Can the Commonwealth (Latimer House) Principles of 2003 serve as an Effective Framework for Safeguarding Democracy

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Can the Commonwealth (Latimer House) Principles of 2003 serve as an Effective Framework for Safeguarding Democracy and the Rule of Law in Commonwealth Countries?
ABSTRACT

The Latimer House Guidelines\(^1\) were written at the start of the new millennium some 11 years ago. After the Guidelines, other supporting documents have been churned out by the Commonwealth.\(^2\) The Guidelines present a framework for achieving separation of powers to enhance honesty, probity and accountability in government in Commonwealth countries. The outstanding question however is how well these guidelines do invoke Monsieur Baron de Montesquieu’s spirit in view of the current challenges faced by governments in Commonwealth countries? Do the guidelines present an effective framework for safeguarding democracy and the rule of law in the States concerned? These questions, chief among other issues are what this paper seeks to explore.

I. INTRODUCTION

Political theories like separation of powers and rule of law have oftentimes being regarded as mere abstractions. In this 21\(^{st}\) century, the urge to dismiss these concepts as antique philosophy is strong. Besides the cynicism and disregard for these concepts in some quarters, we must accept that they are the principles on which modern governance was built and are still the principles that hold our society together. 60 years ago, Sir Winston Churchill remarked:

> Many forms of government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-lies. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.\(^3\)

When this statement was made, democracy was relatively unpopular but today it has gained worldwide acceptance and gradually majoritarianism has pulled down totalitarianism.\(^4\) Though totalitarianism is rare now\(^5\) and democracy has gained (and is gaining) popularity, drawing differences between the past and current threats to our democracy is important. Tyranny and despotism have been replaced by subtle threats like cyberwarfare, surveillance and the over-protectionist policies of

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\(^{1}\) Hereinafter referred to as “the Guidelines”.


\(^{3}\) Winston Churchill, House of Commons, 11\(^{th}\) November, 1947.


\(^{5}\) China, Russia, Cuba, Venezuela and Russia are some of the prominent Socialist States.
government that limit citizens’ rights. It is at this point we realise the need for a balance in the power machinery of governance because though the executive, judiciary and legislature may sometimes act to safeguard state integrity, their actions may be *ultra vires*.

II. DEMOCRACY

Democracy is the world’s most accepted form of governance, but it has not been without flaws, therefore necessitating the constant redefining rather than an outright abandoning of the practice. Democracy and rule of law are mutually inclusive in practice. Democracy presses for the people rule while rule of law, law rule and basic constitutional law in many countries accede to the people as the sovereign and supreme law givers.

Both concepts are foundational principles of the commonwealth. The Declaration by the Commonwealth Prime Ministers creating the modern Commonwealth on 28th April, 1949 states:

> [T]he United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty, and progress.⁶

The Latimer house guidelines developed in Abuja in 2003 reiterated the commitment of the Commonwealth to the furtherance of democracy and the rule of law through the separation of governmental powers among the three branches of government.

To safeguard democracy and rule of law will be to safeguard the very tenets that give these concepts their identity. What then is the crux of democracy? And how is this core ideology safeguarded from contrariness?

A problem with concepts like this is the volume of literature but more heartening is the similarities among the literatures. The crux of democracy can be traced back to the practice of the ancient Greeks⁷; the word itself derived from the Greek words “Demos” and “Kratos” meaning *people* and *rule* respectively and conjoined to mean

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⁶ Declaration by the Commonwealth Prime Ministers creating the Commonwealth of Nations on 28 April 1949.
⁷ The practice of democracy dates back to 2500 years ago.
“people rule”. Therefore, democracy upholds the rule of the majority of the people with the belief that the state will be better off if popular will reigned.

Earlier, especially during the 17th century in America the fear of “majority tyranny” was a common theme, even among those who were sympathetic to democracy. Given the opportunity, it was argued, a majority would surely trample on the fundamental rights of minorities. James Madison and the other federalists at the convention shared this view and it strongly influenced the document they created. However, Madison’s views changed after reflection on and observation of the emerging American democracy.”

Prof. Massuh states that:

Democracy attempts to satisfy the will of the majority without sacrificing the minorities, to favour equality without ignoring differences, to make room for civil society without devaluing the role of the State, to preserve the rights of the individual without neglecting the general interest.

Popular control and political equality have been said to be at the core of democracy. Appadorai posits a range of principles including: political participation, political equality and the possibility of an alternative government. Aggregating these positions we find that regard for individual liberty first and then the collective voice of the people is the crux of democracy. Over the years, democracy has been safeguarded through the law, independent judiciary, devolution of powers, fundamental human rights and the help of an active and educated citizenry. However, chief among the safeguards of democracy is the rule of law.

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9 In a letter of 1833, he wrote, “…No government of human device and human administration can be perfect; … the abuses of all other governments have led to the preference of republican government as the best of all governments…the vital principle of republican governments is the lex majoris partis, the will of the majority”. Ibid.
11 Ibid, ch 2.
13 Ibid, 79.
III. THE RULE OF LAW

No democracy exists without the rule of law and the rule of law exists to create a democratic state. With its tenets of supremacy of the law, equality before the law and liberty, rule of law is a guarantee for a democratic government. The best legal system therefore balances individual rights with the state’s powers because, the power which the state can command is never absolute in a democratic setting as the legal sovereign must coexist with the political sovereign.

IV. SAFEGUARDING 21ST CENTURY DEMOCRACY: HOW DO THE LATIMER HOUSE GUIDELINES FARE?

On the surface, the Guidelines have few fissures if any at all in its bid to promote democracy and rule of law. But such position may be due to oblivion of the challenges and realities of modern governance. This paper makes some recommendations here in view of the Guidelines and while some are novel, others are only addendums to the Guidelines’ recommendations. The recommendations made here will be in regard to the interrelationship of the three arms of government.

A. EXECUTIVE-JUDICIARY

Firstly, we consider the issue of immunity clause found in the constitution of most democratic countries. Most executives in Commonwealth countries enjoy immunity from civil or criminal litigation in courts of the law. The rationale is that absence of immunity will lead to a floodgate of litigation against the executive but the case in many countries where immunity is non-existent renders the argument untenable. Immunity clauses have rather served the ends of the executive negating the

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14 The rule of law (also known as nomocracy) is the legal principle that law should govern a nation, as opposed to arbitrary decisions by individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behaviour, including behaviour of government officials. The phrase can be traced back to 16th century England, and it was popularized in the 19th century by British jurist A. V. Dicey. The concept was familiar to ancient philosophers such as Aristotle, who wrote “Law should govern”.

15 Some theorists have argued that the law in a state may promote autocracy but that argument has been debunked. The naturalists like St. Augustine say that “an unjust law is no law at all” (The Encyclopaedia of Language and Linguistics, Volume 4) and contemporary studies have revealed that any valid law must not run counter to popular will.

16 The origin of this in commonwealth countries is not far-fetched. For many years, the prevailing belief in Britain was that the monarchy could do no wrong. Encapsulated in the saying: “The Queen can do no wrong.”

principles of supremacy and equality before the law and serving as a blanket for the perpetration of corruption by public office holders.\textsuperscript{18} Immunity may not be the sole trigger but it is really one of the factors supporting corruption and the Guidelines only make a statement regarding the removal of immunity in the Plan of Action for Africa.\textsuperscript{19} It is mentioned among others and there are no proposed actions on it. Also, though Africa is a concern, corruption is not endemic to Africa alone and dishearteningly, the Guidelines do not say anything about this dangerous immunity clause phenomenon that only helps to wither public trust in public office holders. Furthermore, official corruption has been unabated even with the proliferation of anti-graft agencies in many Commonwealth states.\textsuperscript{20} More often than not, these agencies are directly linked to the executive, depending on it for allocations and appointments.\textsuperscript{21} Also, in many Commonwealth climes, these agencies work closely with the office of the Attorney-General (usually an executive appointee), the latter’s office approval before the former proceeds on any prosecution. Consequently, citizens have come to regard anti-graft agencies as mere tools for harassment of government’s opposition.\textsuperscript{22} The Guidelines recommend the establishment of accountability mechanisms\textsuperscript{23} like anti-graft agencies, human rights commissions and ombudsman but it fails in recommending modes of appointment to such accountability bodies that will promote rule of law and justice. Also, fairness will be upheld if anti-graft bodies can work closely with the legislature or judiciary through

\textsuperscript{19} \textit{Latimer House Guidelines Plan of Action for Africa 2005}, Item 2.4.4.
\textsuperscript{20} Traditionally, oversight agencies have been recognised as forming part of the executive branch of government. However, some of these agencies have features - including independence from direction, impartiality and qualified immunity from suit - that suggest they may occupy an unusual place in that branch.
\textsuperscript{21} In Nigeria, appointment to the major anti-graft agencies are on the executive’s recommendation. See Economic and Financial omission (Establishment) Act 2004 and Independent and Corrupt Practices and Related Offences Commission Act.
\textsuperscript{22} In Nigeria a prominent scandal was the one which involved petroleum subsidies. Many of the suspects (who are high-state actors or have connections to high-state actors) have not been brought to book and the chief anti-graft agency (the Economic and Financial Crimes Commission) alleges that it is impotent because the Attorney-General has stalled in authorising prosecution. See Tobi Soniyi, ‘AGF Says Indicted Fuel Marketers Won’t be Prosecuted’ (Thisdow, 5 July 2012) <http://www.thissdaylive.com/articles/agf-says-indicted-fuel-marketers-won-t-be-prosecuted/119380/> accessed 01/11/2014.
\textsuperscript{23} The Guidelines’ recommendations that these agencies should report to parliament is laudable.
A panel of inquiries which on discovery that the former has a *prima facie* case against any person, then order a prosecution. This open system will promote justice rather than the current trend where prosecuting corruption rises and falls on the executive arm.

**B. EXECUTIVE-PARLIAMENT**

Challenges like terrorism have made governance today even knottier. Occasionally, the executive which always regards itself as the bastion of state security is forced to take measures which tend to encroach on individual liberties. This phenomenon has always been prevalent in cases of emergency like in the U.S case of *Youngstown Sheet & Tube Co. v. Sawyer*. A common denominator is that such rash emergency acts of the executive are hardly effective. The recommendation made here is the enlargement of parliamentary powers on issues of national security to prevent avoidable conflicts. In the US such “inherent” powers have been reigned by parliament. The Case Act of 1972 sought to limit the president’s power to enter into secret agreements with foreign countries. The War Powers Resolution of 1973 further restricted the president’s power to wage war. Under the Resolution, the president was required to consult congress before committing troops to combat, to report to congress afterward and to withdraw the troops if congressional approval for the development was not obtained within 60 days. The Guidelines should incorporate such recommendations as the afore-stated seeing that there are no less than 15 Commonwealth states which perform poorly on the Fragile States Index.

More so, excessive linkage of accountability mechanisms to the executive has led to gross violations of the right to privacy because these bodies are mandated by the executive for surveillance, wiretapping and phone tapping that can be excessively protectionist. Here, the parliament should be made to play active role in the issue of state security and any measures like the above listed must have parliamentary

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24 The proposed panel of enquiries may be constituted by judges or parliamentarians.
26 Which they usually base on their “Prerogative” or “Inherent” powers.
28 On the Group Grievance indicator which measures internal conflict, these 15 countries score an average of 7.6 which is well above the normal and show a real presence of internal conflicts in some commonwealth States. The Index is part of the 2014 Fragile States Index published by the Fund for Peace.
approval (which may come indirectly through budget approval) but the Guidelines make no recommendations on this issue.

Another problematic area of modern governance is the issue of executive veto which the Guidelines though recommending executive and legislature cooperation is silent on. In the Westminster model, this is not overly problematic due to the fusion of executive and parliament. In the presidential system however, the situation can be chaotic with lawmakers and the president taking differing views on some sensitive issues like the budget that lead to deadlock in the polity. The mechanism of item veto has been suggested as a veritable tool. Here, the president can veto specific items on legislature or budget and return it for parliamentary consideration. This tool of vetoing specific items will aid expediency and help in the developing a responsible and responsive State which is the hallmark of a democratic state.

C. OTHER AREAS
Parliaments have failed to dissuade public distrust through the prevalent regime of remuneration. Many Commonwealth parliamentarians usually decide their remuneration packages which rank as some of the world’s largest pay packages for parliamentarians. The Guidelines should recommend the establishment of an Independent Parliamentary Standards Association that will determine lawmakers’ salaries.

Commonwealth states are among the most resource-rich in the world. This also has perpetrated corruption, internal conflict and the “Dutch Disease”. Some

29 Latimer House Guidelines, Item VI.
31 R. Maidment et al., ibid.
32 J.S et al., ‘Rewarding Work’ (Economist, 15 June 2013) <http://www.economist.com/blogs/graphicdetail/2013/07/daily-chart-12> last accessed 23/10/2014. Britain's legislators currently earn the equivalent of around 2.7 times the country's GDP per person, on a par with many rich countries. Indeed, their basic pay is relatively parsimonious when compared with that of their compatriots elsewhere. Lawmakers in poorer countries in Africa and Asia in particular enjoy the heftiest salaries by this measure. Kenyan MPs, known for their largesse, were recently stymied in an attempt to increase their salary from $75,000 to $120,000 a year.
33 Revenue Watch Institute, The 2013 Resource Governance Index: A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector (Report).
34 This refers to the over concentration on the extraction and trade in one mineral in a country. Collectively these three features have come to be known as the “Resource Curse”.
countries negotiate poor terms with extractive companies, forsaking potential long-term benefits. Many countries do not collect resource revenues effectively. And even when resource revenues do end up in government coffers, they are not always spent in ways that benefit the public. Oftentimes, governments keep citizens and civil society leaders in the dark regarding government contracts and resource revenues.\textsuperscript{35} However, many commonwealth countries have escaped the resource curse by instituting oversight and accountability mechanisms.\textsuperscript{36} Such policies strengthen popular support for government and enhance state legitimacy. The oversight recommendations in item IX should have added that public sector accountability will be enhanced through state’s publication of key financial statements especially strengthened by the need to promote zero-tolerance to corruption and a transparent and accountable government, together with freedom of expression, encouraging the full participation of its citizens in the democratic process.\textsuperscript{37}

Another area of concern in which the Guidelines is silent on is on the prevailing ouster clause doctrine. These are provisions in legislation that strip the court of its supervisory judicial function and prevent judicial review of the acts of any other branch of government."\textsuperscript{38} Ouster clauses have perpetrated executive and legislative rascality in some Commonwealth states\textsuperscript{39}, taking away the last hope of the common man—judicial review.

Also, some countries\textsuperscript{40} promulgate Freedom of Information laws which restrict the right to access the records of government-owned corporations and provincial governments. This is a huge blow to FOI seeing that such corporations are

\textsuperscript{35} Ibid.
\textsuperscript{36} For instance, Ghana’s current petroleum regime has been lauded as one of the world’s most transparent. This has been achieved through periodic disclosure of financial statements by the government. See Petroleum Revenue Management Act 2011 (Ghana), s. 8.
\textsuperscript{37} Latimer House Guidelines, Item IX.
\textsuperscript{38} This constitutional law doctrine has its origin in the 1688 Bill of Rights produced by the Glorious Revolution in Britain which read: “Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” (Bill of Rights, 1688, art. 9).
\textsuperscript{39} In Nigeria, courts are precluded from investigating on proceeding leading up to the impeachment of an executive. In the case of Inakoju v. Adeleke (2007) 2 MJSC 1, a state governor was impeached under clearly questionable circumstance (the aggrieved legislators had met in a hotel to start the impeachment process) but the court was rendered powerless by the ouster provisions.
\textsuperscript{40} Freedom of Information Ordinance 2002 (Pakistan).
corruption prone. The Guidelines make no recommendations for the removal of unnecessary bars to access to information.

Lastly, as the popular English adage remarks, “actions speak louder than words”. Therefore, without efficient monitoring mechanisms, recommendations are ineffective. Strengthening the commonwealth with effective monitoring mechanisms has long been a concern.\textsuperscript{41} There is no strong mechanism for monitoring the present implementation of the Guidelines. The Commonwealth Ministerial Action Group\textsuperscript{42} should be made to undertake this task. They should also develop objective criteria\textsuperscript{43} for determining serious or persistent violations of the Commonwealth’s core values, including human rights that would trigger its engagement with a member state to put remedial measures in place. The EPG report also recommends (and this paper concurs) for the establishment of the office of a Commonwealth Commissioner for Democracy, Rule of Law and Human Rights to provide well-researched and reliable information to the Secretary-General and the Chairperson of the CMAG on serious or persistent violations of democracy, the rule of law and human rights in member states, and to indicate approaches for remedial action. The CMAG can further publish annual reports which indicate the extent of member states adherence to the recommendations set out in the Guidelines. This will provide an effective system of advising and feedback and seeing that many commonwealth countries are emergent states, annual reports will serve as incentive to them and as reference documents for policy makers.

V. Conclusion

Finally, the purpose of a commonwealth has always been for the representation of the state as the common wealth of the society by creating a democratic society ruled by law.

The Commonwealth Charter signed by Her Majesty in the year 2013 provides a clear description of the core values of the Commonwealth in light of the current vicissitudes of governance. The tool of separation of powers upheld by the Guidelines promotes good governance and ensures that governmental arms


\textsuperscript{42} Created by the Millbrook Commonwealth Action Programme of 1995.

\textsuperscript{43} As set out in the Eminent Persons Group Report.
collaborate while avoiding ultra vires actions. The Guidelines published earlier in 2003 fail to incorporate many of the new realities and though serving as an effective safeguard in some areas, it is ineffective to meet some current challenges. A review of the Guidelines is recommended to make it in-tune with the times.

**BIBLIOGRAPHY**


