor, was not only the most senior judge, but the most senior Minister and also, in effect, the speaker of the upper House of Parliament, the House of Lords. He was not the separation of powers, he was the combination of powers. And he it was who decided who should be appointed as judges – how in such circumstances could one be sure that the judges would be independent? And even more bizarre, when a case had been decided by one of the courts of appeal of the United Kingdom there would be the possibility of a further appeal – not to a Supreme Court, but to Parliament – to a committee of the House of Lords.

All of these anomalies reflected a time when the separation of powers was no part of the United Kingdom Constitution. Judges use to sit as members of the lower House, the House of Commons. And there was an appeal from the judges to the upper House of Parliament, the House of Lords, on which all members could vote whether they had any legal knowledge or not.

By the time that I started in the law, these anomalies were anomalies of form, not of substance. Instead of the whole of the House of Lords hearing appeals from the judges, there was a special appellate committee made up of 12 very senior judges. They were, in effect, though not in appearance, a Supreme Court. They took no part in the political business of the House. The Lord Chancellor sat occasionally with the Law Lords, but would certainly not do so in any case in which the Government had an interest. As for judicial appointments, the Lord Chancellor acted on independent advice, including that of the senior judges, and the appointments that he made were always made on merit and were never influenced by any political considerations. So although it did not look like it, we did in fact observe the separation of powers and our judiciary was fiercely independent.

The current Government was not satisfied with this, however. It wanted the separation of powers not merely to exist but to be seen to exist. And so in 2005 it passed a Constitutional Reform Act. This stripped the Lord Chancellor of all his judicial functions, with the result that the Lord Chief Justice of England and Wales became the head of the judiciary of England and Wales in his place. This was of particular significance to me, for I was that Lord Chief Justice. So far as judicial appointments were concerned, this function was transferred to an independent Judicial Appointments Commission, with a lay chair and a lay majority, although the judiciary is well represented on it.

Finally the Act made provision for the creation of a Supreme Court, to act as the final court of appeal of the United Kingdom in place of the 12 Law Lords. The implementation of this provision has been delayed pending the conversion of the building in which the Supreme Court is to sit, but I can say with confidence that the Court will open on 1 October next year. The current Law Lords, other than three who will have reached their retirement age, will become automatically Justices of the Supreme Court, and I shall have the honour of being the first President of the court.

The jurisdiction of the court will be essentially the same as that currently exercised by the Law Lords, so the change will be one of form rather than of substance. What it will achieve, however, is a transparent separation of the judiciary from the legislature.

At last all will be able to see that in the United Kingdom we give full effect to the principle of separation of powers, in the same way as did most of those members of the Commonwealth that gained their independence under the constitutions so painstakingly drafted by the lawyers in Whitehall.

Let me return to them. Constitutions were drafted for and adopted by over 30 new independent States. By no means all the members of the Commonwealth who received such constitutions remained happy with them. Some decided that they did not wish to have the Queen as Head of State, they wanted to become Republics. And so they tore up the constitutions that we had prepared for them, and replaced them with their own, in many cases providing for an elected President as Head of State, in some cases as a figurehead, in others as a holder of serious power. Sometimes the constitutional change followed military coups that suspended the previous constitution. Some States introduced single party

regimes, so that the concept of free and fair elections did not mean much.

In some instances the President had the position of a dictator, and sought to act as one. It is in such circumstances that the mettle of the judiciary is tested, and great courage was shown in a number of jurisdictions by judges who sought to uphold the rule of law.

The constitutions prepared for these new independent States provided, in most instances, for a final appeal from their domestic courts to the Queen, and the Queen acted on the advice of those senior judges who were members of her Privy Council, that is to say all the Law Lords, members of the Court of Appeal and senior judges in the Commonwealth countries.

They sat as a committee, usually of five, called the Judicial Committee of the Privy Council, in a quite delightful courthouse in Downing Street, and there the Judicial Committee still sits. Many members of the Commonwealth decided that they were not happy with an appeal to a court in the United Kingdom, and so created their own final courts of appeal, abolishing the appeal to Downing Street. Others, particularly small States such as a number of the islands in the Caribbean, decided to keep the appeal to the Privy Council, even some of the States that altered their constitutions to become republics.

Today the Law Lords spend about 40% of their time sitting in the Privy Council dealing with appeals from Commonwealth Courts.
In this capacity we frequently find ourselves dealing with constitutional issues as a constitutional court. When the Supreme Court building opens next year, one of the courts that it will contain will be the Privy Council court.

Although most Commonwealth countries have cut the link between their courts and the United Kingdom, we share the common law and we share many of the same principles. And this is something that we have come increasingly to prize. There have been formed a number of bodies that aim to strengthen the ties between the Commonwealth Courts and to work together to achieve what, in modern parlance, might be called ‘best practice’. One is the Commonwealth Magistrates and Judges Association, that was founded in 1970 and another is the Commonwealth Lawyers Association, that in its present form dates back to 1986, but which has its origins in the first Commonwealth and Empire Law Conference held in London as long ago as 1955.

These organisations have contributed to a great achievement, which is the adoption of what are known as the Latimer House Principles. They were

agreed by the Commonwealth Law Ministers and endorsed by the Commonwealth Heads of Government in 2003. They start with this statement:

> Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

They go on to provide for the independence of the judiciary, which requires:

(1) appointment on merit;

(2) security of tenure

(3) adequate resources

(4) suspension or removal only where there is a clear case of incapacity of misbehaviour.

The principles say this about judicial review:

> Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

Finally they say this about good governance:

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

Adherence to these principles is the surest guarantee of the rule of law.

Let me close by drawing attention to an admirable feature of many of the Commonwealth constitutions. That is the express incorporation as constitutional rights of fundamental rights and freedoms. I take just by way of example the protection provided by the constitution of the Bahamas:

Protection of right to life.

Protection from inhuman treatment

Protection from slavery and forced labour.

Protection from arbitrary arrest or detention.

Protection for privacy of home and other property.

Protection of freedom of conscience.

Protection of freedom of expression.

Protection of freedom of assembly and association.

Protection of freedom of movement.

Protection from discrimination on the grounds of race, etc.

Protection from deprivation of property.

The manner in which and the extent to which such rights are in fact protected may provide fruit for discussion in the working groups that are to come.