

Can the Commonwealth (Latimer House) Principles on Three Branches of Government 2003 serve as an effective framework for safeguarding democracy and the rule of law in Commonwealth Countries?

The world has changed significantly in the political, economic, legal and technological spheres since the Commonwealth (Latimer House) Principles on Three Branches of Government (hereafter referred to as the Principles) were formally articulated, and eventually endorsed by Commonwealth Heads of Government in 2003. Two examples of such changes in the legal realm from different regions of the Commonwealth, include the United Kingdom's Constitutional Reform Act 2005, which provided for the establishment of the Supreme Court of the United Kingdom, and the inauguration in 2005 of the Caribbean Court of Justice (CCJ), which replaced the Judicial Committee of the Privy Council as a court of last resort. These two examples are highlighted because of their wide-ranging impact on the judiciary, and in the case of Commonwealth Caribbean states, many parliaments now debate whether to join Barbados, Belize and Guyana in signing on to the appellate jurisdiction of the CCJ.

Resting on the foundations of the Harare Declaration and the Millbrook Plan of Action, the Principles were formulated following a sustained process of consultation which included representatives of key institutions, such as the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association, and the Commonwealth Legal Education Association. This essay supports the view that the Principles can serve as an effective framework for safeguarding democracy and the rule of law in Commonwealth countries, despite the fact that there are emerging challenges to democracy and the rule of law that have arisen since the finalization of these Principles. In particular, the essay will focus on three areas in support of this argument, namely the template that the Principles provide for Commonwealth members, the legal scholarship that the Principles have generated, and the institutional strength of the Commonwealth itself as a means of encouraging adherence to the Principles.

With respect to the Principles serving as a template, it is important to note that some guidelines are better than no guidelines. Though aspirational, the guidelines are comprehensive and provide recommendations that can allow willing governments to address the issues which currently hinder the promotion of governance that is transparent, inclusive, and accountable. The Principles aim for a harmonious balance among the Executive, Legislative and Judicial branches of government, which is a difficult challenge for many states. However, Commonwealth member states now have in the Principles a rudder which can guide them in their efforts to govern in a twenty-first century world that has complex and challenging issues. Many small, developing member states of the Commonwealth have challenges with respect to budget constraints, court administration, judicial training, and strong and stable governance. As a template, the Principles, which emerged from a long and collaborative process, can help these governments as they try to build strong political and legal systems. As former Commonwealth Secretary General, Rt. Hon. Don McKinnon stated in his Introduction to the Principles ‘What we now wish to see is the sharing of best practices and dissemination of agreed values and principles. This will enable member country to move to that optimum state of governance which is predicated on the rule of law in our Commonwealth member states.’¹

A key strength of the Principles is the breadth of coverage provided, and the setting out of important guidelines for the promotion of effective governance. As an international body with an estimated 1.7 billion constituents², having member states with varying governmental capacity, the Principles provide a useful template for states that are grappling with the challenges of safeguarding democracy. Indeed the Annex to the Principles notes that ‘It is recognized that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.’³

¹ Don McKinnon. Commonwealth (Latimer House) Principles on the Three Branches of Government (Commonwealth Parliamentary Association 2004) 2.

² Commonwealth (Latimer House) Principles on the Three Branches of Government (Commonwealth Parliamentary Association 2004) 3.

³ Parliamentary Supremacy. Judicial Independence. Latimer House Guidelines for the Commonwealth. (Commonwealth Parliamentary Association 1998) Annex, p. 16

The dissemination of the Principles therefore created higher expectations of Commonwealth governments and these Principles can serve as the yardstick by which citizens of the Commonwealth can measure the performance of their Governments and hold them accountable. In Section X, of the Principles, governments are encouraged to develop meaningful relationship with civil society. This ensures that there is a space and role for non-judicial and non-parliamentary institutions, many of which have assumed increasingly greater roles in the democratic process since the articulation of the Principles. In this regard, Commonwealth Secretary General Kamalesh Sharma at a 2008 ministerial meeting remarked ‘You have convened because you all know there is a continuing gulf between the rhetoric and the reality. Civil societies have also been engaged in the review of the Latimer House Principles.’⁴

As a testament to the impact of the Principles, *The Nation*⁵ newspaper in Colombo, Sri Lanka, published an article about claims by several Commonwealth bodies that Sri Lanka had ignored the Principles with respect to an impeachment motion moved against the Chief Justice, Dr. Shirani Bandaranayake. It is apparent that there is a heightened awareness of the Principles among Commonwealth Governments and that they are grappling with the Principles in various ways. The Sri Lanka situation is an example of a working out of Section IV of the Principles concerning the independence of the judiciary, particularly section (d).

It is evident, therefore, that among Commonwealth states, the Principles have generated meaningful dialogue, assessments and analysis. For example, John Halligan compared the performance of the three branches of government within the Australian

⁴Tangata Vainerere. ‘Latimer House Principles Reviewed’. Wednesday, 9 July, 2008. Secretariat of the Pacific Community. <http://www.spc.int/fpocc/index.php?option=com_content&task=view&id=115> Website accessed 16 October, 2014.

⁵ ‘Commonwealth Associations ‘Misjudge’ Latimer House Principles’. *The Nation*. Sunday, 16 December 2012. <<http://nation.lk/edition/latest-top-stories/item/13672-commonwealth-associations-%E2%80%98misjudge%E2%80%99-latimer-house-principles.html>> Website accessed 16 October, 2014.

Capital Territory (ACT) against the Principles.⁶ In his recommendations, he identified the shortfalls against the Principles, but noted the possibility of improved governance. This is precisely why the Principles are effective. They encourage introspection by governments, whether at the national or local levels and open the door for recommendations. Halligan also makes the important point that the ‘use of universal principles has to be related to a context.’⁷ He raises two relevant questions: ‘To what extent can certain principles be fully and appropriately realized in a small and intimate system of government? More generally the principles may pull in different directions: for example, how readily is branch independence to be reconciled with effective relations between branches?’⁸ Halligan’s assessment of the Principles resulted from the adoption of them by the Legislative Assembly of the Australian Capital Territory (ACT) in 2008. In adopting the Principles, the Assembly requires a re-evaluation of them in the second year following a general election. It is also interesting that in reviewing the Principles, David Skinner and Tom Duncan looked at Halligan’s ACT assessment and were encouraged by Halligan’s review⁹.

One could also reflect on the usefulness of the Principles in the case of the situation in Jamaica in 2009 during the tenure of former Prime Minister Bruce Golding. The issue related to attempts by the United States to extradite Christopher “Dudus” Coke, a Jamaican national who was charged by the United States of conspiracy to transport illegal narcotics to the United States and the trafficking in illegal firearms. There was the perception of interference and undue pressure on the part of the Executive with respect to the judiciary, which resulted in a delayed signing of the extradition order by the then Justice Minister and Attorney General, Dorothy Lightbourne. The handling of the Christopher Coke incident eventually led to the resignation of Prime Minister Golding. One of the recommendations in the 2011 Report

⁶ John Halligan. An Assessment of the Performance of the Three Branches of Government in ACT Against Latimer House Principles. (2011) ANZSOG Institute for Governance. University of Canberra.

⁷ Ibid.

⁸ Ibid.

⁹ David Skinner and Tom Duncan. ‘Reviewing the Commonwealth Latimer House Principles: The ACT Experience. (2013) 94 Parliamentarian.

<<http://content.yudu.com/A2570d/ParlIssueOne2013/resources/index.htm?referrerUrl=>> Website accessed 28 October, 2014.

of the Commission of Enquiry¹⁰ into the matter was that the positions of Minister of Justice and Attorney General should be separated, and that the Attorney General need not be a member of either House.

One could also argue that the Principles have led to increased discussion by legal and political scholars, thereby creating a significant body of scholarship. It is a testament to the importance of the Principles that their articulation has led to numerous books, journal and newspaper articles and incorporation by various levels of governments throughout the Commonwealth. The Principles have also fuelled debate about their relevance and practical application. Sir David Simmons, former Chief Justice of Barbados, for example, has discussed the executive control of discretionary matters such as judicial education in the Commonwealth Caribbean. He notes that 'in many small jurisdictions, including Barbados and Trinidad and Tobago, an application to attend overseas conferences has to be made to and approved by the Executive.'¹¹ This is an inescapable reality in some small and medium states with challenges such as funding, corruption, nepotism and political victimization.

This is also an important observation that is useful for other small states within the Commonwealth which may face similar situations relating to conflicts among the various branches of government. This is healthy dialogue that can only serve to enhance the role and capacity of the judiciary, and lead to further examination of ways in which a suitable balance among the various branches of government can be maintained. Scholarship has revealed, and can continue to unearth best practices which can be adapted by countries with similar issues and challenges. In addition, scholarship can also help to identify new themes or emerging challenges which will help to refine or revise the Principles in the future.

The institutional capacity of the Commonwealth itself is another reason for optimism that the Principles can be considered an effective framework for promoting democracy and the rule of law. In his assessment of the Commonwealth over the past

¹⁰ Report of the Commission of Enquiry into the Extradition Request for Christopher Coke. 6 June 2011.

¹¹ David Simmons. 'Aspects of Judicial Independence and Accountability – Lessons for the Commonwealth Caribbean?' (2007) 33 CLB 657.

sixty years, Peter Kucherepa notes that ‘the Commonwealth contains the largest global pool of parliamentary experts in the world. The Commonwealth Parliamentary Association (CPA) links together some 10,000 parliamentarians in virtually every region of the globe providing an effective source of governance consultation.’¹² Kucherepa further notes the capacity building role of bodies such as the Commonwealth Magistrates’ and Judges’ Association, and the Commonwealth Lawyers’ Association. Election monitoring, capacity building, human rights and accountability measurement are identified by Kucherepa as democratic governance structures of the Commonwealth.¹³ With respect to human rights, in a post-9/11 world of rapid legislative changes, the Commonwealth’s role in this area is even more important.

The Commonwealth Heads of Government meetings provide an opportunity for member states to assess each other’s achievements and to discuss actions by member states that are contrary to good governance and the rule of law. This has been evident in the past in which states such as Nigeria, Fiji and Zimbabwe have been ostracized and shamed based on actions inimical to good governance. The Principles therefore serve as a standard which can help to guard against actions by Governments that are undemocratic and unfair to their citizens. States tending towards failure have the weight of the Commonwealth as an institutional body and the good examples and practices of influential and friendly governments to look to. While it may lack the funding abilities of say the World Bank and International Monetary Fund, or the capacity to sanction or use peacekeeping forces in the case of the United Nations system, The Commonwealth has an enduring legacy of promoting the rule of law and good governance. The Principles that have been articulated over a long and consultative process by its members have been embraced and are being reviewed, interrogated and adopted. Citizens of the Commonwealth are hopefully being impacted in positive ways as a result of these Principles.

¹² Peter Kucherepa. The Commonwealth at 60: Purposeful and Focused Change for Common Wealth of Nations. Submitted to the Royal Commonwealth Society on Review of the Role and Mandate of the Commonwealth on its 60th Anniversary.

¹³ Ibid.

In concluding, therefore, it is fair to say that the Commonwealth (Latimer House) Principles on Three Branches of Government 2003 serve as an effective framework for safeguarding democracy and the rule of law in Commonwealth Countries. This essay has highlighted the significant impact of these Principles across a number of Commonwealth member states. Adaptation is occurring. Best practices are emerging. Civil society is engaged. Scholars still continue to analyze and discuss the Principles. While aspirational, the Principles are an effective framework for willing governments who desire democracy and the rule of law for their citizens. Many political, economic, legal and technological changes have occurred since the Principles were formally outlined and adopted by Commonwealth Heads of Government, and there will likely have to be a revisiting of the Principles in the near future in light of these changes and emerging areas of law and new threats to democracy and the rule of law. Nevertheless, the Principles are a standard and a beacon of hope which citizens of the Commonwealth deserve.

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