

3017B

COMMONWEALTH LAW BULLETIN

THE CHARTER OF THE COMMONWEALTH

2011-13: ORIGINS, TEXT & HOW IT MAY BE
UTILISED

The Hon. Michael Kirby AC CMG

COMMONWEALTH LAW BULLETIN

THE CHARTER OF THE COMMONWEALTH 2011-13: ORIGINS, TEXT & HOW IT MAY BE UTILISED*

The Hon. Michael Kirby AC CMG**

ABSTRACT

In December 2012, the Heads of Government of the Commonwealth of Nations agreed to a *Charter of the Commonwealth*. In March 2013 it was signed by Queen Elizabeth II in her capacity as Head of the Commonwealth. It commits the Commonwealth to principles and values: including democratic legislatures, the rule of law, good government and universal human rights. In 2019-20 an important test for the application of the *Charter* was presented in Malawi following a presidential election which the courts annulled as flawed. The values of the *Charter* were upheld. This article describes the origins of the *Charter* amongst the recommendations of an Eminent Persons Group (EPG) (2010-11). The author, as a member of the EPG, prepared a draft for a charter, which was annexed to the EPG's report. An EPG proposal for a Commissioner to help implement it was not agreed to by the Perth CHOGM in 2011; but the idea of a charter was endorsed. The adoption of the *Charter* in December 2012; and the decision in April 2018 confirming the succession of the Prince of Wales to be the third Head of the Commonwealth since its reorganisation in 1949, together with the passage of Brexit in United Kingdom law in 2019, suggest the Commonwealth's continuing potential. Beginning with a reference to recent events in Malawi, the author examines the potential of the *Charter* to convert its stated aspirations into actuality at a time of otherwise weakening multilateralism. He reflects on the opportunities of the *Charter* in its historical context. Annexures contain the draft charter proposed by the EPG (Annex A) and the text of the *Charter* as adopted by CHOGM (Annexure B)

* The first part of this article was first published in *The Round Table* in October 2020. Other parts are published for the first time in this article. The overlap of the articles engages the distinct readership of each journal, both of which are published by Taylor & Francis Pty Ltd.

** Member of the Eminent Persons Group on the Future of the Commonwealth of Nations (2010-11); Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of Solomon Islands (1995-6); and Independent Co-chair of the Constitutional Conference of Malawi (1994). The author acknowledges, and has reflected, the comments of two anonymous reviewers on the draft of this article.

MALAWI'S ELECTION 2019-20 ILLUSTRATES A NEW CHARTER

In 1992 Malawi, a Commonwealth nation following its emergence from colonial rule as Nyasaland, faced an important crisis. After winning independence from the United Kingdom in 1964 it had been led by its foundation President, Ngwazi Dr Hastings Kamuzu Banda, into constitutional arrangements¹ establishing a single national political party. Moreover, President Banda enjoyed constitutional rule for life.² However, by 1992, moves were afoot to abolish life tenure for the President and to substitute a constitutional system of multi-party democracy with other democratic features for which opposition leaders had called.

The governing party, comfortable with its long enjoyment of the privileges of office, resisted change.³ Yet, by 1992 the British Government withdrew economic support. and Bishops and others joined universities in criticising the autocratic rule of Dr Banda. A round table on change was held in Lilongwe in early July 1993.⁴ The local and international community combined to effectively force a referendum on change which was duly. The electors overwhelmingly voted in favour of multi-party democracy. Political parties other than the Malawi Congress Party were then established to compete in a general election. A number of outstanding constitutional issues were then debated at a national conference in Blantyre in February 1994.⁵ The present author, who had visited Malawi for the round table in 1993, was invited to return as one of two independent

¹ *Republic of Malawi (Constitution) Act 1966* (UK) annexing *Malawi Constitution*, s4.

² *Ibid*, s9.

³ John G. Pike, *Malawi: A Political and Economic History* (Pall Mall Press, London 1969, 77 ff: J. McCracken, *A History of Malawi 1859-1966*. (James Currey, Boydell & Brewer, 2012) 51

⁴ M. D. Kirby, "Round Table on Transition to Multi Party Democracy in Lilongwe, Malawi" (1994) 20 *Commonwealth Law Bulletin* 675.

⁵ M. D. Kirby, "Malawi Constitutional Conference, Blantyre, Malawi 21-24 February 1994: Closing Ceremony: What has been Achieved?" (Unpublished)

chairmen of the Constitutional Conference in 1994. That conference resolved the remaining constitutional controversies. For the first time multi-party elections were then conducted.

Dr Banda submitted himself for re-election. However, he was defeated by a significant vote which installed Bakili Muluzi as President.⁶ Dr Banda's Malawi Congress Party was also defeated; although it remained a political force in the country. Electoral change at the ballot box in subsequent elections was respected, despite ongoing difficulties. It appeared that Malawi, after decades of authoritarian rule, had settled into the ways of a stable electoral democracy.

However in May 2019, President Peter Mutharika sought re-election in presidential elections. These were subsequently labelled the 'Tippex Election'. Many ballot papers were found to have been altered by the use of Tippex – a correction fluid. That cast doubt on the integrity of the poll. The courts of Malawi annulled the election in which President Mutharika had been returned. It ordered that a fresh election should be held. The President appealed against this order. However, on 8 May 2020 the Constitutional Court rejected the President's appeal declaring it "embarrassing" and "unprofessional". President Mutharika thereupon alleged a "failure of judicial responsibility on the part of the courts". He declared that this "constituted an improper attack" on the constitution. He criticised the ruling and the judges who had made the adverse decision.

⁶ M.D. Kirby, "Malawi and the Transition & Adherence to Multi-Party Democracy" (2018) *Commonwealth Law Bulletin*, (2016) 42, [3], 443-452.

This action by the President represented a breach of several articles of the United Nations *Universal Declaration of Human Rights*:⁷ specifically of Article 21.1 declaring that “everyone has the right to take part in the Government of his country directly or through freely elected representatives” and 21.3 “The will of the people shall be the basis of authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”.

The attack on the judiciary by President Mutharika constituted a departure from Article 7 of the UDHR that promised that “all are equal before the law and are entitled without discrimination to equal protection of the law.” And Article 8 states that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental right granted him by the constitution or by law.” The order invalidating the Malawi election of 2019 had been only the second such order on the continent of Africa. It followed an order in Kenya which, in 2017, required a rerun of the national vote that resulted in the same outcome. However, in Malawi in 2019 President Mutharika held a small plurality over the opposition leader Mr Chakwera . The election had been conducted on the “first past the post” principle. The judges of Malawi found that the failure to provide for appropriate integrity and auditing of the poll, together with closeness of the margin dividing the finalists, were sufficient to require a rerun of the election. The case was thus a test for respect for electoral integrity and also independence of the judiciary in Malawi. The challenger was entitled to invoke several new and additional principles contained in

⁷ Adopted and proclaimed by the UN General Assembly, Resolution 217 A (III), 10 December 1948.

the *Commonwealth Charter* of 2013.⁸ Relevantly these included the first stated value, “ I. Democracy”, which is explained:

We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections, in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard... We support the role of the Commonwealth Ministerial Action Group to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour.

In addition, other values in the *Commonwealth Charter* were relevant, namely:

VI Separation of Powers:

We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion of the protection of fundamental human rights and adherence to good governance.

VII: Rule of Law

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government [providing] and “independent, effective

⁸ *Commonwealth Charter*, signed by Commonwealth SG K. Sharma, 14 December 2012; signed and proclaimed by Queen Elizabeth II, 11 March 2013, 11 March 2013.

and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.”

The departures from international and Commonwealth-wide values resulted in strong criticism of President Peter Matharika by the Commonwealth Magistrates’ and Judges’ Association and also by the Human Rights Institute of the International Bar Association⁹. In the result the Constitutional Court of Malawi adhered to its decision; the re-run of the poll was duly conducted on 23 June 2020. The opposition candidate, Dr Lazarus Chakwera won 59.34% of the ballots. The outgoing president won 29.92%. Dr Chakwera was declared elected and assumed office. The Constitution of Malawi was vindicated. So was the Commonwealth *Charter* and the principle of peaceful transition and democratic change in Malawi envisaged by the *Charter*.

What is the *Commonwealth Charter*? How did it come to be adopted? What is the machinery for its application and the potential of its impact to safeguard values and aspirations of a quarter of humanity living in the Commonwealth’s diverse lands?

THE BIRTH OF THE CHARTER

As will appear, from this article, the *Charter of the Commonwealth* originated from a proposal contained in a report of a Commonwealth advisory body. To that report was annexed a draft for a charter prepared by the present author. The *Charter of the Commonwealth* as eventually

⁹ Commonwealth Magistrates’ and Judges’ Association, “Statement on the Threats against the Judiciary in Malawi”, 9 June 2020; International Bar Association Human Rights Institute, “IBAHRI condemns President Mutharika’s continued attacks against Malawi’s Judiciary”, 16 June 2020.

adopted by the Commonwealth Heads of Government Meeting (CHOGM) on 14 December 2012. It was different in many respects from the draft. Yet the influence of the draft on the document that ultimately emerged was clear. This article will seek to demonstrate the course of the development of the *Charter* and the similarities and differences in the successive texts. It will also outline the potential and limitations of the *Charter* for the defence of democratic institutions, the rule of law, good governance and human rights, including equality, in the Commonwealth of Nations.

The idea of a charter for the Commonwealth of Nations was first raised at the inaugural meeting of the Eminent Persons' Group (EPG) of the Commonwealth convened in London in July 2010. The EPG was a body established by the Secretary-General of the Commonwealth following the CHOGM held at Port of Spain, Trinidad and Tobago, in November 2009. That meeting had declared that the Commonwealth of Nations could become "more of a Commonwealth of the people than it currently is".¹⁰ That affirmation led to a decision to comprehensively re-examine the institutional machinery of the Commonwealth. This decision led, in turn, to the creation of the EPG. I was appointed to the EPG by the Secretary-General of the Commonwealth. At the time this was, Mr Kamallesh Sharma, an Indian diplomat. The Commonwealth statesman whom he appointed to chair the EPG was Tun Abdullah Badawi, past Prime Minister of Malaysia.¹¹ The member of the group, who was informally accepted by the members as rapporteur, was Sir Ronald Sanders, an Antiguan Barbudan diplomat.¹²

¹⁰ Commonwealth of Nations, *Affirmation of Port of Spain*, CHOGM, Trinidad and Tobago, November 2009.

¹¹ Tun Haji Abdulla bin Haji Ahmad Badawi, Prime Minister of Malaysia, 31 October 2003 – 3 April 2009.

¹² The other members of the EPG, in addition to Tun Badawi, Sir Ronald Sanders and the author were Dr Emmanuel O Akwetey (Ghana); Ms Asma Jahangir (Pakistan); Ms Patricia Francis (Jamaica); Mr Samuel

The first meeting of the EPG took place at the official residence of the Secretary-General in London. At that meeting, after dinner, Tun Badawi suggested, as we sat around with coffee, that we should propose a charter of the Commonwealth. From his remarks it seemed clear to me that he was thinking in terms of a structural document, rather like the *Charter of the United Nations* or perhaps the *Charter of the Association of Southeast Asian Nations* (ASEAN). The latter charter had been adopted by ASEAN on 18 December 2008 during Tun Badawi's service as Prime Minister of Malaysia.¹³

Such a structural document presented difficulties for some members of the EPG, given the informal arrangements that had first led to the creation of the modern Commonwealth in 1949 in the place of the British Commonwealth. The British Commonwealth had itself emerged out of the British Empire whose leaders had met infrequently at Colonial Conferences held after 1887. These meetings were later titled Imperial Conferences after 1907 and later still the Prime Ministers' Meetings between 1944 and 1969. The British Commonwealth had emerged in 1926 when the Imperial Conference adopted the *Balfour Declaration*.¹⁴ This proclaimed that the United Kingdom of Great Britain and Ireland and the British Dominions "beyond the Seas" were:

Kavuma (Uganda); Ms Graca Machel (Mozambique); Sir Malcolm Rifkind (UK); Mr Hugh Segal (Canada); and Sir Ieremia Tabai (Kiribati). Garca Marchel was incapacitated by illness and took no part in the EPG's deliberations.

¹³ Tun Badawi served as Prime Minister of Malaysia in succession to the first term of Dr Mahathir Mohamad. He participated in the adoption of the *Charter of ASEAN*, replacing the *Declaration of Bangkok* as the constituent instrument of ASEAN. This was adopted towards the end of his service as Malaysian leader and Chairman of ASEAN. It would have engaged much of his attention in both of his offices.

¹⁴ The *Balfour Declaration* grew out of a proposal made by the Prime Ministers of the Union of South Africa (JBM Hertzog) and the Dominion of Canada (W.L. McKenzie King). It was approved unanimously by the Inter Imperial Relations Committee. This was chaired by Rt Hon. Arthur Balfour, past Prime Minister of the United Kingdom. It was unanimously adopted by the Dominion Prime Minister on 15 November 1926. See Sir Peter Marshall, "The Balfour Formula and the Evolution of the Commonwealth", 2001, 90 (361) *The Round Table* 541-553.

“autonomous countries within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the King and freely associated as members of the British Commonwealth of Nations.”

The first CHOGM conference, so named, had taken place in Singapore in 1971, following which the Commonwealth took on its new name and a slightly more formal organisational character. The hesitation in the EPG over a charter of a structural or constituent kind represented a recognition by the members of the very sensitive character of the issues that would be thereby raised for decision. These might include questions concerning the Headship of the Commonwealth, presently held by the monarch for the time being of the United Kingdom; the overall relationship to the British Crown which had made a royal palace in London available for the Commonwealth's headquarters; procedural questions concerning admission and expulsion of members; and any machinery that should be adopted to enforce Commonwealth decisions and values in the event of differences arising about them amongst the members. Some members of the EPG appeared to share my concern that, at least at the time of our meeting, if the EPG sought to press the Commonwealth to agree on defining and expressing the organs and institutions of the Commonwealth we might be demanding more than the organisation could deliver. Failure might, in turn, harm the association by the divisions that would be revealed, if disagreements were pressed to formal decision-making. In a sense, the organic make-up of the association was established by history. Its rules and procedures defied over-exact description and escaped over-precise definition.

The EPG explored Tun Badawi's idea of a charter at some length, both at the Residence and in the following days at Marlborough House, the headquarters of the Commonwealth Secretariat. Because I was keen to ensure that the Commonwealth would become more overtly a values-based organisation than it had been (with at least some new machinery and values to match), I proposed that Tun Badawi's suggestion should be taken up but in terms of a 'charter of values'. I reminded the EPG that this was, put generally, the way the United Nations itself had evolved in and after 1945 to give rise to the UN *Charter*, 1945 and later to the *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly on 10 December 1948.¹⁵ It had originally been envisaged that the *Universal Declaration* would be part of an International Bill of Rights that comprised, together the *Charter* of the United Nations, the governing instrument of the new international organisation.

As in the design of the *Constitution* of the United States of America after 1776, the drafters of the UN *Charter* in 1945 ran out of time. They eventually agreed to the constituent instrument which became the UN Charter. However, they did not immediately agree on the terms of the instrument of universal values.¹⁶ In the result, an expert committee was created, chaired by Mrs Eleanor Roosevelt widow of the late President of the United States of America. That committee produced the *UDHR* in

¹⁵ United Nations adopted and proclaimed by the General Assembly resolution 217A(III) of 10 December 1948.

¹⁶ *Documents of the United Nations Conference on International Organization*, San Francisco, Vol 5 (London & New York): United Nations Information Organisation, published in cooperation with The Library of Congress, 1945, 551.

1948. This supplemented the UN *Charter*, when it was adopted by the General Assembly.¹⁷

The *UDHR* was accepted at the third session of the General Assembly held exceptionally in Paris. Dr H.V. Evatt, the Australian delegate, was in the chair as the third President of the General Assembly of the United Nations in December 1948. A somewhat similar history had accompanied the adoption of the *ASEAN Charter*. ASEAN had been created in November 2007. It was inaugurated on 15 December 2008. As contemplated by the *ASEAN Charter*, an ASEAN Intergovernmental Commission on Human Rights was established in 2008. That body, in November 2012, adopted the text of the *ASEAN Human Rights Declaration*. These latter developments would have been well known to Tun Badawi, past president of ASEAN and subsequently, the chair of the EPG.¹⁸

I had all of the foregoing developments in my mind in proposing that the EPG should agree to a charter of values for the Commonwealth. Indeed, there was broad consensus in the EPG about the Chairman's proposal; but in this modified form. The outcome was not exactly what Tun Badawi had in mind. However, it grew out of his earlier experience in ASEAN. Tun Badawi must take credit for the fact that a charter was placed on the table of the EPG; that he supported the revised form that emerged from our discussions; and that he supported both the type of charter that we

¹⁷ M.G. Johnson, "The Constitutions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights (1987) of *Human Rights Quarterly* 24; J.H. Bunger, "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century" (1992) 14 *Human Rights Quarterly* 471.

¹⁸ Curiously, as at the writing of this article in 2019, the entry on the life and career of Tun Badawi in *Wikipedia* makes no mention of his appointment as Chair of the EPG of the Commonwealth of Nations.

agreed upon; and that we should distribute a draft that had been prepared, so as to expedite consideration of the proposal.

In the text of the report of the EPG, delivered to the Perth CHOGM held in October 2011, the members of the EPG described what next happened:¹⁹:

“In this report we have suggested ways in which the Commonwealth of Nations can be more of a “Commonwealth of the People” than it currently is. Member governments should institutionalise the machinery we have proposed for listening to Commonwealth civil society in structured and regular meetings from which agreed and measurable actions will flow.

We go one step further, mindful that in doing so, we propose building on foundations that you [CHOGM] have laid in the evolution of the modern Commonwealth. We suggest that you consider the establishment of a Commonwealth Charter. Such a Charter would establish a Commonwealth “spirit” – one that is shared by the people of the Commonwealth and their governments, and that would institute firmly the concept of a Commonwealth whose collective purpose is driven by the aspirations of its people.

Because we envisage such a Charter as a “Peoples’ Charter” we believe that there should be wide consultation about its content and formulation within each Commonwealth country... The Commonwealth-wide process of discussing the proposed Charter could itself serve to renew and invigorate interest in, and

¹⁹ EPG Report, A Commonwealth of the People - Time for Urgent Action (Perth 2011) p 33.

commitment to, the Commonwealth. It would also source the values and aspirations in the will of the peoples of the Commonwealth.”

The foregoing ideas were considered by the EPG at its five meetings between July 2010 and July 2011, generally in London but on one occasion in Kuala Lumpur. At those meetings the members worked towards achieving a consensus of the EPG. Its report was ultimately unanimous. There was broad agreement within the EPG that we should put the idea of a charter before the Perth CHOGM in our report.

As the EPG was concluding its work at its fourth meeting held at Marlborough House in 2011, I offered to my colleagues to turn my hand to a first draft of a Commonwealth Charter as it was evolving in broad discussions amongst the participants. My experience in international meetings (including drafting international agreements at meetings of the United Nations, the Commonwealth, UNESCO and the OECD²⁰) had taught me that generalities normally get nowhere once bodies like the EPG conclude their mandate and the members disperse. I therefore considered that it was urgent that we should try, so far as we could, to agree on a document that would provide at least a structure or working outline for possible early action on the part of CHOGM. A draft, however preliminary, could help to focus the debates and consultations that would necessarily follow. It could also help to settle some of the anxieties.

²⁰ The author had helped in the drafting of the *OECD Guidelines on Privacy Protection 1980* adopted by the Council of the OECD, Paris in 1980; the *International Guidelines on HIV/AIDS and Human Rights* of the former UN Office on Human Rights 1996; the UNESCO *Universal Declaration on Human Rights and Bioethics*, adopted by the General Conference of UNESCO 2005, and contributed to the resolution of differences concerning revisions to the Constitution of Malawi in 1994 for UNDP, as that country moved to establish a multi-party democracy.

Many aspects of universal human rights law were well developed by 2011, in the *UDHR* and in UN and other treaty law. I considered that the task of offering a draft, or at least a structure, was achievable. Certainly, it was an objective which the EPG should attempt. I had the impression that there was general consensus that preparing a draft was right in principle. However, various members of the EPG expressed doubts that such a document could be produced in the limited time remaining to the EPG. I did not accept this pessimism.

THE FIRST DRAFT OF A CHARTER

Following the meeting of the EPG at which agreement for me to prepare a draft was signified, I had to depart London for Colombo, Sri Lanka to receive an honour from the University of Colombo (formerly University of Ceylon) on 21 July 2010. Before I boarded my flight from London to Colombo, I began drafting the proposed charter in my mind. On board the flight, I began jotting down notes on airline paper napkins. I continued doing this and pressed on towards the possible language of a proposed charter whilst I was in Sri Lanka, and later on the flights home to Australia. In the last sector of the journey from Singapore to Sydney, I called for more paper napkins from the Qantas Airlines cabin crew. These were produced to their bemusement. I wrote out the principal headings and some of the contents of a proposed *Charter of the Commonwealth*. The paper napkins were later sent by me to the Commonwealth Secretary-General as part of the EPG archives.

Upon my arrival in Sydney, relying on my detailed notes, I dictated, the first drafts of the proposed draft charter onto electronic memory sticks. My personal assistant (Sarah Conquest) was given this dictation together with the paper napkins to engross the proposed draft, relying on both. The

emerging charter drew heavily on the UDHR; on international human rights law and on the conclusions of successive CHOGM meetings over the previous forty years. The outcome was eventually edited, revised, re-edited, repeatedly retyped and finally produced in a form that I considered suitable for circulation to the members of the EPG, the Commonwealth Secretary-General and the staff of the Secretariat.

In the fifth and final meeting of the EPG held in London the draft report was discussed at length amongst the members. It attracted a good measure of agreement from the participants. The concluding text of the EPG report was finally approved. It was also decided that it was appropriate to annex to it the draft charter that I had submitted. The discussion of the draft charter amongst the EPG was addressed mainly to the suitability of the draft for publication with our report rather than whether the specific language of the text should be approved and endorsed, word for word. Some members of the EPG were inclined to more caution, suggesting that the draft would require much more consideration and refinement before it was adopted. On the other hand, other members of the EPG suggested that the annexure of my draft might help to focus debate and to ensure that something happened upon this idea rather than being consigned to the repository of worthy but unendorsed aspirations.

Eventually in the discussions, the view emerged that the draft, as I had presented it, was at a sufficiently advanced stage of drafting to be accepted as an annexure to the report of the EPG itself. This was not to be a substitute for the widespread consultation with member states, civil society and the peoples of the Commonwealth that the EPG considered to be necessary. It was, however, designed to give focus to that consultation which would otherwise potentially be 'all over the shop'. I

must admit that I was surprised that my colleagues agreed, by consensus, that my draft was worthy of annexure to the EPG report for this purpose. But there was no dissent to that decision. Authorial modesty quickly gave way on my part to participation in the meeting's consensus.

In the result, the following paragraph, explaining exactly what had been decided, was added to the report of the EPG:²¹

“In the event that you consider our proposal for a Charter favourably, we have appended to this report a version drafted by one of our members, the Hon. Michael Kirby. We suggest that it might be used as a basis for the Commonwealth-wide consultations proposed in the previous paragraph. The draft derives substantially from the many declarations of Commonwealth values and principles issued by Heads of Government at the conclusion of CHOGM since 1970 and which can now be said to be entrenched in the Commonwealth's modern culture.”

Remembering the different form of a charter that our Chairman, Tun Badawi, had originally proposed, the EPG report went on to explain:²²

“We recognise that an option exists for the future expansion and development of the proposed Charter if, after consultations with them, the people of the Commonwealth feel such a course to be appropriate. The constitutive instruments of other inter-governmental organisations show the possibilities that could be developed. For example, they might include:

²¹ EPG Report *cp cit*, p 34.

²² EPG Report *op cit*, p35.

- The objectives of the Commonwealth;
- The principles upon which the association is founded;
- The criteria for admission to, and continuance of, membership;
- The organs, office-bearers and decision-making processes; and
- External relations.

However, because the development of such a constitutive Charter might be seen as altering the character of the Commonwealth in fundamental respects and would in any event require the widest possible consultation, we decided to do no more than to call this larger possibility to your notice.”

To the present time, so far as is known, the “larger possibility” has not been taken further by CHOGM or by any individual members of the Commonwealth. However, at the CHOGM meeting held in London in April 2018 one question that would clearly have required attention in any such constitutive charter was settled “in the Commonwealth way”: by a consensus decision reached by the Commonwealth Heads of Government in attendance. This followed intervention by the Queen herself expressing her “sincere wish” that her son and heir, the Prince of Wales, Prince Charles, should be accepted by CHOGM as her successor as Head of the Commonwealth when the time came. CHOGM so decided.

By that decision, the Heads of Government decided the issue without resolving whether the Headship of the Commonwealth of Nations always passes with the royalty of the United Kingdom or is the subject of an ad

hoc decision on each occasion when necessity presents. It was Prime Minister Attlee of the United Kingdom and Prime Minister Jawaharlal Nehru of India who, in 1949, agreed, on Nehru's suggestion, that King George VI should remain Head of the Commonwealth when India became a Republic, terminating the allegiance of India's citizens to the British Crown.²³ He should do so as "the symbol of their free association". That agreement, strongly supported at the time by Prime Minister Chifley of Australia, terminated the previous notion that the bond of the association was legal allegiance. Upon the death of King George VI in February 1952, it was Nehru again who wrote to Winston Churchill as British Prime Minister, suggesting that the newly proclaimed Queen Elizabeth II should follow her father as Head of the Commonwealth. Now a similar arrangement has again been agreed. It was approved by the Commonwealth Heads of Government in April 2018.²⁴ No constituent instrument provides what must happen. The decision was approved without any public record of dissent and without any document laying down the requirement or the manner of its acceptance.

The more general recommendations of the EPG report of 2011 reflected many values that contained expressions of the objectives of the Commonwealth of Nations. One such series of recommendations dealt with the global epidemic of HIV/AIDS as a Commonwealth problem. These recommendations not only addressed causes that were of special

²³ Frank Heinlein and Robert Holland, *British Government Policy and Decolonisation 1945-1963: scrutinizing the Official Mind* (London, Routledge, 2002) p.67; R.J. Moore, *Making the New Commonwealth* (Oxford, Clarendon Press, 1987); F. Bongiorno, "British to the Bootstraps? H.V. Evatt, J.B. Chifley and Australian Policy on Indian Membership of the Commonwealth 1947-1949", (2005) 125 *Australian Historical Studies*, 18-39.

²⁴ The Queen made a speech on the first day of the CHOGM meeting in London on 19 April 2018 including the observation that "it is my sincere wish that the Commonwealth will continue to offer stability and certainly for future generations and will decide that one day the Prince of Wales should carry on the important work stated by my father in 1949." On the following day the Commonwealth Heads of Government agreed that Prince Charles should succeed Her Majesty as Head of the Commonwealth. *BBC News*, 19 April 2018.

interest and concern to me. They also demonstrated a knock-on effect that arises from the fact that the EPG had devoted much of its own time to addressing matters of values in the Commonwealth. HIV and AIDS had been an issue to which I had contributed in successive meetings of the EPG by reason of my then concurrent appointments with various United Nations bodies. These involved the leaders of the global response to the HIV epidemic, namely in the World Health Organisation, UNAIDS (the Joint Programme on HIV/AIDS) and UNDP (the United Nations Development Programme). These bodies and others were closely engaged in the global response to HIV and AIDS and their work is referred to in the EPG report.²⁵

Statistical and graphical evidence collected by UNDP, reproduced in the EPG report, demonstrated that the levels of HIV and AIDS were generally twice as high in countries of the Commonwealth of Nations, particularly developing countries in the Caribbean and Africa, than in non-Commonwealth countries.²⁶ UNDP research had suggested that this was, in part at least, a result of the stigmatisation, isolation, criminalisation and punishment of Commonwealth citizens for homosexual (same-sex) sexual activity under criminal laws inherited from the colonial period. Rates of HIV in Commonwealth jurisdictions were considerably higher than in non-Commonwealth countries of the former French, Spanish, Portuguese and other colonial empires. This was so even though the non-Commonwealth countries were often contiguous to, or otherwise neighbours of, the Commonwealth states.²⁷

²⁵ EPG Report, *op cit*, pp98-102, Recommendations RR57-61.

²⁶ See United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights and Health*, Ch3, Men Who Have Sex with Men, Law on HIV. Tables of samples of African and Caribbean countries that do/and do not criminalise same-sex sexual activity alongside levels of HIV infection (2012) p.46.

²⁷ UNDP Global Commission Report, *loc cit*, Part 3.3, pp 44-50, Recommendation 3.3.

One of the specific recommendations of the EPG report, adopted unanimously by the members of the EPG, was:²⁸

“Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of Commonwealth countries to the HIV/AIDS epidemic and commit to programmes of education that would help a process of repeal of such laws”.

This proposal involved an implied (but not specifically spelt out) call for the repeal of the anti-sodomy laws that were originally universal in criminal statutes and codes inherited from British colonial rule. That issue presented a significant controversy for some Commonwealth countries. Gaining consensus within the EPG on such an issue – even though expressed in elliptical language that everyone fully understood - was a significant achievement for the EPG, reached at its meeting in Kuala Lumpur. However, gaining consensus on the “discriminatory laws” at the level of the Commonwealth, its politicians and officials presented, as was recognised, a much greater challenge.

The members of the EPG considered that agreement on a Charter of the Commonwealth, which included provisions respecting equality and other human rights, could be a useful step in the direction of securing the repeal of such left over colonial laws affecting sexual minorities. But also other laws affecting women and stigmatised minorities facing hostility in punitive environments in various parts of the Commonwealth. The proposed

²⁸ EPG Report, Recommendation 60, p168.

values of the Commonwealth raised serious issues for these and other laws and the policies in member countries. At the time of the EPG report, some 36 of the 54 countries of the Commonwealth, for example, retained laws that criminalised same sex sexual activities even though such activities were consensual, involved only adults and occurred in private. Securing reform had proved a huge challenge. The challenge could not be addressed expressly in the EPG report. That would have pressed the EPG beyond its level of consensus. Just the same, the language in the EPG's report dealing with HIV/AIDS was all but explicit. And that gave a measure of approval in the drafting for my attempt to express the contents of a charter and subsequently in the *Charter of the Commonwealth* as it was adopted in 2013.

The proposal for a Commonwealth charter together with my annexed draft, along with the rest of the EPG report were duly presented by the EPG to the Perth meeting of CHOGM in October 2011. The members of the EPG were allowed to attend that meeting as observers during the closed session of CHOGM that discussed their report. However, they were not allowed to participate in the discussion. Only one member of the EPG (Dr Emmanuel Akweley, Ghana) was invited to address the Perth CHOGM, and then only briefly.

An attempt had earlier been made at the CHOGM meeting in Perth to prevent the public distribution of the EPG report. This was done by officers of the Secretariat on the basis that the report had not yet been read and approved by all the Heads of Government. This attitude was criticised by the members of the EPG at a press conference held in the corridors of the CHOGM meeting in Perth. One of our members, Sir Malcolm Rifkind KCMG QC – past British Defence and Foreign Minister -

was not so easily trifled with. The media had informed us that copies of the report had already been ‘leaked’ to the media before the meeting in Perth. Unhesitatingly, Sir Malcolm Rifkind, with a flourish, delivered his own copy of the EPG report to the assembled media. The Perth CHOGM was thereby faced with a public *fait accompli*. In the result, copies of the report were quickly released by the Secretariat. The emergence of the *Charter* from the EPG draft to final form was messy; it contrasted with the publication of the several CHOGM Declarations, and, in the end, was rather anti-climactic.

The Heads of Government in Perth swiftly indicated their hostility to the EPG’s proposal that a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights should be appointed.²⁹ Contrary to the EPG’s understanding of his position on that proposal, Secretary-General Sharma was reported as considering that there was “no need” for such a Commissioner to undertake tasks which the Secretary-General of the Commonwealth could himself fulfil. However, the connected proposal for a Commonwealth charter enjoyed a happier fate. It was referred by the Heads of Government to officials, to examine the proposal and to advise their ministers upon it. Perhaps the fact that the suggestion of the charter became known to have originated from one of those who, in early CHOGM meetings, had been one of the participants of CHOGM as Prime Minister of Malaysia, made it more difficult to reject that proposal out of hand.

However that may have been, the result was that the report and the charter were committed to officials meeting subsequently at Commonwealth headquarters in London. Those meetings were

²⁹ EPG Report, *ibid*, 46 (R2).

conducted behind closed doors. Members of the EPG were not invited to attend. Individual members of the EPG lobbied Commonwealth governments to endorse the recommendations in the report. In December 2011 the Canadian Government appointed the Hon. Hugh Segal, member of the EPG and former Senator, to be special envoy of Canada to the Commonwealth with the responsibility to persuade member countries to endorse the EPG's recommendations including a Charter. In what proved to be a relatively short interval, a text for the eventual *Charter of the Commonwealth* was completed and approved by the officials. It was then sent to the Heads of Government for their consideration.

That text was next discussed in New York by the Commonwealth Foreign Ministers meeting in October 2012. The officials' draft was next approved by the Secretariat of the Commonwealth and released in an edited form in December 2012. Thereafter, it was accepted in its final terms by the Heads of Government of the Commonwealth countries. Finally, the *Charter of the Commonwealth* was signed by the Queen as Head of the Commonwealth. This last step was taken during a visit made by the Queen for that purpose to Marlborough House, London on Commonwealth Day, 11 March 2013.

In this way, the *Charter of the Commonwealth* came into force as an instrument adopted by CHOGM. Although there are many differences between the text prepared by me for the EPG and the text finally adopted by the officers' process just described, the exposure of a draft provided by the EPG undoubtedly expedited the consideration of the proposal for a charter. It was transformed from being a concept, vague and general in content, to a specific proposal with draft language expressing detailed

content with which officials of the 54 then member countries could grapple.

The Commonwealth of Nations may have rejected the establishment of the office of a Commissioner to uphold the charter, as the EPG proposed. However, it did secure a charter containing many admirable concepts. And the document, as finally agreed and signed into force, bore many similarities to the EPG's draft. In time it may be viewed as the most lasting, and with a little luck, the most influential of the recommendations of the Commonwealth EPG of 2011.

ANALYSIS OF THE CHARTER

Foundations: In this analysis I will call the draft submitted by me the "EPG draft" although the detail of this text was not expressly endorsed in its entirety by the EPG. Nevertheless, without the EPG's agreement to annex the draft to its report, this source document would probably have been lost. A source of comparisons and contrasts would probably not have been available to the officials and ministers who later came to consider the final charter, as eventually adopted.

A number of basic features of the EPG draft of the charter were altered as the *Charter* itself evolved. In this analysis I will explain the overlaps, similarities and differences that emerged when the two documents are compared, side by side.

Contents and structure: Although, as in the EPG draft, the text of the *Charter* begins with the assertion "We the people of the Commonwealth"

[CP1]³⁰ (and this phrase is common to the Preamble [P] of each draft), the operative language was different. In the EPG draft the subscription concluded that it was executed “in the name of the Peoples of the Commonwealth of Nations and in the presence of the Head of the Commonwealth” [EA3]. It also provided for the document to be signed by the “Commonwealth Heads of Government”. In that sense the EPG draft took on features of a treaty rather than the draft that was presented to the Head of the Commonwealth for the Queen’s signature and association with it [EA4].

As to the design and contents *Charter of the Commonwealth*, as ultimately adopted:

- * The *Charter* contains the superscription of the signature of the Queen as Head of the Commonwealth, affixed in her own hand over the symbol of the Commonwealth of Nations [CP]. There was no reference to this in the EPG draft [EP].
- * The subscription, at the foot of the *Charter*, contains the signature of the Commonwealth Secretary-General (Kamalesh Sharma). It is stated as appended on “14 December 2012, on which day Commonwealth Heads of Government adopted the *Charter* of the Commonwealth”; [CA3 and 4]. This was not the approach adopted in the EPG draft of the Testimonium or closing formula of the draft;
- * The *Charter of the Commonwealth* follows the same general layout as in the EPG draft. Thus, there is a Preamble to the

³⁰ In order to make cross references and comparisons between the “*Charter of the Commonwealth*” and the EPG draft clearer the paragraphs of each document have been numbered according to the tripartite sections observed in the two documents. Thus, each document is divided into a Preamble (P); Values (V); and Aspirations (A). Where the *Charter* is referred to the suffix “C” is used. Where the EPG Draft is referred to by the suffix “E”. Accordingly, the Preamble to the *Charter* is “CP”. The Preamble to the EPG Report is referred to as “EP”. The successive paragraphs are then numbered as in the documents annexed to this article.

Charter [CP]; a set of “Core Values and Principles [CV]” and a number of Aspirations [CA]. The same overall design had been followed in the EPG draft. It also contained a Preamble [EP]; a number of stated Values [EV]; and a list of Aspirations [EA]. However, whereas the EPG draft contained 11 basic Aspirations (13 if sub paragraphs are counted separately), the Aspirations expressed in the adopted *Charter* are fewer in number (2 paragraphs only) and they are presented on the final page – appearing almost as an apparent afterthought. Most of the Aspirations in the EPG draft have not found their way directly into the final *Charter*. However, a number of them are reflected and in one at least of the provisions of the *Charter* as adopted. The borrowing of language in some instances is obvious. Thus in EA 26, the EPG draft states:

“We aspire to a Commonwealth that will be a strong and respected voice in the world, speaking out on major issues; committed to strengthening and enlarging the many networks that already exist; dedicated to raising the profile of the Commonwealth in the world and devoted to improving the lives of the peoples of the Commonwealth and thereby of humanity everywhere.”

The final Aspiration in the *Charter* as adopted [CA2] reads in words that are markedly similar:

“We aspire to a Commonwealth that is a strong and respected voice in the world, speaking out on major issues; that strengthens and enlarges its networks; that

has a global relevance and profile; and that is devoted to improving the lives of all peoples of the Commonwealth.”

Adoption procedure: Whereas in the EPG draft, emphasis was placed on the need for “wide consultation about its content and formulation within each Commonwealth country, including with civil society organisations³¹ and with a subsequent sharing of the results”,³² no reference is made in the *Charter* as adopted or in the steps taken to adopt it, to any such procedure or necessity.

In the countries of the Commonwealth, the precise extent of consultative procedures that were undertaken concerning the charter, if any, is not publicly known. The involvement of “civil society organisations... schools, universities and in town hall meetings”³³ did not happen in some countries (including Australia). To that extent, the objective of the EPG that the charter should be the subject of widespread consultation before adoption, was not followed.

Nevertheless, the commencement of the agreement on the charter on 14 December 2012 led to a public media release declaring a “New Era for the Commonwealth”. This media statement was issued by the Commonwealth Secretary-General (Mr Sharma) and the Commonwealth “Chair-in-Office” (a rotating office determined by the Head of Government of the Commonwealth country where the most recent CHOGM was held) relevantly Hon. Julia Gillard MP – then Prime Minister of Australia,

³¹ EPG Report, *op cit*, p.34. See also 35 [R1].

³² EPG Report, p. 154, Recommendations R1.

³³ EPG Report, *op cit*, p. 34.

replacing Hon. Kevin Rudd MP. The *Charter of the Commonwealth* states that it contains the values and aspirations of the Commonwealth in a “single accessible document”. In her statement that coincided with the release of the *Charter*, Ms Gillard declared that the *Charter* would belong as much to the people of the Commonwealth as to its governments. The fact that the Charter arose out of the report of the EPG was acknowledged. It was agreed that the *Charter*, as approved, would influence the programmes of the Commonwealth.

Enforcement: Although the *Charter* of the United Nations Organisation of 1945 contained mention of commitment of the United Nations to universal human rights and fundamental freedoms, an obvious deficiency was the failure to provide any means of enforcement beyond reliance on any initiatives taken by the relevant nation states. Since such countries might sometimes be the cause of departures from human rights and fundamental freedoms, the necessity of relying on their action was an obvious flaw in the design of the UN *Charter* and of the *UDHR* that followed it. Whereas regional statements of fundamental human rights, in Europe, the Americas and Africa provide for a commission and a court to evaluate and sanction alleged breaches, there is no equivalent mechanism in the UN *Charter* or the *UDHR*. Although the UN *Charter* creates the International Court of Justice as a judicial organ, the *Statute* of that Court does not confer a general jurisdiction on that court relating to breaches of individual human rights. On the contrary, the *Statute* substantially limits that Court’s jurisdiction to initiatives taken by nation states and international organisations. This is a weakness in the design of the UN *Charter*, recognised from the start.

Even the *ASEAN Charter*, with its comparatively weak enforcement mechanisms, eventually provided for a commission to evaluate individual allegations of human rights abuses. However, there is no judicial organ nor a commissioner for the Commonwealth of Nations. In the days of the British Empire, the Judicial Committee of the Privy Council, although in form a body established to advise the British monarch, in practice afforded a large judicial jurisdiction over petitions filed by subjects of the Crown seeking judicial redress, including for what would now be seen as constitutional or human rights grounds. Its orders were effectively enforceable throughout the British Empire in the same way as a court judgment. With the effective dissolution of the British Empire, the international role of the Privy Council has been reduced to jurisdiction in a few remaining (mostly island) states. Although certain transjurisdictional Commonwealth courts were established in East and West Africa and in the Caribbean in the days of the British Empire, the notion of creating a general Commonwealth appellate court never succeeded. The judicial enforcement of the values and aspirations of the *Charter of the Commonwealth* is therefore entirely dependent on any law to that effect in each Commonwealth country. The principles of international law might occasionally be used to fill gaps or to resolve ambiguities in municipal law. However, even influence of such an attenuated kind is controversial in some Commonwealth countries.³⁴

The EPG draft charter has to be understood in the context for which it was presented. This was in the report of the EPG addressed to the wider question of updating the Commonwealth's institutions so that it could

³⁴ *Al Kateb v Godwin* (2004) 219 CLR 562 at 585-595 [47]-[733], per McHugh J; cf 617-630 [152]-[192], per Kirby J (dissenting); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 255 [181], per Heydon J (dissenting).

serve “a world of sweeping changes where old orders no longer command their previous dominance; where power can no longer be measured by military might or even financial resources; and where people are often demanding greater participation in the manner by which they are governed and in fashioning the principles that guide their governance.”³⁵ It was in that context that the first of the proposals of the EPG on “Championing Values”, contained the recommendation expressed in the EPG draft that leaves aside the recommendation that it should be based on the “will and desire of the People of the Commonwealth”. It also departs from the proposal that it should be developed after widespread consultation conducted in a substantial transparent process in all Commonwealth countries.

The proffered concept of a charter and the EPG draft appeared in a report that contained a number of non charter recommendations for the strengthening of the institutions of the Commonwealth. In the opinion of the EPG, those institutions had all too often failed to live up to the aspirations of the CHOGMs’ closing declarations. In particular, the Commonwealth’s Ministerial Action Group (CMAG) had substantially confined the exercise of its functions to dealing with unconstitutional changes affecting the government of Commonwealth countries, particularly those effected by military coups.³⁶ It was to broaden the effectiveness of the Commonwealth’s responses to include serious breaches of the rule of law and human rights that the EPG recommended a new and enlarged role for the CMAG and for the Secretary-General to engage in defending the Commonwealth from violations of its values.³⁷ In

³⁵ EPG *op cit*, p.33

³⁶ EPG *op cit*, 42.

³⁷ EPG *op cit*, p 46-47, RR 3-10.

harmony with a larger engagement with civil society, the EPG urged that the Secretary-General should provide civil society groups and Commonwealth organisations with the opportunity “to make representation to the CMAG through oral hearings, when appropriate, in addition to the current practice of receiving written submissions”.³⁸

The charter envisaged by the EPG must be understood in this proposed new institutional context. Unlike the UDHR, it is not expressed in terms of the rights of individuals. It would have been possible to frame a charter expressed in terms of the basic rights of Commonwealth citizens. However, that would have been to embrace notions considered apt for the Roman Empire (“*civis romanus sum*”) or in the British Empire’s concept of the enforceable legal rights of British subjects. In the new era of the United Nations, basic rights belong to human beings, whether citizens or not. It was this wider notion that the EPG considered should be upheld by the Commonwealth’s new charter.

Yet, In proposing a charter, the EPG did not have in mind another purely aspirational statement, such as those adopted in declarations issued at two-yearly intervals at the close of every CHOGM. This is why the EPG made the creation a charter the first of its recommendations.³⁹ However, the second of the EPG’s recommendations was that:

“... a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights should be appointed to provide well researched and reliable information simultaneously to the Secretary-General and the Chairperson of [CMAG] on serious or

³⁸ EPG *op cit*, p43.

³⁹ EPG R1, p35.

persistent violations of democracy, the rule of law and human rights by member states, and to indicate approaches for remedial action”.⁴⁰

Only when this structure of the EPG’s substantive report is remembered can the language of the EPG’s proposal for a charter be fully understood. It is not language that expresses rights as such (enforceable or otherwise). It is a draft that expresses “beliefs” and “aspirations”, the latter being softer in content than the former. The Commissioner proposed by the EPG was to be the ever-present guardian and vigilant champion of the “beliefs” and “aspirations” expressed in the EPG’s proposed charter.

The provision of human rights guardians, separate from the executive head of international institutions, was by no means an unusual institutional model when it was recommended to CHOGM by the EPG. In the United Nations, the office of Secretary-General was created by the UN *Charter*.⁴¹ The Office of the High Commissioner for Human Rights was not established by the UN *Charter* but by a resolution of the General Assembly, adopted on 20 December 1993.⁴² The office had been recommended by the World Conference on Human Rights held in Vienna in 1993. Institutionally, this separation of functions recognised that a chief executive officer, such as the Secretary-General, had many sensitive political duties to serve the member states whilst advancing the survival, funding and all of the general objectives of the Organisation. He or she was therefore to be subject to the stimulus and impetus of a separate guardian of human rights. Functionally, the two offices were thought to

⁴⁰ EPG R2, p46.

⁴¹ UN *Charter* arts. 97-101, (Office of the UN Secretary-General).

⁴² The mandate of the Office of the UN High Commissioner for Human Rights derives from articles 1, 13 and 56 of the UN Charter and General Assembly Resolution A48/141 (20 December 1993).

work better if they were held by separate persons: the Secretary-General concentrating on broad issues of policy, implementation and administration and the proposed Commissioner concentrating on complaints handling and investigation , remedial action, education and other provisions of the *Charter*.

During that part of the debate at the Perth CHOGM meeting in October 2011, to which members of the EPG were admitted, they heard the statement by Secretary-General Sharma, in answer to a question, that he did not understand why it was necessary to create the office of a Commissioner for Democracy, the Rule of Law and Human Rights as the EPG had proposed. The members of the EPG were obliged to sit silent when this was said and as the debate at CHOGM unfolded. However, a telling intervention was immediately made by one Commonwealth Head of Government who had reason to know the need to differentiate between the executive head of the Commonwealth (the Secretary-General) and the special guardian of basic values proposed by the EPG (the Commissioner).

This intervention was made by the then President of Maldives, Mohamed Nasheed, attending the Perth CHOGM as such. Prior to the Perth Conference he had been imprisoned by President Maumoon Gayoom, who had earlier ruled Maldives, a Commonwealth country, for 30 years.⁴³ President Nasheed declared that, from his prison cell, following his arrest, he had written many letters to the Secretary-General of the Commonwealth, requesting action to defend democracy, the rule of law

⁴³ Maldives achieved its independence from the United Kingdom on 26 July 1965. It became a ‘special member’ of the Commonwealth on 9 July 1982 until 20 July 1985 and a member thereafter. It withdrew from membership on 13 October 2016. It was readmitted to membership on 1 February 2020.

and his own human rights in Maldives. He had never received a reply. “Perhaps if there had been a Commissioner, I might have had a reply; even perhaps action”.

Following the Perth CHOGM, President Nasheed was deposed, tried, re-imprisoned but later returned once again to office as President of the Maldives. By the time of his re-imprisonment his predicament had attracted the attention of the United Nations. He sought asylum in the United Kingdom. Later still he sought sanctuary in the premises of the High Commission of India in Maldives. Later still, Mr Nasheed returned to Maldives as Speaker of the legislature (Majlis). The Commonwealth did not cover itself with glory in the handling of his complaints. Yet, at the Perth CHOGM, he explained more clearly than the EPG could have done, the need to separate the political and administrative functions of the Commonwealth from the receipt, impartial investigation and resolution of serious complaints and the defence of Commonwealth values and aspirations. Unfortunately, in 2011 his words fell on deaf ears. Upon one view, this was inevitable given the institutional arrangements of the Commonwealth and its Secretariat at that time.⁴⁴

So far, neither CHOGM nor the successor Secretary-General of the Commonwealth, Baroness Scotland QC, has revived the EPG’s proposal for a Commonwealth Commissioner. The lack of such a Commissioner is a serious weakness in the structure of the Commonwealth of Nations as presently organised. Even when grave wrongs to the principles of democracy, the rule of law and human rights occur in a member country of the Commonwealth, the asserted values are all too often ineffective to

⁴⁴ The Commonwealth Secretary-General. Statement on Maldives decision to leave the Commonwealth 13 October 2019. The Commonwealth re-admitted Maldives on 1 February 2020.

secure action. The particular utility of a *Charter of the Commonwealth* in such cases can often not be left to countries themselves or to their own institutions encouraged by local civil society organisations. Commonly, those institutions and individual citizens can not rely on local institutions and instruments that give effect to values and aspirations of the kind expressed in the *Charter of the Commonwealth* or in UN human rights instruments. However, absent such institutions and instrument and without an independent, courageous and vigilant Commissioner, as proposed by the EPG, the adoption of the *Charter* is often revealed as mainly aspirational.

Several of the values expressed in the *Charter of the Commonwealth* were breached in the case of President Nasheed, both before and after the Perth CHOGM. Without a Commissioner to give “teeth” of some kind to the *Charter* and impetus to the Commonwealth association and its office-holders and institutions, the language of the document is largely hortatory and formalistic. The EPG was anxious to move beyond this. Sadly, it must be admitted that we failed to persuade CHOGM to do so. It might be said that, if a commissioner had been created and appointed, there would have been little more than a voice in the wilderness and the ritual of condemnation and emphatic findings.⁴⁵ However, sometimes the provision of a respected voice can be important to reassure victims of abuse and encourage others to provide protection and example. The office of Ombudsman, based on a Swedish model that is wholly investigatory and limited to non-binding recommendations has spread to many Commonwealth countries since the 1960s. Depending on the

⁴⁵ H. Charlesworth, “Swimming to Cambodia: Substance and Ritual in Human Rights After conflict (2010), *Australian Yearbook of International Law* pp 1-16.

qualities of the appointee, the lack of a power of enforcement can sometimes be a strength rather than a weakness.

Evaluation: The officials who laboured on preparing the draft charter for the Heads of Government of the Commonwealth made a number of improvements, when compared with the EPG draft. It is proper for me to acknowledge these:

- * The layout and presentation of the *Charter of the Commonwealth*, as adopted, is clearer than the EPG draft. The expression of the 16 Commonwealth Values and the bold headings by which these values are identified and presented allow the reader much more easily than in the EPG draft, to perceive the core foundations to which the *Charter* dedicates the Commonwealth. Substantively, most of the same concepts are mentioned in the EPG draft; but without the same clarity and simplicity;
- * In the *Charter* as adopted, there are only two Aspirations whereas in the EPG draft there were 14. A number of matters which the EPG assigned to Aspirations are now treated as falling within the Values to be defended by the *Charter*. This appeared to be a desirable development. But it could reflect the view of the officials that the Values were themselves but Aspirations. And hence that the distinction between Aspirations and Values may have been viewed as insignificant. This would not be a correct view, consistent with international human rights law and practice; and
- * In several expressions of the Values in the *Charter*, as adopted, there has been a strengthening of the language of the EPG draft,

which is to be welcomed. For example, in the specific Value of “Human Rights” the following appears [CVIIB]:

“We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.”

This assertion is considerably stronger than the language of the EPG draft which was founded on the *UDHR* [EV.5B]. Moreover, whereas the EPG’s Value 5, of “Human Rights”, together with Values 6 and 7, assert belief in particular aspects of human rights and equality, in dealing with discrimination, the EPG draft [EV7] rather more weakly expressed as the “belief” of the Commonwealth in “tolerance, respect and understanding among all peoples in the diverse nations of the Commonwealth”. The EPG draft [EV 7.3] “acknowledge[s] that *unjustifiable* discrimination against individuals or groups impedes the attainment of the values of the Commonwealth and demands proper correction and redress”. However, this is not as strong as the *Charter’s* broader assertion of implacable opposition to “discrimination on other grounds”. It avoids the ambiguity of “unjustifiable discrimination”.

Drawing a distinction between “unjustifiable” (and by inescapable inference “justifiable”) discrimination is an approach that the *Charter of the Commonwealth*, as adopted, does not take [CVIIB]. This is also an improvement both in drafting and in substance. So is the emphatic commitment on the *Charter* to “equality” [CVIIA]. This is a precious provision which I was not sure in the deliberations of the EPG that either the EPG or CHOGM would accept in terms. Yet CHOGM did, proving once again the importance of courage and principle in the role of those

who draft international instruments of every kind. Timidity can be seductively attractive for those who underestimate the forces that sometimes combine to uphold principle and embrace universal human rights. Whilst the EPG pushed the Commonwealth in the correct overall direction with its draft charter, it seems clear that the untold story of the deliberations of the officials of the Commonwealth, meeting at Marlborough House, sometimes proved wiser and bolder than the EPG's Draft had dared to be.

The omission from the *Charter of the Commonwealth* of the historical features of the evolution of the Commonwealth, mentioned in the Preamble to the EPG Draft [EP1-5] suggests that the officials and CHOGM were disinclined to refer to the gradual historical movement of the Commonwealth from notions of "imperial dominion over our nations" to notions such freedom, independence and universal human rights. This historical narrative, explaining the context of the Values and how they emerged over time, is completely missing from the *Charter*, as adopted. Perhaps this indicates that, even today, 50 years after independence, the newer members of the Commonwealth, closer to their independence struggles are less willing than the old Dominions to concede that the history of the British Empire was one of gradual evolution from autocracy to fundamental rights. Several references in the EPG draft to ways in which its draft charter afforded a potential future contribution by the Commonwealth to the wider, universal goal of "global peace, equity and justice in the challenges that face the world" [EV3].

The EPG Draft made reference to protecting and defending the "natural environment and equity, sustainability and diversity in our planet and for all living creatures that make it up". [EV15] This reference to how the

environment and non-human animals must be protected beyond human beings finds no equivalent provision in the *Charter*. However, in a separate Value on “Protecting the Environment” in the *Charter*, as adopted [CVX], there is a specific and much bolder substantive mention of protection and conservation of our national ecosystems” and the “natural environment”. This was also a further step forward by the officials and by CHOGM than by the EPG drafts. It endorsed a larger engagement with the environment in the Commonwealth *Charter* beyond that proposed in the EPG draft. In the EPG representatives from low lying Commonwealth states (Kiribati) and Caribbean states were insistent on protection of environmental rights. However, once again, reflecting broader existential and political values, the Draft Charter prepared for CHOGM by officials proved bolder and stronger than did that of the author in the EPG Draft.

One day it may be hoped that the documents submitted to and considered by the CHOGM officials will be released so that the contentions debated by them can be disclosed and the emergence of the *Charter of the Commonwealth* tracked from the EPG draft to its final form.

In ascertaining the meaning of formal instruments of public international law (such as treaties) it is commonly useful to examine closely the *travaux préparatoires*.⁴⁶ By examining successive drafts as they emerged from the negotiation process, a clearer idea will sometimes emerge as to the purpose or informed ‘intention’ of the final instrument. By contrasting the

⁴⁶ The care that must be taken in interpreting the language of treaties, including those like the *Refugees Convention* 1951 having a human rights or humanitarian purpose, has been explained in many authorities (see for example the *Vienna Convention on the Law of Treaties* art. 31). See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 247 (per Brennan CJ diss. At 247); per McHugh J (251-258); per Gummow J (278-9); and per Kirby J diss. 294-5).

successive expressions contained in provisions in the text, noting those that have been rejected or omitted and those that have been retained, refined or clarified, inferences may sometimes be drawn as to the emerging purposes of the parties signified by the final text.

Neither the EPG Draft nor the *Charter of the Commonwealth* were expressed as a treaty, binding in law on member states of the Commonwealth. However, sometimes international agreements can prove highly influential, although never reduced to the form of a binding treaty. The *Universal Declaration of Human Rights* is, in form, a resolution of the General Assembly of the United Nations. Nevertheless, it has proved most influential. Likewise, international guidelines of international bodies can sometimes prove highly influential on municipal law and state practice, although never reduced to the form of a binding treaty.⁴⁷

It is one thing for a charter to be adopted for the Commonwealth of Nations. It is another for that document to become known to Commonwealth citizens; to be taught in schools and other institutions of learning; to become familiar to officials, civil society organisations and other champions of human rights; and to influence the political, economic, social and environmental activities of the Commonwealth of Nations: especially amongst the young.

I am not conscious of active initiatives on the part of the Secretary-General or the Commonwealth Secretariat in the promotion of the *Charter*. Its existence was mentioned in a review of Commonwealth initiatives on

⁴⁷ The Guidelines on the Protection of Privacy and Transborder Data Flows, adopted by the Council of the Organisation for Economic Cooperation and Development (OECD) in 1980 is an illustration.

human rights in 2014, but only fleetingly.⁴⁸ The starting point is to inform Commonwealth citizens about the *Charter* and to get them interested in its origin, text and potential. That is why this article has been written. The remaining content of this article examines, by use of a comparative schedule, the influence of the EPG draft on the text of the *Charter* as finally adopted. This is followed by reflections and commentary on the implementation of the *Charter* and ideas about ways in which it might capture the attention and imagination of Commonwealth citizens. To do this it needs champions.

The texts both of the EPG draft (Annexure A) and the *Commonwealth Charter* as adopted (Annexure B) are annexed to this article. Comparing one with the other, it is suggested, is a useful way to analyse the context, values and aspirations of the *Charter* as now adopted. Only if these are known will it be possible to convert the *Charter* into a useful and influential project to enhance and promote the stated values and aspirations of the Commonwealth of Nations.

⁴⁸ Human Rights Unit, Commonwealth Secretariat, “Historical overview of human rights in the Commonwealth: successes, challenges and the way forward” (2014) 40 *Commonwealth Law Bulletin* 421 at 422. See also reference to the Charter in Julian Mukuesu Nganumu, “Judicial independence and economic development in the Commonwealth” (2004) 40 *Commonwealth Law Bulletin* 431 at 431; and Commonwealth Secretariat “A model act on integrity in public life” (2014) 40 *Commonwealth Law Bulletin* 563.

COMPARATIVE TABLE OF CHARTER AND EPG DRAFT

A comparative schedule demonstrates the substantial influence of the EPG draft on the *Charter* as ultimately adopted by CHOGM

<i>EPG DRAFT</i>	<i>CHARTER OF THE COMMONWEALTH</i>
-	<i>Superscription of Royal Signature</i>
EP1	<i>Assertion of Source</i> “We the People of the Commonwealth” CP1
	<i>Preamble</i>
EP7	CP1 Changes, threats & role
EP1	CP2 Voluntary association
EP3	CP3 Diversity and shared inheritance
EP8	CP4 Catalyst for global spirit of UN
EA24	CP5 Small states
	CP6 Intergovernmental bodies
	CP7 Commitment to Singapore and other Declarations
	CP8 Consensus and common action
EP9	CP9 Reaffirm core values and principles
	<i>Values</i>
EV4	CV1 <i>Democracy</i>
EV4.1	CV1A Individual exercise. Elected bodies
EA22	CV1B Min Action Group [CMAG]
EA23 EA27 Uncorrupted officials, political parties, electoral processes	
EV4.5	CV13 Young people, democracy
EP8	CV2 <i>Human Rights</i>
EP5.1, EP5.3, EP8, EP9	CV2A UDHR commitment – universal Indivisible interdependent and interrelated

EP9 EV5.2 EV7	CV2B implacable opposition to all forms of discrimination rooted in gender, race, colour, creed, political belief or other grounds
EV6	CV2B Root out discrimination, gender, race, colour
	CV3 <i>Peace & Security</i>
EV3	CV3A Progress as Piracy and terrorism
	CV3D Pledge support United Nations eradicate terrorism
EP3, EP4 EV4	CV3A Search for development Peace and disarmament
	CV4 <i>Tolerance Respect & Understanding</i>
EV7	CV4A Moderation & religious freedom
EP3, EP5	CV4B Diversity & understanding multiple identities
EA25.3 Link together in economies rich and poor large and small	
	CV5 <i>Freedom of Expression</i>
EV5, GA 25.1-GA 25.2, EV 5.1, EV11, EV12	CV5 Open dialogue & free flow of info
EV4.1, EV4.2 EA25.2	CV5 Free & responsible media enhancing the democratic tradition
EV9, EV10.1, EV10.2	CV6 <i>Separation of Powers</i>
EV10	CV7 <i>Rule of Law</i>
Rule of law and human rights EV10.3	
EV10.4 EV8.1, EV8.2 EV7.1	CV8 <i>Good governance</i> Transparency and accountability to root out corruption
	CV9 <i>Sustainable Development</i>
EV3, EP4	CV9A Eradicate poverty, promote equality
EP5	CV9B Sustainable transformation democracy
EV2	CV9C Remove wide disparities
EA25.3	CV9D Multilateral trading system

	CV10 <i>Protecting the Environment</i>
CV6.3	Sustainable development, climate change
EV14	Dumping and erosion
EA24	Effective voice for vulnerable states
	CV11 <i>Access to Health, Education, Food and Shelter</i>
EV14 EV15	C11A <i>Shelter, health, education, sustainable development</i>
	CV15 <i>Defence of natural environment, respond calamity</i>
	CV12 <i>Gender Equality</i>
EV6.3; EV2 EA17 EV6.2 EA18 EV7.3 EV11	CV12 <i>Equality, empowerment, education and development</i>
EV4.5	CV13 <i>Importance of Young People</i>
EA25.1 EV15	CV13 Positive and active role of young People
25.1	Enhance the role of youth
	CV14 <i>Recognise small states needs</i>
EA24	CV14 Concerted support for small states
	CV15 <i>Recognition of vulnerable states</i>
EA24	CV15 Small and vulnerable states
EA12, EA12.1, EA13	CV16 <i>Role of Civil Society</i>
EV12	Promote support Commonwealth values
EV15	Freedom of association assembly and achieving development goals

IMPLEMENTATION OF THE CHARTER

Continuity and utility: The examination of *travaux préparatoires*, can assist in emergence of the interpretation especially where there is ambiguity in the text, as will often be the case in instruments dealing with matters of human rights. Such instruments have to begin somewhere with a first draft. The first draft of the *UDHR* of 1948 was, for the most part, the work of Professor John Peters Humphrey of McGill University in Canada. He served as head of the secretariat of the drafting committee chaired by Eleanor Roosevelt. On the 50th anniversary of its adoption, Canada issued a postage stamp displaying the opening words of Article 1 of the *UDHR* in the firm, clear handwriting of Humphrey: “All human beings are born free and equal in dignity and rights”.

In the mid-1980s I worked with John Humphrey as a Commissioner of the International Commission of Jurists in Geneva. We often spoke of his role in developing the early drafts of the *UDHR*, submitted to Eleanor Roosevelt, René Cassin and their colleagues in the development of that instrument. He explained how, on daily bus trips to the UN Secretariat Building, then in Lake Success, New York, he would jot down words that were later incorporated in the emerging draft. Subsequently, many of these were approved by the committee and became part of the language of the *UDHR*. Today the *UDHR* is one of the most influential documents in the world: It has had a huge impact on international law, not only in its own right but also in shaping the United Nations and other treaty law and scholarly discourse that has followed.

The *Charter of the Commonwealth* will not have the same impact of the *UDHR*. However, in time, it may enjoy some influence, especially if effective machinery is adopted by the Commonwealth and its member

states to give its language operational and programmatic consequences. The year 2019 marked the 75th anniversary of the creation of the modern Commonwealth in 1949. The agreement of the London CHOGM in 2018 to extend the role of the British monarch as Head of the Commonwealth into the next generation of the United Kingdom monarchs shows that the Commonwealth, as an international body, continues to evolve. As it survives, it must be inferred that the Commonwealth Heads of Government, and those who advise them, see utility in its continuance. This perception may lead to strengthening of the implementation of its expressed institutional values and aspirations, even if doing so sometimes results in resentment, criticism of non-complying members or occasionally the withdrawal of member states. Past experience shows that states that have withdrawn normally return. History alone is insufficient to guarantee the continuance of the Commonwealth. Allegiance to the British Crown is no longer the universal or even majority ingredient. Affection for a particular Head of the Commonwealth is a fragile foundation for the organisation's continuance. These considerations tend to enhance the importance of the *Charter*.

One of the main values reflected in the *Charter* appears to be the provision that the Commonwealth gives a voice for small states facing common problems. Another is support the Commonwealth derives from the governmental, professional and civil society organisations in Commonwealth countries that share common problems, challenges and values. This continues, in part, because of the shared language and a similar way of tackling matters of law and government in Commonwealth countries. Administrative traditions and comfortable dialogue amongst administrators, defence personnel, university and other educational

heads, leaders of the arts, sciences and cultural experts help to preserve the perceived utility of the Commonwealth links.

Enhancing the Charter: The *Charter of the Commonwealth* will not be effective unless it becomes known to, and is used by, individual Commonwealth citizens, governmental officials, corporations and professional and civil society organisations that appeal to the “better angels” of the Commonwealth’s long traditions.⁴⁹ A number of steps could be taken to encourage and enhance this development:

1. The archives of the Commonwealth Secretariat. should be made available to explain the work of the EPG and others so that the aspirations and principles expressed in the *Charter*, explained briefly in these pages, will be made known to a wider audience;
2. The archives of the officials’ meetings of Commonwealth member countries that followed the Perth CHOGM of 2011 should also be made available to Commonwealth citizens in a more transparent way. They should be accessed, when available, to reveal the ways in which those anonymous denizens of Commonwealth bureaucracies, successors throughout the world to the officials who once ruled a quarter of the world from Whitehall, tackled the task that they were given of finalising the *Charter*. Many of them would doubtless have regarded that task as an unpleasant duty of preparing an instrument for political office-holders, some of whom would possibly be reluctant and fearful of adopting a charter that might later return to cause trouble for them;

⁴⁹ W. Shakespeare, *Othello*, Act 5, Scene 2, line 235. Cf A. Lincoln, First Inaugural Address, Washington DC, 4 March 1861.

3. Scholars of law, politics and international affairs, in and beyond the Commonwealth, should be encouraged to examine the recent history of the Commonwealth of Nations and the role of its secretariat and Secretary-General with a view to reconsidering the recommendations for improvement of the Commonwealth as an institution, including the institutional recommendations contained in the EPG report of 2011 but not yet implemented. Most especially, attention should be addressed to the EPG's recommendation for the creation of the office of a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights. Instances and examples might be collected and used as illustrations of how such an office-holder might have handled better instances of failure and shortcomings such as those of Malawi and Maldives mentioned above. Such instances might build a case to help revive the proposal of the EPG. Such a commissioner could help in the implementation of the admirable values expressed in the *Charter* as now adopted;

4. In the aftermath of Brexit, involving the departure of the United Kingdom from membership of the European Union, it is inevitable that the United Kingdom, will be seeking political, economic and diplomatic opportunities elsewhere, especially in the Anglosphere. Neither Francophonie nor the Commonwealth of Independent States (successors respectively to the French and Russian Empires) have functioning institutions with anything like the potential in international relations of the Commonwealth of Nations. Where this organisation will go in the coming century is uncertain. However, because nature abhors a vacuum, the future opportunities

for the Commonwealth may be greater, post Brexit, than we can now envisage. Without presuming to depart too far from the consensus model and the so-called “Commonwealth way”, it is possible that the Commonwealth may have a future greater even than the EPG envisaged in the years 2010-11. It may be greater than the current leaders and participants in CHOGM in 2020 aspired to or imagined.⁵⁰

5. The pushback from some quarters against multilateralism in international relations may actually provide new opportunities for the Commonwealth. This is illustrated by Brexit but there are other illustrations. Several involve moves on the part of the United States. They include that country’s withdrawal from membership of the UN Human Rights Council; its departure in 2020, hopefully temporarily, from funding the work of the World Health Organisation and its exploration of re-expression of the meaning of “unalienable human rights” in the place of the values and principles that Eleanor Roosevelt, John Humphrey and their colleagues adopted in the UDHR. These and other steps indicate a stepping back from areas of global cooperation. Several other countries now likewise reject the leadership of the Human Rights Council on women’s rights and on the rights of sexual minorities. Retreat from globalisation is also reflected in the responses of Poland, Hungary, Romania and other European countries to the influx of migrants and refugees from Iraq and Syria. The same trend was evident in the decision of the Russian Federation to invade Crimea and separate it from Ukraine. Similar pushback from international cooperation is visible in the

⁵⁰ M.D. Kirby, “Multilateralism, Pushback and Adjustment: From the UN Charter to COVID 19”, 20 *Maryland Journal of International Law* 101 at 127 (2020).

withdrawal of Venezuela and Brazil from pre-existing multilateral cooperation. It is also evident in the defiance of international opinion by countries such as Philippines, Cambodia, China, Myanmar (Burma) and Turkey. In a world where multilateralism is under siege, the continuing links of the Commonwealth may become more important in the future for peace, security and international cooperation amongst member countries than it has been in the past. A document such as the *Charter*, that defines and encourages the shared values in the Commonwealth may come, in time, to enhance the Commonwealth's enduring features of multilateralism. Suddenly these have become more significant in the world;

6. The glue that holds together the Commonwealth of Nations is essentially a shared history, some common or very similar institutions, civil society organisations and a language which has assumed global pre-eminence, including because of its primacy in politics, trade, science, technology and popular culture. For the Commonwealth to reach its full potential it needs to build on those shared features whilst attending to the special requirements of its 50 plus member countries. The links will fragment and fray unless the Commonwealth reinforces the values and aspirations that make the association valuable to its members and to their citizens, societies and peoples, beyond links that exist or are created bilaterally.
7. The Secretary-General of the Commonwealth should assume the responsibility of reporting to each successive CHOGM the steps that have been taken to promote the *Charter of the Commonwealth* and to encourage governments, educational institutions, media,

professional bodies and Commonwealth citizens generally to promote discussion and awareness of the *Charter* in future Commonwealth meetings and initiatives. Its purpose was to be a document that would inspire action and encourage initiatives. The *Charter* should not lie gathering dust at Marlborough House.

8. If and when the Commonwealth is bold enough to appoint a human rights commissioner, as recommended by the EPG, the *Charter* would take on a larger programmatic function. The advent of the COVID19 pandemic in 2020 has called the attention of humanity to existential challenges that the world needs to face. Because of the special role of the Commonwealth engaging with professional bodies and civil society organisations in the diverse countries of the Commonwealth, it may be hoped that fresh thinking and bold action will grow out of the present testing times. This is why it is specially useful to identify deep values that Commonwealth citizens holds in common. Hopefully renewed reflection on the origins, text and potential of the *Charter* will help stimulate fresh reflection and action in this global association.

THE COMMONWEALTH WAY

The *Charter of the Commonwealth* may come in time, to fulfil a more useful role in preserving and strengthening the links of the Commonwealth that have a surprising resilience. In considering that role, it is useful to examine the way in which, almost accidentally, the EPG of 2011 arrived at the conclusion it reached, to recommend a charter of values and aspirations to the Perth CHOGM of that year. The national leaders and their officials picked up and refined the EPG's recommendation, giving

rise to the *Charter of the Commonwealth*. In several ways, explained in this article, the leaders and inferentially their officials were braver and bolder than the EPG dared to be in its draft. This review has been designed to explain how the recommendation came about; how it was changed the course of its in delivery to something different how it became more challenging than an organisational blue print that recorded the status quo; how its language was developed and extended by the process of deliberation; and how its aspirations and potential now challenge us and demand to be fulfilled to meet the goals of the present generation of Commonwealth citizens.

In 1883 Sir John Seeley said that the British Empire, then hearing its zenith of power, had emerged from a “fit of absence of mind”.⁵¹ Without necessarily accepting this self-conceit, pretending to an indifference to the political, cultural, racial and economic advantages of the imperial age for Britain and disadvantages of those conquered and ruled, it is true that many of the constitutional, legal and economic features of the British Empire grew out of experience rather than a pre-conceived plan. The same appears to be true of the Commonwealth and its emergences as something different from, and larger than, its constituent parts and its sometimes oppressive history. The Commonwealth’s evolution is continuing today, denying the many repeated predictions of its demise. Its endurance is powerful evidence of its utility. So an instrument that seeks to express its shared values and aspirations is an important yet still unthreatening step. The citizens and nations of the Commonwealth need to know, and to own the *Charter* that presumes to describe the common

⁵¹ Sir John Robert Seeley, *The Expansion of England* (1883) para 3: “We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind” (Little, Brown, Cambridge, reprinted 1922).

bonds of this most remarkable and persistent of global associations. That also is, or should be, the Commonwealth way.

ANNEXURE A

ANNEX B: A Draft Charter of the Commonwealth in the EPG Report

WE THE PEOPLE OF THE COMMONWEALTH OF NATIONS

[EP] PREAMBLE

[EP1] REMEMBERING the historic evolution that, by the wisdom and resolve of our forebears, transformed an imperial dominion over our nations and peoples into a free association of member nations to which we, the peoples of the Commonwealth of Nations, belong:

[EP2] RECALLING the sacrifices and struggles, the pain and sorrow of earlier times and the achievement of the independence of our nations within the Commonwealth, each nation responsible for its own laws, practices and policies but co-operating in the Commonwealth in the interests of their peoples and promoting the objectives of international understanding and world peace; [Harare, par.2];

[EP3] CELEBRATING the shared experiences of history and language [Harare, par.3], similar institutions and aspirations and including peoples of many different races and origins, encompassing every state of economic development and comprising an unequalled variety of races, origins, cultures, religions, traditions and institutions of the world [Harare, par.(2)];

[EP4] MINDFUL that economic and social development must remain a primary and urgent goal for the great majority of the people of the Commonwealth and therefore of the Commonwealth itself;

[EP5] RECOGNISING that the Commonwealth today comprises more than 50 nations; more than 2 billion people; and more than 1 billion young people who have a special potential to promote development, peace and democracy, to uphold Commonwealth values and to achieve the Commonwealth's aspirations for the future which they will further inherit and determine;

[EP6] REJOICING in the family of nations and peoples that is the Commonwealth and cherishing the links that connect our nations and peoples together in friendship for one another, at peace with the world;

[EP7] DETERMINING that, in each succeeding generation, we will strengthen the bonds that connect us together and broaden and deepen our links of friendship, co-operation, trade and shared values and aspirations;

[EP8] ACKNOWLEDGING the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, whose proclamation coincided with, and heralded, the birth of the Commonwealth itself in its present form; and

[EP9] AFFIRMING that we will support each other in the observance of the Values and Aspirations of this Charter, both in the Commonwealth and throughout the world;

[EP10] NOW SOLEMNLY RESOLVE by the decision of the Heads of Government of the Commonwealth of Nations made on our behalf and in our own name, to uphold, preserve and defend the Values and Aspirations of the Commonwealth as declared in this Charter.

VALUES OF THE COMMONWEALTH

EV1. We believe in international peace and security, recognising that the scourge of war, genocide and conflict has brought untold loss and sorrow to humanity [UN Charter, Preamble 1] which the Commonwealth helps seeks to avoid and repair. We pledge our support for the United Nations and other international institutions in the search for peace, disarmament, development and the promotion of international consensus on major global political, economic and social issues [Harare, par.9(n)].

EV2. We believe in economic growth and development throughout the Commonwealth, recognising their special importance for the transformation of our nations, the elimination of poverty, the removal of disparities and unequal living standards, and the strengthening of all of these changes in every land [TT, par.5(a) and (h)];

EV3. We believe in an effective multi-lateral system for the maintenance of our global relationships, based on inclusiveness, equity and international law and in the strengthening of the United Nations as the surest foundation for achieving securing global peace, equity and justice in the challenges that face the worlds:

EV4. We believe in democracy as the central principle for governance of our own nations and the safest means of resolving disagreements at home and in the world:

EV4.1 We re-affirm our belief in the inalienable right of Commonwealth citizens to participate, by means of free and democratic political processes, in shaping the societies in which they live;

EV4.2 We believe that governments, political parties and civil society have vital responsibilities for upholding and promoting a democratic culture and practices in all nations of the Commonwealth;

EV4.3 We believe in the accountability to the people of all those who hold public office, whether elected or appointed; and

EV4.4 We recognise that parliaments and local government and other forms of national, regional and local governance are essential elements in the exercise of true democracy throughout the Commonwealth [TT, par.5(b)]; and

EV4.5 We recognise that electoral integrity is essential to entrenching democratic processes and accountability [TT, par.11].

EV5. We believe in universal human rights and that they are applicable to all persons throughout the Commonwealth in accordance with the principles of international law:

EV5.1 We re-affirm our commitment to the Universal Declaration of Human Rights of 1948 and to human rights covenants and instruments that declare the universal rights of all;

EV5.2 We believe that equality and respect for the protection and promotion of civil, political, economic, social and cultural rights for all, without discrimination on any grounds, are foundations for the creation and maintenance of a peaceful, just and stable society; and

EV5.3 We believe that all these rights are universal, indivisible, inter-dependent and inter-related and that they may not be implemented or denied selectively [TT, par.5(c)].

EV6. We believe in gender equality, re-affirming that such equality and empowerment are:

EV6.1 A requirement of the universal principals of human rights [Harare, par.9(b)];

EV6.2 Essential for human development; and

EV6.3 A pre-condition, through the advancement of women's rights, for effective and sustainable development throughout the Commonwealth [TT, par.5(i)].

EV7. We believe in tolerance, respect and understanding among all peoples in the diverse nations of the Commonwealth:

EV7.1 We recognise that such values strengthen both democracy and development;

EV7.2 We release that respect for the dignity of all human beings is essential to the promotion of peace and prosperity; and

EV7.3 We acknowledge that unjustifiable discrimination against individuals or groups impedes the attainment of the values of the Commonwealth and demands proper correction and redress [Harare, par.4(b); TT, par.5(d)].

EV8. We believe that good governance throughout the Commonwealth is essential to the attainment of these values in all member nations:

EV8.1 We commit ourselves to ensuring integrity, transparency and accountability in the governance in our own countries and in the organs of the Commonwealth itself; and

EV8.2 We pledge ourselves to strive, by effective and co-operative means, to root out systemic and systematic corruption of those who hold power over others, both at national and international levels [TT, par.5(k)];

EV9. We recognise the importance of maintaining the integrity of the distinctive functions of the Legislature, the Executive and Judiciary [TT, par.5(e)];

EV10. We believe in the rule of law as an essential protection for the people and an assurance of limited and accountable government:

EV10.1 We recognise that, in each nation of the Commonwealth, the Legislature, the Executive and the Judiciary have distinctive roles to fulfil as guarantors of the rule of law;

EV10.2 We assert that access to justice and to an independent judiciary is among the universal rights belonging to all peoples and that it is fundamental to the maintenance of the rule of law;

EV10.3 We acknowledge that the rule of law implies that the content of law should conform to universal human rights and to the principles of lawfulness, justice and reasonableness; and

EV10.4 We believe in the enhancement of the rule of law by effective, transparent, ethical and accountable governance throughout the Commonwealth, by the appropriate sharing of legal materials and by undertaking and promoting systematic reform of the law [TT, par.5(f)].

EV11. We believe in human diversity and human dignity and we oppose all forms of discrimination whether it be based in race, ethnicity, creed or gender or other like cause [Coolum report, par.3]. We believe in

freedom of thought, conscience and religion and oppose discrimination upon any such ground [UDHR, art.18].

EV12. We believe in the important role functions that civil society and the media of communications plays in our communities and nations:

EV12.1 In affording opportunities to the people of the Commonwealth to express their civic freedoms and to fulfil themselves as citizens and as human beings;

EV12.2 In enhancing the pursuit of freedom and happiness in life in all Commonwealth countries [TT, par.5(l)];

EV12.3 In promoting and supporting these Commonwealth values; and

EV12.4 In advancing the attainment of these Commonwealth aspirations.

EV13. We believe in the strengthening of civil society and of the organisations that, individually and collectively, can give expression to these Commonwealth values and aspirations, and help harness our shared historical, professional, cultural and linguistic heritage [Harare, par.12].

EV14. We believe in access to shelter, health care, education [Harare, par.9(d)] and work for all peoples of the Commonwealth; and in the fulfilment of the universal principles of human rights as essential means to alleviate poverty; to promote sustainable development [Millbrook, par.6]; and to uphold justice in every land [Harare, par.9(e); TT, par.5(j)].

EV15. We believe in mutual support in times of natural calamity or where peace building is needed [Youth Declaration TT, pmb1 2]. We commit ourselves to the proper protection and defence of the natural environment and to equity, sustainability and diversity in our planet and for all living creatures that make it up. [TT 12]. [Declaration Port-of-Spain: Partnering for a More Equitable and Sustainable Future: Release 27 Nov 2009].

COMMONWEALTH ASPIRATIONS

EA16. We aspire to a Commonwealth that is in harmony with the future: an association that draws on its history; utilises its strengths; pursues the common interests of its members; and seizes the opportunity to help to them and others to shape a better world [Coolum, par.8].

EA17. We aspire to a Commonwealth that is foremost in the elimination of poverty, unjust discrimination, powerlessness and despair. We pledge ourselves, through the Commonwealth, to contribute to the enrichment of life for peoples everywhere and to provide a powerful influence for peace, development, good governance and human rights throughout the world [Singapore, par.14].

EA18. We aspire to a Commonwealth that builds on its strengths but is unafraid to evolve and to adapt itself constantly prepared to adapt to changing times and fresh challenges [Coolum, par.8].

EA19. We aspire to good relations between our nations so that they are conducted in accordance with the values of the Commonwealth and consistent with the principles of consensus and common action, mutual

respect, inclusiveness, transparency, accountability, legitimacy and responsiveness that mark the Commonwealth out amongst international associations. [TT, par.6].

EA20. We aspire to an enlarged role for the Secretary-General of the Commonwealth [Millbrook, par.4] and the Commonwealth Secretariat in promoting and upholding the Commonwealth's values; in supporting adherence by our countries to such these values and principles; in preventing and settling any conflicts that may arise; and in giving voice in the Commonwealth and in the world to these values and aspirations to which we pledge ourselves.

EA21. We aspire to affording practical assistance and technical aid to build the capacity of the public and private institutions in Commonwealth countries that uphold Commonwealth values and to strengthen the institutions of member countries so as to ensure the attainment of our values and the avoidance of all violations [Millbrook, par.2], CMAG [Millbrook par.3].

EA22. We aspire to an effective role for the Commonwealth Ministerial Action Group (CMAG) as the special custodian of the Commonwealth's values. We call on CMAG to respond and deal promptly and effectively and promptly with all instances of serious or persistent violations of Commonwealth values; to adopt measures designed to prevent such violations from occurring and to pronounce and act upon them, including in public as appropriate, so that the commitment and resolve of the Commonwealth to abide by its values will not be put in doubt [TT, par.8].

EA23. We affirm that, in the face of serious or persistent violations of the values expressed in this Charter, silence on the part of the Commonwealth is not an option [EPG, 26 October 2010].

EA24. We recognise the particular vulnerabilities of small island and developing states [Millbrook, par.6(e)] as well as the urgent need for concerted action by the international community to address their special needs. We aspire to a Commonwealth that will pursue innovative and practical support for small states and recognise its role as a special and effective voice at international forums for the small and vulnerable states of the world [Coolum, par.7; pars. 37 and 38].

EA25. We aspire to immediate progress consistent with Commonwealth values that will transform the Commonwealth in ways that seize the opportunities and respond effectively to the challenges of our time:

EA25.1 By enhancing the role that the youth of the Commonwealth will play in the governance, institutions and diverse voices of the Commonwealth, acknowledging that the future of the Commonwealth belongs to them;

EA25.2 By increasing the linkages of the people of the Commonwealth through new information technology so that the shared means of communication and our common use of the English language will enhance national, individual and group relationships, promote national and international understanding and strengthen the ties of friendship; and

EA25.3 By promoting the advantages of the freest possible multi-lateral trade within the Commonwealth [Harare, par.9(f)], utilising the shared media of language, legal, educational, sporting [Harare, par.9(h)],

professional and other commonalities so that our unique global association will become a true Commonwealth for all its Peoples linking together economies rich and poor, large and small, developed and developing, to the benefit of the economic progress of all; to strengthen economic capacity and resilience so as to support and advance Commonwealth values and aspirations and the wellbeing of all Commonwealth citizens.

EA26. We aspire to a Commonwealth that will be a strong and respected voice in the world, speaking out on major issues; committed to strengthening and enlarging the many networks that already exist; dedicated to raising the profile of the Commonwealth in the world; and devoted to improving the lives of the peoples of the Commonwealth and thereby of humanity everywhere.

EA27. And we aspire to strengthen the Commonwealth as a free association of peoples who are represented in its councils and agencies by democratically elected and appointed leaders, served by uncorrupted officials, based on these abiding values and aspirations and organised to give primacy to the people of the Commonwealth in whose name this Charter is expressed.

EA3 DONE at -----, this ----- day of -----20 -, in the name of the Peoples of the Commonwealth of Nations, and in the presence of the Head of the Commonwealth

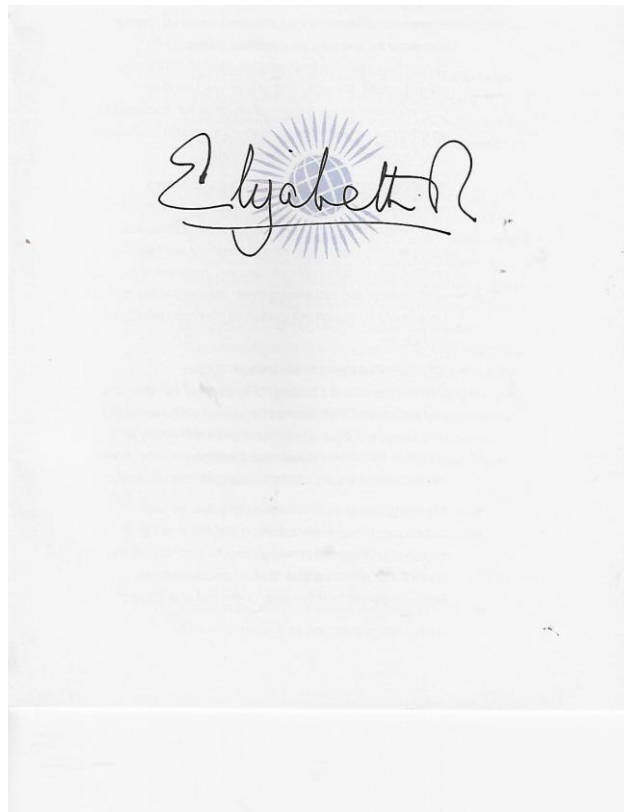
[EA4] (signed) by Commonwealth Heads of Government

ANNEXURE B

COMMONWEALTH CHARTER

[CP]

*The Commonwealth
Charter of the Commonwealth
Signed by Her Majesty Queen Elizabeth II
Head of the Commonwealth
Commonwealth Day 2013*



PREAMBLE OF CHARTER

WE THE PEOPLE OF
THE COMMONWEALTH:

[CP1] Recognising that in an era of changing economic circumstances and uncertainty, new trade and economic patterns, unprecedented threats to peace and security, and a surge in popular demands for democracy, human rights and broadened economic opportunities, the potential of and need for the Commonwealth – as a compelling force for good and as an effective network for co-operation and for promoting development – has never been greater.

[CP2] Recalling that the Commonwealth is a voluntary association of independent and equal sovereign states, each responsible for its own policies, consulting and co-operating in the common interests of our peoples and in the promotion of international understanding and world peace, and influencing international society to the benefit of all through the pursuit of common principles and values.

[CP3] Affirming that the special strength of the Commonwealth lies in the combination of our diversity and our shared inheritance and language, culture and the rule of law; and bound together by shared history and tradition; by respect for all states and peoples; by shared values and principles and by concern for the vulnerable.

[CP4] Affirming that the Commonwealth way is to seek consensus through consultation and the sharing of experience, especially through practical co-operation, and further affirming that the Commonwealth is uniquely placed to serve as a model and as a catalyst for new forms of

friendship and co-operation in the spirit of the Charter of the United Nations.

[CP5] Affirming the role of the Commonwealth as a recognised intergovernmental champion of small states, advocating for their special needs; providing policy advice on political, economic and social development issues; and delivering technical assistance.

[CP6] Welcoming the valuable contribution of the network of the many intergovernmental, parliamentary, professional and civil society bodies which support the Commonwealth and which subscribe and adhere to its values and principles.

[CP7] Affirming the validity of and our commitment to the values and principles of the Commonwealth as defined and strengthened over the years including: the Singapore Declaration of Commonwealth Principles, the Harare Commonwealth Declaration, the Langkawi Declaration on the Environment, the Millbrook Action Programme, the Latimer House Principles, the Aberdeen Agenda, the Trinidad and Tobago Affirmation of Commonwealth Values and Principles, the Munyonyo Statement on Respect and Understanding, the Lake Victoria Commonwealth Climate Change Action Plan, the Perth Declaration on Food Security Principles, and the Commonwealth Declaration on Investing in Young People.

[CP8] Affirming our core Commonwealth principles of consensus and common action, mutual respect, inclusiveness, transparency, accountability, legitimacy and responsiveness.

[CP9] Reaffirming the core values and principles of the Commonwealth as declared by this Charter:

[CV] I.

DEMOCRACY

[CV1A] We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard. Parliaments and representative local governments and other forms of local governance are essential elements in the exercise of democratic governance.

[CV1B] We support the role of the Commonwealth Ministerial Action Group to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour.

II.

HUMAN RIGHTS

[CV2A] We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note

that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

[CV2B] We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

III.

INTERNATIONAL

PEACE AND SECURITY

[CV3A] We firmly believe that international peace and security, sustainable economic growth and development and the rule of law are essential to the progress and prosperity of all. We are committed to an effective multilateral system based on inclusiveness, equality, justice and international law as the best foundation for achieving consensus and progress on major global challenges including piracy and terrorism.

[CV3B] We support international efforts for peace and disarmament at the United Nations and other multilateral institutions. We contribute to the promotion of international consensus on major global political, economic, and social issues. We will be guided by our commitment to the security, development and prosperity of every member state.

[CV3C] We reiterate our absolute condemnation of all acts of terrorism in whatever form or wherever they occur or by whomsoever perpetrated, with the consequent tragic loss of human life and severe damage to political, economic and social stability. We reaffirm our commitment to work together as a diverse community of nations, individually, and

collectively under the auspices and authority of the United Nations, to take concerned and resolute action to eradicate terrorism.

IV.

TOLERANCE, RESPECT AND UNDERSTANDING

[CV4A] We emphasise the need to promote tolerance, respect, understanding, moderation and religious freedom which are essential to the development of free and democratic societies, and recall that respect for the dignity of all human beings is critical to promoting peace and prosperity.

[CV4B] We accept that diversity and understanding the richness of our multiple identities are fundamental to the Commonwealth's principles and approach.

V.

FREEDOM OF EXPRESSION

[CV5] We are committed to peaceful, open dialogue and the free flow of information, including through a free and responsible media, and to enhancing democratic traditions and strengthening democratic processes.

VI.

SEPARATION OF POWERS

[CV6] We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.

VII.

RULE OF LAW

[CV7] We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

VIII.

GOOD GOVERNANCE

[CV8] We reiterate our commitment to promote good governance through the rule of law, to ensure transparency and accountability and to root out, both at national and international levels, systemic and systematic corruption.

IX.

SUSTAINABLE DEVELOPMENT

[CV9A] We recognise that sustainable development can help to eradicate poverty by pursuing inclusive growth whilst preserving and conserving natural ecosystems and promoting social equality.

[CV9B] We stress the importance of sustainable economic and social transformation to eliminate poverty and meet the basic needs of the vast majority of the people of the world and reiterate the economic and social progress enhances the sustainability of democracy.

[CV9C] We are committed to removing wide disparities and unequal living standards as guided by internationally agreed development goals. We are also committed to building economic resilience and promoting social equity, and we reiterate the value in technical assistance, capacity building and practical cooperation in promoting development.

[CV9D] We are committed to an effective, equitable, rules-based multilateral trading system, the freest possible flow of multilateral trade on terms fair and equitable to all, while taking into account the special requirements of small states and developing countries.

[CV9E] We also recognise the importance of information and communication technologies as powerful instruments of development; delivering savings, efficiencies and growth in our economies, as well as promoting education, learning and the sharing of culture. We are committed to strengthening its use while enhancing its security, for the purpose of advancing our societies.

X.

PROTECTING
THE ENVIRONMENT

[CV10] We recognise the importance of the protection and conservation of our natural ecosystems and affirm that sustainable management of the natural environment is the key to sustained human development. We recognise the importance of multilateral cooperation, sustained commitment and collective action, in particular by addressing the adaptation and mitigation challenges of climate change and facilitating the development, diffusion and deployment of affordable environmentally friendly technologies and renewable energy, and the prevention of illicit dumping of toxic and hazardous waste as well as the prevention and mitigation of erosion and desertification.

XI.

ACCESS TO HEALTH
EDUCATION, FOOD AND SHELTER

[CV11A] We recognise the necessity of access to affordable health care, education, clean drinking water, sanitation and housing for all citizens and emphasise the importance of promoting health and well-being in combating communicable and non-communicable diseases.

[CV11B] We recognise the right of everyone to have access to safe, sufficient and nutritious food, consistent with the progressive realisation of the right to adequate food in the context of national food security.

XII.

GENDER EQUALITY

[CV12] We recognise that gender equality and women's empowerment are essential components of human development and basic human rights. The advancement of women's rights and the education of girls are critical preconditions for effective and sustainable development.

XIII.

IMPORTANCE OF YOUNG PEOPLE IN THE COMMONWEALTH

[CV13] We recognise the positive and active role and contributions of young people in promoting development, peace, democracy and in protecting and promoting other Commonwealth values, such as tolerance and understanding, including respect for other cultures. The future success of the Commonwealth rests with the continued commitment and contributions of young people in promoting and sustaining the Commonwealth and its values and principles, and we commit to investing in and promoting their development, particularly through the creation of opportunities for youth employment and entrepreneurship.

XIV.

RECOGNITION OF THE NEEDS OF SMALL STATES

[CV14] We are committed to assisting small and developing states in the Commonwealth, including the particular needs of small island

developing states, in tackling their particular economic, energy, climate change and security challenges, and in building their resilience for the future.

XV.

RECOGNITION OF THE NEEDS OF VULNERABLE STATES

[CV15] We are committed to collaborating to find ways to provide immediate help to the poorest and most vulnerable including least developed countries, and to develop responses to protect the people most at risk.

XIV.

THE ROLE OF CIVIL SOCIETY

[CV16] We recognise the important role that civil society plays in our communities and countries as partners in promoting and supporting Commonwealth values and principles, including the freedom of association and peaceful assembly, and in achieving development goals.

ASPIRATIONS

[CA1]

We are committed to ensuring that the Commonwealth is an effective association, responsive to members' needs, and capable of addressing the significant global challenges of the future.

[CA2]

We aspire to a Commonwealth that is a strong and respected voice in the world, speaking out on major issues; that strengthens and enlarges its networks; that has a global relevance and profile; and that is devoted to improving the lives of all peoples of the Commonwealth.

