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“ 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?”

Commonwealth is an intergovernmental organization of 53 states. The Latimer House building located in Buckinghamshire, England has a significant importance in the history of democracy. After losing the civil war from England’s Parliament, King Charles I was imprisoned in the same building before being taken to London. The building’s momentousness in terms of democracy was revived again in 1998 when three institutions of commonwealth¹ framed guidelines based on fundamental political values decided previously in Singapore and Harare declarations. These guidelines were endorsed later by the Commonwealth Heads of Government at their meeting in Abuja, Nigeria in December, 2003.

The significance of guidelines and objectives of Commonwealth principles will be discussed above

The relation between Parliament and Judiciary and their impact on Human Rights²:

Guideline I.1 attempts to sustain a balance between judiciary and parliament with respect to their constitutional roles. While the judiciary must subject interpretation of laws to the intention of Parliament, it must also have the authority to challenge the legitimacy of the law to secure the ends of justice and preservation of human rights. In countries where Parliament is supreme e.g. United Kingdom, the judiciary may issue a declaration of incompatibility³, while in countries where constitution is supreme, they may declare any legislation ineffective e.g. In Pakistan, the courts are well furnished with the power to declare any legislation abortive if it is not in conformity with fundamental rights of the constitution. In 2012, Pakistani Supreme Court used its powers under Article 8 of the Constitution to declare void the Contempt of Court Act

¹ The Commonwealth’s Parliamentary association, Commonwealth’s Legal Education Association and Commonwealth’s Judges and Magistrates’ Association.

² Guideline I

³ In United Kingdom after enactment of s.3 of the Human Rights Act 1998, domestic courts are required to interpret every statute in line with human rights law and if they can’t, they may issue a declaration of incompatibility. However, the legislation will still remain valid.

2012⁴. Indian Supreme court has derived the same power from Article 13(2) of the Constitution. In Sri Lanka, the courts do not have such a power but they may still create hindrance in enactment of any legislation while exercising their special constitutional jurisdiction⁵

Guideline I.2, I.3 and I.4 read together stipulate an extensive role of judiciary in protecting human rights. A.V. Dicey's third limb of rule of law emphasized more on the prominence of common law protection of human rights because common law rights are social values evolved over time corresponding to the needs of society and demands of justice. In spite of this, many countries have promulgated Bill of Rights or conferred rights in the constitution which leaves judiciary with a mere interpretational role, these guidelines demand judiciary to use purposive approach while interpreting any of those human rights instruments. This interpretative approach requires courts to step into the shoes of the draftsman and consider what the statutory objective of the legislature was⁶. By doing so, judges try to fill in the gaps because of parliament's inability to foresee the impacts of changing social and modern needs and the new scientific interventions in the society. Pakistani Supreme court in the case of *Shela Zia v. Wapda*⁷, while interpreting constitutionally guaranteed right to life, held that it includes right to a healthy environment. An example from United Kingdom is the case of *Ghaidan v. Godin-Mendoza*⁸, where House of Lords used a purposive approach while interpreting Rent Act 1977 to protect the rights of hetero-sexual widow under Article 8 and Article 14 of Human Rights Act, 1998. In Australia, s.30 of Australian Human Rights Act 2004 instructs the courts to interpret each law of the territory in line with Human Rights law⁹.

⁴ The enactment was to prevent a former prime minister from Contempt Proceedings, This was held to be a void legislative action - Constitution Petition No.77 of 2012 & CMA No.3057/2012 a/w Const. Petitions No.72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, and 103 of 2012.

⁵ Reeza Hameed and H J F Silva- 'Judicial review of legislative action in Sri Lanka' – Journal of Commonwealth Legal Education Association Volume 8 Number 2 Spring 2012

⁶ *Maunsell v Olins*[1975] AC 373

⁷ PLD 1994 SC 693

⁸ [2004] UKHL 30

⁹ http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/s30.html Last accessed at 15th October 2014 1:23AM

Guideline I.2 states that Parliament must incorporate International Human Rights law to give effect to their international obligations. While most of the countries have signed many international agreements, they flout them because there are no sanctions involved¹⁰ or they may be culturally resistant¹¹. The incorporation of Human Rights obligations into the domestic legal system can therefore ensure the protection and enforceability of human rights. An example of this is the current state of Human rights in United Kingdom after incorporation of European Convention of Human Rights by Human Rights Act 1998. However, the countries where IHRL is not incorporated, the judges are still required to use it as an aid to interpretation.

Preserving Judicial Independence¹²:

Guideline II of the principles endorses to ensure that administrative functions of judiciary are not exercise by executive in a manner which might underpin judicial independence. It demands all judicial appointments by a judicial commission or by another independent process¹³. This also embarks that the judiciary must be diverse and appointed on merit so that the public confidence may be uplifted. In many Commonwealth judiciaries, there is a male domination due to the cultural resistance towards the equality of women in the society. In 2012, United Kingdom had only 23% of female judges¹⁴. The situation is not much different in Pakistan. No woman has ever made it to their Supreme Court. Even in the lower courts, female judges are only 2.91% which they are bound to maintain at 33%.¹⁵ According to the first woman judge of the Canadian Supreme Court, Male judges have been unable to make neutral judicial decisions chiefly in the areas of tort, criminal and family law without considering the feminine perspective and it results into judicial

¹⁰ For example, Universal Declaration of Human Rights has a status of declaration which is not a legally binding document.

¹¹ Spaak and Tobern "Moral Relativism and Human Rights" - (Buffalo Human Rights Law Review , Vol. 13, pp. 73-86)

¹² Guideline II

¹³ Commonwealth (Latimer House) Principles 2003 Guideline II.1

¹⁴ UK AMONG WORST IN EUROPE FOR EMPLOYING FEMALE JUDGES

<http://www.theguardian.com/law/2012/sep/20/uk-female-judges-ratio-europe> Last accessed at 20th October, 2013

¹⁵ Pakistan is a signatory to CEDAW and Beijing Conference of 1995, see "PAKISTAN: Gender imbalance in Pakistan judiciary (Document ID :AHRC-FAT-022-2013)"

<http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-022-2013> Last accessed at 20th October, 2014

decisions which are not fundamentally sound and unjust.¹⁶ In such jurisdictions, enforceability of commonwealth principles can play a vital role in ensuring appointments to judiciary on merit and without gender discrimination. Majority of the Commonwealth countries e.g. Pakistan, Zimbabwe, South Africa, India and United Kingdom etc. have Judicial Commissions for the appointment of judges. However, many small developing countries do not have effective procedures for judicial appointments and judicial education for example In Jersey and Guernsey, judges are appointed by the Queen on the advice of Home Secretary without any independent judicial commission. The announcement is posted in an open court. In these two jurisdictions, the training of judiciary is difficult due to small numbers of judicial officers and unavailability of the law schools. They have to rely upon their neighbors for judicial education. In 1999, Jersey in pursuance of its obligations to commonwealth principles, issued a 5 years program for judicial and legal education (From 1999-2004) in order to educate the members of legal profession with the impact of the Human Rights (Jersey) Law 2000, training and communication skills which is a living example of Commonwealth principles providing effective guidelines to ensure rule of law.¹⁷

Preserving the independence of Parliamentarians¹⁸:

1. Freedom of Speech:

It is an exigency of the democratic values that MPs must have immunity from judicial proceedings so that the viewpoint of electorates can be enunciated without any encumbrance. The Guideline III.1 mentions Article 9 of the Bill of the Rights 1688 which undoubtedly confers a right on parliamentarians but does not draw a prominent distinction between the jurisdictions of judiciary and parliament. The courts do not annihilate any parliamentary privilege but may investigate the question that does the

¹⁶ Madam Justice Bertha Wilson, "Will women judges really make a difference?" (1990) 28 Osgoode Hall Law Journal 507, 512-515.

¹⁷ The Latimer House Guidelines and Their Implementation in Small Commonwealth Jurisdictions
26 Commw. L. Bull. 550 2000

¹⁸ Guideline III of the Commonwealth Latimer House principles

contested right actually fall under the scope of any guaranteed privilege¹⁹. The principle is well settled in many other jurisdictions. The courts of Tonga²⁰ and Papua New Guinea²¹ have acknowledged such rights. In Canada, Supreme Court held that the defendant speaker had the right to stop media from the coverage of parliamentary proceedings as it was an exercise of a constitutionally inherent privilege to exclude strangers from the House and its precincts.²² In Pakistan, Article 66 of the Constitution bestows a similar right upon the parliamentarians but judiciary has put some restraints to it e.g. In *Asif Ali Zardari v. Special judge*²³, it was held that parliamentary privileges did not entitle a member to attend session of National Assembly, while he was in custody as an under trial prison.

2. Floor crossing:

Whenever a MP changes his/her party allegiances, the government may be forced to resign due to a possibility of lack of majority. To prevent such situation, many jurisdictions have enacted 'Floor crossing' statutes whereby such member has to resign, the rationation is that electorates should not be misled but represented. A dissenting view is that parliamentarians must be bound by their consciousness and not the political party²⁴. In Pakistan, Article 63-A of the constitution demands such members to resign, but the proceedings can be initiated only by the head of the aggrieved political party. In South Africa, the legitimacy of floor crossing was abolished by the Fourteenth Amendment Act of 2008 and the Constitution Fifteenth Amendment Act of 2008²⁵.

¹⁹ Lord Denmore CJ: "Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons" (1839) 9 Ad. & El.1; 112 ER 1112, at p 1168

²⁰ In *Siale v Fotofili* [1987] LRC (Const) 240 at p 242. (Martin J stated: "certain privileges are well established. They are necessary for Parliament to function effectively. Their purpose is to enable members to carry out their duties effectively")

²¹ In *Maha v Kipo* [1996] 2 LRC 328 at p 331, Woods LJ stated "The Supreme Court has agreed that what is done within the walls of the Parliament in respect of its own procedures cannot be inquired into in a court of law"

²² *New Brunswick Broadcasting Co v Speaker of House of Assembly, Nova Scotia* (1993) 100 DLR (4TH) 212.

²³ 1992 PLD 430

²⁴ Andrew Harding 'The Westminster model 'constitution overseas transplanted, adaptation and development in commonwealth states' 4 Oxford U. Commw. L.J. 143 2004

²⁵ BOOYSEN, S 2006 "The will of the parties versus the will of the people? Defections, elections and alliances in South Africa", *Party Politics* 12(6).

- **The accountability mechanisms²⁶:**

1. Judicial Accountability and development of ethics:

The accountability of judiciary is paramount to fight against judicial corruption and to maintain public confidence in legal system but this accountability must not usurp judicial independence as observed in Pakistan when Chief Justice was removed from his office and later detained in his house because of his strong position on matters of public importance. In the due course, Pakistan's membership of Commonwealth was also suspended. This led to a big lawyer's moment which continued for two years and finally the Chief Justice was reinstated in March, 2009.²⁷

Guideline V asserts for development of judicial ethics, an aid to this provision may be the six values provided in Bangalore principles²⁸ namely judicial independence, impartiality, integrity, propriety, equality, competence and diligence. Many judiciaries like United Kingdom²⁹, Pakistan³⁰ and Eastern Caribbean³¹ have developed their ethics in compliance with this guideline.

2. Executive's accountability to Parliament:

Baron Acton's famous saying Power corrupts and absolute power absolutely corrupts³² is the corner-stone of Guideline VI.2. To avoid the abuse of power by the executive, Parliament must scrutinize the executive and ministerial actions through its committees, in house debates or by any other means. The use of select committees is a part of Westminster parliamentary system. A crucial role is played in scrutiny by the Public

²⁶ Guideline V and VI of the Commonwealth Latimer House principles(2003).

²⁷ Naveed Ahmad "the rule of law- A substratum of Justice" Journal of Commonwealth Law and Legal Association Volume 8, Number 2, spring 2012.

²⁸ Bangalore Principles on Judicial Conduct 2002, available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf, approved by the United Nations Commission on Human Rights in 2003 (resolution 2003/43) Last accessed at 00:06AM 24th October, 2014

²⁹ Guide to Judicial Conduct, 2nd supplement 2008, available at http://www.judiciary.gov.uk/docs/judges_council/judicialconduct_update0408.pdf, Last accessed at 00:25AM 24th October, 2014

³⁰ <http://www.supremecourt.gov.pk/web/page.asp?id=435> Last accessed at 00:25AM 24th October, 2014.

³¹ <http://www.eccourts.org/canon-1/> Last accessed at 00:29 24th October, 2014

³² Letter to Bishop Mandell Creighton, April 5, 1887 published in Historical Essays and Studies, edited by J. N. Figgis and R. V. Laurence (London: Macmillan, 1907)

Accounts committee chaired by the opposition leader to combat corruption by probing into financial matters of executive and MPs. Select committees also ensure the legislative scrutiny before it's passed. The requirement of establishment of office of Ombudsman is another step towards ensuring accessibility to justice for people who can't afford legal representation. The Ombudsman office in Pakistan since 1983 redresses complaints and provides relief to the public by carrying out independent investigations into complaints about '*maladministration*' in any Federal Government agency without fees or charges³³

3. Parliamentary Ethics:

A code of conduct for Parliamentarians is necessary to ensure the promulgation of laws and initiation of debates without any conflict of interest. Legislative members are all in a position to take major policy decisions and the process shall be without any influence or motivation. South African Parliament has developed its code of conduct for Parliamentarians which is seen to be really helpful in ministerial accountability and transparency. It requires all members to adhere to Selflessness, Integrity, Objectivity, Openness and Honesty.³⁴ Canadian Parliament has also developed a code of ethics which prohibit members from voting on matters where they might have direct pecuniary interest.³⁵ In countries where there are no hard and fast rules, the conflict of interest doctrine is overwhelmingly underpinned, A recent example was perceived in Pakistan when a petroleum minister and CEO of a private airline company was appointed as a member of decision making committee for his business competitor airline i.e. Pakistan's official airline service(PIA)³⁶.

³³ <http://www.mohtasib.gov.pk> Last accessed at 12:41PM 25th October, 2014.

³⁴ http://www.parliament.gov.za/live/content.php?Category_ID=83 last accessed at 6:05PM 25th October, 2014.

³⁵ <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch04&Seq=12&Language=E> Last accessed at 6:18PM 25th October, 2014.

³⁶ <http://www.thenews.com.pk/Todays-News-3-202633-JACPIAE-slams-intervention-of-Khaqan-Abbasi-in-PIA-affairs> last accessed at 6:36PM, 25th October, 2014.

- **The role of Women in Parliament and law making process** ³⁷:

The feminist contention that men while making laws do not take into account the implications which are faced by women in society is unruly³⁸. To counter that, women and men both must have equal representation in the parliament so that the laws against the gender balance and equality cannot be entertained. There are critical mass theories which say that women representation must be above a certain number otherwise the interests of female population can't be protected and on the other hand there are examples from member-states like Mauritius where the presence of 10% female representation in legislature was material to enactments like Sex Discrimination Act 2002 and Domestic Violence Act 1997³⁹. In 2005, Tanzania had met the 30% female MPs goal set by SADC. An examination of how their political system was effected due to it suggests that mere presence of women in the legislature is insufficient, they must come forward with the audacity to raise issues of female population which itself is difficult without extending the cultural parameters from a male oriented society to a gender balanced one. It was due to this female representation's demand through party caucuses and parliamentary standing committees that enactments like Tanzania Gender Networking Programme 2006 and the Sexual Offences Act of 1998 were passed. The role played by women in legislature has also attempted to change the views of society who are now aware that women are capable of leading and being good politicians.⁴⁰

Auxiliary to that, Guideline VII demands that all draft bills must be examined and shall be made open to public before enactment so that no retrospective, veiled or unjust laws may be ordained and after receiving a consented approval from the majority, the legislation must be sent to select committees which must exercise their perquisite to make or suggest amendments to the laws in light of public and expert criticism of the concerned laws.

³⁷ Guidelines IV and VII of the Commonwealth Latimer House Principles 2003.

³⁸ Davies, M. Asking the Law Question. (Sydney: Lawbook Co., 2002) second edition [ISBN 0455218110] Chapter 6: 'Feminisms'

³⁹ Yoon, M., and S. Bunwaree. 2008. 'Is a minority truly powerless? Female legislators in Mauritius' Asian Women 24, no. 3: 83102.

⁴⁰ Mi Yung Yoon- 'More women in the Tanzanian legislature: Do numbers matter?' Journal of Contemporary African Studies Vol. 29, No. 1, January 2011, pp. 83-98

- **The role of Civil Society:**

Hegel defines civil society as a distinct private realm of commerce, class interest, religion and other individual prerogatives, distinguished from the universal and encompassing power of the state.⁴¹ Pakistan in last few years has seen eminent and healthy alterations because of the pressure by the civil society. The prejudice caused to the rape victims by the *Hudood Laws* of 1979 was finally redressed in 2006 due to the awareness campaigns by women rights NGOs and media groups which occasioned the enactment of Female Protection Act, 2006⁴². Another huge movement was seen after the dismissal of the Chief Justice of Pakistan in 2007 by the dictator president. This led to a huge lawyer's movement and as a result he was finally reinstated by the new government⁴³. Civil Society has also played a huge role in democratization of many African countries⁴⁴.

- **Conclusion:**

While commonwealth principles are proficient of cultivating the democracy and rule of law in a worthier direction by mounting an independent role for various institutions of the state, it is hitherto another International contract which does not have a stringent binding effect. The concept of a single market was material to the advancement and consolidation process of Treaty of Rome into a complete European Union legal system. Commonwealth should also step forth and lend some more effort to develop policies with a focus to improve trade among its member-states so that every state obtains benefits from economic apparatuses like common markets which they may reimburse by maintaining their legal system in accordance with commonwealth guidelines and on their failure to do so, the commonwealth may impose trade restrictions. This will ramblingly make Latimer House principles enforceable.

⁴¹ Keane, "Despotism and Democracy," p. 50.

⁴² Shahnaz Khan- "Zina" and the Moral Regulation of Pakistani Women- Feminist Review No. 75, Identities (2003), pp. 75-100

⁴³ Naveed Ahmad "the rule of law- A substratum of Justice" Journal of Commonwealth Law and Legal Association Volume 8, Number 2, spring 2012

⁴⁴ See more at Lewis and Peter M, "Political transition and the dilemma of civil society in Africa" - Journal of International Affairs Volume 46 Issue 1.

Bibliography

1. Commonwealth (Latimer House) Principles, 2003.
2. Reeza Hameed and H J F Silva- 'Judicial review of legislative action in Sri Lanka'
Journal of Commonwealth Legal Education Association Volume 8 Number 2
Spring 2012
3. Spaak and Tobern- "Moral Relativism and Human Rights" - (Buffalo Human
Rights Law Review , Vol. 13, pp. 73-86)
4. Madam Justice Bertha Wilson, "Will women judges really make a difference?"
(1990) 28 Osegoode Hall Law Journal 507, 512-515.
5. Andrew Harding 'The Westminster model 'constitution overseas transplantation,
adaptation and development in commonwealth states' 4 Oxford U.
Commonwealth. Law Journal 143- 2004
6. BOOYSEN, S 2006 "The will of the parties versus the will of the people?
Defections, elections and alliances in South Africa", Party Politics 12(6).
7. Naveed Ahmad "the rule of law- A substratum of Justice" Journal of
Commonwealth Law and Legal Association Volume 8, Number 2, spring 2012
8. Davies, M. Asking the Law Question. (Sydney: Lawbook Co., 2002) second
edition [ISBN 0455218110] Chapter 6: 'Feminisms'
9. Yoon, M., and S. Bunwaree. 2008. 'Is a minority truly powerless? Female
legislators in Mauritius' Asian Women 24, no. 3: 83102.
10. Mi Yung Yoon- 'More women in the Tanzanian legislature: Do numbers matter?'
Journal of Contemporary African Studies Vol. 29, No. 1, January 2011, pp. 83-98

11. Shahnaz Khan- "Zina" and the Moral Regulation of Pakistani Women- Feminist Review No. 75, Identities (2003), pp. 75-100
12. Lewis and Peter M, "Political transition and the dilemma of civil society in Africa" Journal of International Affairs Volume 46 Issue 1.