

“CAN THE COMMONWEALTH (LATIMER HOUSE)
PRINCIPLES ON THREE BRANCHES OF GOVERNMENT
2003 SERVE AS AN EFFECTIVE FRAMEWORK FOR
SAFEGUARDING DEMOCRACY AND RULE OF LAW IN
COMMONWEALTH COUNTRIES?”



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INTRODUCTION

Democracy and rule of law being the system of governing nations where the views and wishes of citizens are taken into consideration for the common good has received much attention in recent times. Ideal democracy and rule of law envisage a government devoid of all forms of arbitrariness and the protection of fundamental human rights. International organisations, corporate bodies, governments and citizens have all made various contributions on the best ways to safeguard this principle of governance. The commonwealth (Latimer House) principles on the three branches of government focus on a balance of power between the Executive, Legislative and Judiciary. In order to provide good governance for citizens, the Latimer House Principles were designed to aid the business of fair, efficient, transparent, and responsible commonwealth governments¹.

Although these principles are very instrumental in the safeguard of democracy and rule of law, they are not wholly sacrosanct in terms of serving as effective framework for safeguarding democracy and rule of law in the commonwealth countries. Despite the fact that the principles established the three arms of government with well defined functions of each, as clearly stated in the introduction of the Latimer House principles, the confidence, belief and trust that people have in their government is the ultimate litmus test², it would be improper for the Commonwealth Lawyers' Association, the Commonwealth Legal Education, Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association to purport to make principles for their citizens and not emphatically state the interest of citizens in the principles.

In addition, examining the origin of the Larimer House principles makes their practicability questionable, since usually it is the same arms of government who abuse the democratic and rule of law process causing citizens not to trust these "democratic" governments. Any representative of such government who purports to formulate any

¹ Commonwealth Secretary-General's Foreword to the Latimer House Principle, paragraph 22

² ibid

guidelines of democracy would be deemed untrustworthy unless otherwise is actually proved.

The principles are like a double-edge sword; hence their meanings could be construed in diverse ways. The nature of Latimer House principles only makes democracy and rule of law in commonwealth nations ideal for every government but very difficult to practically work them out. In recent times, general elections, a key pillar of democracy, have been a heavy task for most commonwealth states especially, the African states. The provisions on election are highly inadequate as they do not provide any comprehensive solution to handle this situation. The Latimer House Principles only concentrated on the balance of power between the three arms of government without addressing how these powers can be effectively changed from one party or individual to the other. This loophole in the principles could render the whole framework ineffective since in the end democracy and rule of law could not be safeguarded.

APPROACH TO THE STUDY

This study basically focuses on the black letter approach to examine the various published ideas and concepts of democracy and rule of law within the commonwealth countries.

Also analyses of some provisions of the Latimer House Principles on three branches of government, 2003 to determine how relevant these principles are in safeguarding democracy and rule of law in commonwealth states.

I will also approach the study through a jurisdictional perspective to figure out how other states safeguarded democracy and rule of law to make recommendations.

THE CONCEPT OF DEMOCRACY AND RULE OF LAW WITHIN COMMONWEALTH STATES

Democracy and rule of law are inseparable principles in an effective liberal state³. From the time of Montesquieu⁴, who thought of separating the powers of government to avoid

³ Commonwealth Education Online, Retrieved October 2014, from <http://www.commonwealthhealth.org/>

arbitrary rule, through to the Abraham Lincoln's⁵ time who also believed that the government of the people, by the people and for the people is democratic, many scholars have added their views to these interesting concepts. Notable among them is Rachel Kleinfeld Belton who identified some key elements of rule of law and democracy:

1. A government bound by and ruled by law;
2. Equality before the law;
3. The establishment of law and order;
4. The efficient and predictable application of justice and the protection of human rights.
5. The existence of comprehensive laws or a constitution based on popular consent;
6. A functioning judicial system;
7. Established law enforcement agencies with well-trained officers⁶.

The Commonwealth of Nations in an attempt to provide effective framework for safeguarding these concepts of democracy and the rule of law produced the Latimer House Principles on Three Branches of Government in November 2003.

Before the productions of there principles, there has been the historical development of the modern Commonwealth of Nations, and likewise, series of deliberations for a better framework to safeguard democracy and rule of law⁷. Although these principles have made remarkably, a lot of credits, the principles have not gained the historical trust of citizens and governments to actively subscribe to them. Apart from the United Kingdom, which had a practical experience of over centuries of democracy and rule of law, most of the states that played active role in the formulation of the principles like

⁴ His published work in 1748: *De L'Esprit des Loix* (On the Spirit of the Laws).

⁵ American President (1809-1865)

⁶ Cited in *Rule of Law: Essential Principles* ,Retrieved October 2014, from <http://www.democracyweb.org>

⁷ As stated in the foreword of the principles, "...there were debated and adopted by Heads of Government in Abuja in 2003, and - in being so - they greatly strengthened the existing body of beliefs and goals of this organisation, as set down in Singapore in 1971, Harare in 1991, and Millbrook in 1995".

Nigeria⁸ did not comparatively have any adequate experience on the subject. The question that comes to mind is to what extent were the framers of the principles influenced by their respective democratic states? By way of comparison to the advanced democratic states, how efficient are the Latimer House principles in safeguarding democracy and rule of law?

Non commonwealth nations like the United States of America and France are noted for developed framework which enhance rule of law and democracy⁹ such as good electoral systems. It could be inferred that, drawing inspiration from these developed democratic nations, the framers of the Latimer House Principle did not effectively take into account the necessary peculiar factors¹⁰ of each commonwealth state. The result is that subsidiary principles such as Plan of Action For Africa, April 2005 and Edinburgh Plan Of Action, July 2008 tried to remedy some of the ineffectiveness of the Latimer House Principle, 2003. This in effect, reduces the confidence of some commonwealth countries to regard the principles as an effective framework in safeguarding democracy and rule of law

THE LATIMER PRINCIPLES IN REALITY

The very first principle, recognises and establishes that Parliaments, Executives and Judiciaries in each commonwealth nation are the guarantors of good governance, protection of fundamental Human Rights and rule of law. The guarantee for these is expected to be based on the highest standards of honesty, probity and accountability which serve as a good framework for the safeguarding democracy and rule of law. However, this framework is ineffective since it does not expressly state the interest holding parties to which the three arms of government act as guarantors for good governance. The Parliaments, Executives and Judiciaries are guarantors of these elements of democracy and rule of law for which people or entity? One falls into the difficulty of having full grasp and knowledge of the entire Latimer House principles in

⁸ Abuja, Nigeria 2003, where the principles were debated and adopted.

⁹ Daniel J. Elazer ; *contrasting models of Democracy: The American and French Revolutions*. Retrieved October 2014, from www.jcpa.org/dje/articles2/contmodels.htm

¹⁰ such as the historical, social, cultural and economic factors

order to assume in whose or what interest, these arms of government act as guarantors. Such an omission could not be said to be of no consequential effect since it opens the doorway for uncertainties which renders the provision ineffective. It could be assumed that these arms of government guaranteed for the democracy and rule of law in dealing with the relationship between citizens and the arms of government by using the purposive approach for interpreting the principles. However, it could easily be argued that the guarantee is in reference to the exercise of the powers of an arm of government and the personality who exercises such powers and may also be a citizen.

The omission also suggests that, the framers had only the three arms of government in mind and formulated the principles to advance their interest at the expense of the citizens. Normally, democratic parliaments of commonwealth nations implies that the parliamentarians are the representatives of the people¹¹, likewise the executives and judiciary arms of government at any time exist for the supreme interest of the people. For instance, article 1(1) of the 1992 Constitution of Ghana provides that: "The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in the Constitution." So to formulate principles to regulate the activities of these arms of government without first stating emphatically the interest of which the principles are being guaranteed is fatal for the effectiveness of such principles.

If the Latimer House Principles have failed to mention for whom the principles are being guaranteed, how wrong would it be for these arms of government or persons assume that the guarantee for their own interest?

¹¹Annex, Parliamentary Supremacy Judicial Independence Latimer House Guidelines For The Commonwealth 19 June 1998

Guideline (I)

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may
2. 2 be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures

Evident in principle (II) of the Latimer House Principle, is the fact that the principles only focuses on the relationship between parliament and the judiciary (arms of government) and not how the arms relate to the citizens. Principle (VII) provides for accountability mechanisms, and throwing more light on the accountability mentioned in principle (I), the situation is worsened. The wording of the provision¹² does not suggest in the least sense that, these arms of government are ultimately accountable to the citizens. It only emphasizes executive accountability to Parliament and judicial accountability. If indeed, Parliaments, Executives and Judiciaries are the guarantors of the rule of law, protection of fundamental human rights and the entrenchment of good governance, how come they are accountable to themselves only? Under principle (IX), in addressing oversight of government, citizens are only encouraged to exercise their freedom of expression to enhance their participation in the democratic process and no direct link is made to the transparent and accountable government. For effective safeguard of these principles, accountability of the three arms of government to the citizens should not be implied but express so as to avoid any doubt or uncertainties.

CONSTITUTING THE ARMS OF GOVERNMENT EFFECTIVELY TO SAFEGUARD DEMOCRACY AND RULE OF LAW

Another factor which makes the Latimer House Principles ineffective in safeguarding democracy and rule of law is the principles inability to provide comprehensive guidelines on elections or how to efficiently and effectively constitute the three arms of government¹³. Most often the democracy and rule of law in commonwealth states break

¹²Guideline (VI) (b) of the Annex,1998 provides for Public Criticism:

- (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
- (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

¹³ Later development of the Principle in Edinburgh Plan Of Action, July 2008, an attempt was made by providing for good governance and accountability:Action(2.1) Elections: Bearing in mind the importance of the proper conduct of the electoral process to the realisation of the Principles:

All branches of Government have responsibility for lawful and timely conduct of that process. The Executive must ensure that there is an independent and autonomous electoral commission with powers and security of tenure guaranteed by statute. All Commissioners should be fully conversant with the Commonwealth's fundamental values, including the Principles. In observing elections, the Commonwealth Secretariat should continue to ensure that the members of the Observer Missions are fully aware of the Principles and actively apply them in their observations. All candidates for election should be fully aware

down when there is a transition from one party or individual to the other. The Latimer Principle 2003 only concentrates the balance of power and the smooth running of governments. Such principles in reality would be best recommended for a shared government or a government with minority in parliament. Realising this inefficiency, the later principles¹⁴ sought to provide quiet enough guidelines for the creation of the Judiciary. For instance Plan Action for Africa Principle (VI) on judicial accountability addresses the appointment, remuneration and removal of judicial officers. This could have been said to provide certainty and a more confident framework so as to entrust citizens' beliefs and aspirations in the judiciary. A case in point in recent times is, African commonwealth such as Kenya¹⁵ and Ghana¹⁶, where citizens are resorting to the Judiciary to address electoral disputes thereby promoting democracy and rule of law. Comparatively, if the Executive and Parliament had any such principle or guideline, it would be an effective framework to safeguard democracy and rule of law. However since it would be difficult to formulate effective practical principles to regulate the appointment, remuneration and removal of both executive and parliamentary officials of the commonwealth nations, comprehensive guidelines could be provided for the electoral commissions.

The need for ensuring unbroken existence of democracy and rule of law could effectively be captured under the principle of good governance and accountability. If each arm of government were to ensure that there is a peaceful transition of one democratic constitutional rule to the other, proper measures would be adopted to prevent the frequent breakdown or disturbance of democratic rule, and thereby safeguarding democracy and rule of law.

of the Principles. Judicial processes should be given appropriate expedition when hearing and determining cases relating to elections in order to guarantee the legitimacy of the election process. Determinations should be scrupulously respected.

¹⁴ Plan Action for Africa, Principle (VI) (1.)-(2)(b) and Edinburgh Plan Of Action Principle (IV) (a)-(d)

¹⁵ *Petition No. 5 of 2013*, retrieved on October 2014, from www.judiciary.go.ke/portal/full-judgement-presidential-election-petition-2013.html

¹⁶ *Nana Addo Dankwa Akuffo-Addo and others v John Dramani Mahama and others* (Presidential Election Petition, 2012) retrieved on October 2014, from www.judicial.gov.gh

CONCLUSION

I do not seek to underestimate the active role of the Latimer House principles in safeguarding democracy and rule of law. Inasmuch as I maintain that the principles are beneficial just that they are ineffective, a blind eye could not be turned to the weaknesses that renders the principles ineffective.

The Latimer House Principles as seen above do not carry the needed weight for their efficiency in safeguarding democracy and rule of law. The impact of the principles could be felt if commonwealth nations adhered to the principles effectively so as to make them appealing and exemplary to even non-member states. In the course of times, the historical records could be a motivating factor for their adoption since they would be tried and tested means of safeguarding democracy and rule of law.

It is highly recommended that a review of the principles would be necessary so to actively incorporate the interest of citizens and the peculiar socio-cultural changes for efficiency of the principles. The principles could draw inspiration from already existing developed democratic states but should not be just a copy, so that in the end, a more simple workable universal principle for the commonwealth without any additional regional principles or protocols could be produced.