

DEMOCRATS AND DESPOTS – DOES CONSENSUS WORK?

THE EFFECTIVENESS OF THE COMMONWEALTH CHARTER IN THE PROMOTION OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW

Mr Chairman, Excellencies, Distinguished delegates,

DEMOCRACY IS AT THE SOUL OF THE COMMONWEALTH

1. The Commonwealth would lose its soul the moment it no longer identifies itself as a voluntary association of States that hold firm the fundamental belief that democracy, human rights and the rule of law are an integral part of development. At its essence of this association of States is the furtherance of democracy as a way of life for the well-being of the citizens of the States that voluntarily form part of it.

THE ISSUE OF CONSENSUS

2. However, it is important to recognise that, unlike the European Union - which now has only two of its member states that also form part of the Commonwealth, Malta and Cyprus - there is no sharing of sovereignty in the Commonwealth. The Commonwealth is a strictly inter-governmental international organisation joined by states of their own free will and, with few but significant exceptions, States that, before independence, formed part of the British Empire.
3. The issue of consensus as a method of decision making therefore, in my view, is not only intrinsic to the Commonwealth's nature but is clearly also influenced by its

historical development. All States in the Commonwealth, whether the largest democracy in the world, or one of the smallest countries in the world, sit around the CHOGM table in equality, and in friendship.

4. In this context, I cannot see how the consensus methodology can develop into a decision-making mechanism based on a majority, of whatever sort. The Commonwealth spirit of friendly and equal cooperation is fundamentally reliant on consensus.

THE COMMONWEALTH MINISTERIAL ACTION GROUP (CMAG)

5. Still, some developments have taken place within the Commonwealth that, while retaining consensus as a requirement, have limited that consensus to a limited number of countries rather than to all the membership.
6. I am referring in particular to the Commonwealth Ministerial Action Group, CMAG, which I had the honour to Chair for a number of years while I was serving as Malta's Foreign Minister.
7. With its rotating composition of Foreign Ministers from all the various regions of the Commonwealth, Asia, the Americas and the Caribbean, the Pacific, Africa and Europe, CMAG is a representative body which brings together the particular realities and experiences of each part of the Commonwealth.
8. This is a Grouping which relies on the Secretary General of the Commonwealth to be convened and on the Secretariat

of the Commonwealth for its briefings and information, although – except in unambiguous cases such as a coup d’etat – invariably also listens to the view of the Foreign Minister of the country which is being discussed on its Agenda.

9. It is also a decision-making body which takes decisions as a result of which measures can be taken against a member state of the Commonwealth that is in breach of the Commonwealth values of democracy, separation of powers, human rights and the rule of law. During my tenure as Chair of CMAG for example two countries, Fiji and Pakistan, were suspended from the Commonwealth, or more precisely, from the Councils of the Commonwealth with a number of consequences including participation at CHOGM and in Commonwealth programmes. In Fiji the issue was a coup d’etat clearly in violation of the constitutional order. In Pakistan it was not a coup d’etat, but action taken in clear breach of the constitution, the independence of the judiciary and human rights. In both cases the decisions were taken by consensus, in unanimity, by CMAG after due deliberation.
10. This is a tool which the Commonwealth has at its disposal to oversee respect for the values of the Commonwealth as now enshrined in the Commonwealth Charter, which for many years previously derived from the Harare Declaration, the Millbrook Action Programme, and other documents emanating from CHOGM reached by consensus by all the participating leaders of the Commonwealth states.

11. Besides the “nuclear option” of suspension from the Commonwealth - which can lead to expulsion, although this has never happened – CMAG also has the tool of placing a country on its Agenda for discussion of a particular issue of concern in relation to the values of the Commonwealth. Not only does no country want to be suspended from the Commonwealth but no country wishes to be placed on the Agenda of CMAG.
12. Both these tools at the disposal of the Commonwealth as an organisation committed to democratic values, can also have an influence on national and international public opinion and can be a source of moral pressure for the country to return to the right path of respect for democratic values. After all, Commonwealth diplomacy is distinguished by the fact that the Secretary General, in use of his or her good offices, and sometimes the Chair of CMAG, do not refrain from continuing the dialogue with, and pressure on, the current ruler of a suspended member even after that suspension has taken place.

A TOOLBOX FOR DEMOCRACY

13. Is this enough? Surely not. One would have been rather myopic to believe that absolutely all the current or past rulers of the Commonwealth member states fit or fitted comfortably within the term of *democrat* rather than *despot*, even if one stretches beyond its limit the 1991 Harare Declaration’s qualification of a democracy and democratic institutions as those “which reflect national circumstances”. The Charter reaffirms this Declaration but thankfully; in setting its own clear democratic standards, it does not refer to this qualification of democracy and democratic

institutions in its text and unequivocally and unreservedly upholds the democratic values of the Commonwealth and CMAG's mission to monitor and act in "all instances of serious or persistent violations of Commonwealth values".

14. The issue of rendering the Charter more effective, in my view, rather than relating to the issue of consensus, should be focussed on **the toolbox** at the disposal of CMAG and the Commonwealth Secretariat and the Commonwealth in general to further democracy, human rights and the rule of law.
15. This toolbox was strengthened in the 2011 Perth CHOGM with an enhanced mandate for CMAG mandating it specifically to be more proactive and pre-emptive. However, the same fate did not result for another of the Eminent Persons Group's suggestions: **the appointment of a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights** – a reform that would have added another element the Commonwealth's **democratic values toolbox**.

A COMMONWEALTH COMMISSIONER FOR DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW

16. The Eminent Persons Group made it clear that the Commissioner was to advise both the Secretary General and the Chair of CMAG, replacing the role currently undertaken by the general secretariat staff with a focussed structure.
17. Yet the role of Democracy, Human Rights and Rule of Law Commissioner is in itself a strong political role – as can

be seen where it already exists, such as in the Council of Europe's Commissioner for Human Rights set up in 1999. In my view the political nature of this figure, *however welcome it would be*, could have been deemed as in competition or even in conflict, with the role of the Secretary General - and that, in itself, could be a source of resistance to the adoption of this recommendation.

A COMMONWEALTH COMMISSION FOR DEMOCRACY THROUGH LAW

18. Allow me to present a different suggestion which could bypass this issue of political competition with the figure of the Secretary General. This is the suggestion to set up a **Commonwealth Commission for Democracy through Law**. The model for this would be the Council of Europe's European Commission for Democracy through Law, known as the Venice Commission, set up in 1990 initially – as the date of set up indicates - to assist the new European democracies after the fall of the Berlin to Wall to bring up to European standards their constitutional structures and their laws particularly those relating to democracy, human rights and the rule of law.
19. The Venice Commission, of which I have formed part since 2013, has 61 member states- including four Commonwealth States (the UK, Canada, Malta and Cyprus) - **and is composed of legal experts, *acting independently*, with the mandate to provide “legal opinions to help states bring their legal and institutional structures in line with European standards and international experience in the fields of democracy,**

human rights and the rule of law.” The Commission also provides *amicus curiae* advice to the European Court of Human Rights

20. Such a Commonwealth Commission for Democracy through Law could essentially:

(a) provide legal opinions on the democratic standards of proposed or adopted legislation in any Commonwealth country, at the request of either the Secretary General, or any of the institutions (government, parliament, judiciary) of the Member Country itself.

(b) assist CMAG, at the request of the Secretary General or the Chair of CMAG, in assessing whether any proposed or adopted legislation or constitutional or institutional framework, meets with, or is in breach of, the standards of the Commonwealth as set out in the Commonwealth Charter.

21. The Commission would carry out its advisory role taking into account the particular circumstances of the country in consideration. In fact, the Venice Commission model requires engagement through a country mission (onsite or online) which includes discussion on the proposed or adopted legislation and its context with all the stakeholders : representatives of government, of the political forces in or outside parliament, of civil society. Before adoption, the authorities are given a confidential copy of the Opinion for their comment. The process is very inclusive, and consultative until the Opinion is adopted, and although the implementation is persuasion-based, Venice Commission Opinions have become strongly influential and often followed.

22. By way of example, in one of the CMAG cases which we tackled when I was Chair, one of the issues was the conflict between an elected executive President being at the same time the effective hands-on Head of the Armed Forces. We relied on the Secretariat, and on our own knowledge and experience, to assess whether this was a breach of the values of the Commonwealth. In the context of a Commonwealth Commission of legal experts for Democracy through Law, an opinion on such a question in the light of the Commonwealth Charter and its democratic values, international standards and good practice, could have been requested by the Secretary General or by CMAG.

23. The advantage, from an institutional point of view, is that this Commission carries out its assessment objectively from a legal not from a political angle, and therefore acting as support for, and in no way impinging on, the political role of the Secretary General or of CMAG.

Chair, Excellencies, Ladies and Gentlemen,

24. In conclusion, as an international organisation dedicated to development and democracy, the members of which have committed to the democratic values as enshrined in the Commonwealth Charter, the Commonwealth **needs to further enhance its democratic toolbox.**

25. While the appointment of a Commissioner for Democracy, Human Rights and the Rule of law as

envisaged by the Eminent Persons Group would certainly be a positive reform, there may be resistance to having a political figure who could possibly be seen as being in competition with the role of the Secretary General.

26. The Commonwealth should further strengthen its democratic toolbox with the setting up of a Commonwealth Commission for Democracy through Law on the model of, and preferably in consultation with, the Venice Commission with the mandate to: (a) assist in aligning proposed or adopted legislation in member states with the democratic, human rights and rule of law standards laid out in the Commonwealth Charter and (b) provide *amicus curiae* advice in this regard to the Secretary General and to CMAG. Such a Commission would further boost the Commonwealth's credentials as an international organisation which holds democratic values as fundamental to its membership.

Thank you.

Michael Frendo

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