

ELECTIONS AND BOUNDARIES COMMISSION

COMMISSION'S STATEMENT ON CONSTITUTIONAL REFORM

INTRODUCTION

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I recall that in September 2006, the draft of a new Constitution was published in the local press for public comment. Apart from a proposal in it concerning election of senators using a system of proportional representation and in respect of which the Elections and Boundaries Commission (EBC) was given the role of making a public declaration of the number of senatorial seats to be allocated to political parties under the proposed system, no other changes in the Commission's constitutional mandate was suggested insofar as the functions of the EBC are concerned.

As far as I am aware, the EBC was not consulted in connection with the preparation of the draft.

Then in January 2009 the Prime Minister laid in the House of Representatives a paper entitled *The Working Document on Constitutional Reform for Public Consultation*. In his statement in the House, the Prime Minister exhorted his colleagues in Parliament and the general public to subject, to the "utmost scrutiny", the proposals in the paper relating to: the Presidency, Parliament and its composition; Parliamentary Committees; Cabinet and Executive Powers; the Director of Public Prosecutions, the Judicature and Final Appellant Court; and the Service Commissions and the Bill of Rights. There was no attempt either in the document itself or in his exhortation, to remodel the Constitution in relation to electoral matters in so far as they affect democratic governance.

I wish to make it clear that the proposals made in this presentation are what the EBC considers to be fundamental components in the architecture of the Constitution in relation to electoral matters. Some may argue that the proposals are matters that should be dealt with by ordinary legislation and therefore not be included in the Constitution. To which I say, in just the same manner that the architecture of any structure is the style in which it is designed and constructed, the architecture of a country's Constitution should first and foremost reflect the style of its governance. The nuts and bolts of the construction, if you would pardon the mechanical analogy, would of course be provided in separate legislation in a manner similar to that, for example, in which registration of voters and the conduct of elections, functions of the EBC which are currently enunciated in the existing Constitution.

When one compares the basic conditions required of Governments under International Law for the establishment of modern-day electoral systems, with the provisions in the Constitution of Trinidad and Tobago, it is clear that those of the latter are jejune. The Commission, therefore, in response to the Prime Minister's invitation to respond to the proposals in the Working Document referred to earlier focused on the following:

- (i) definition and registration of political parties;
- (ii) funding of political parties and the regulation of campaign financing; and
- (iii) civic and voter education.

They are revisited here for the purpose of the current consultation. I shall deal with them seriatim.

DEFINITION AND REGISTRATION OF POLITICAL PARTIES

Although there is reference to the term political party in the provisions of the Constitution, there is no definition of it; neither is it in any other law extant in Trinidad and Tobago. A political party is an organised body having a legal personality consisting of individuals who undertake activities aimed at attaining the objective of governing a country on the basis of the provisions of the Constitution of the country and in accordance with its own Constitution. It is our view that such a definition should therefore be included in the proposals for the reformed Constitution.

Given the role political parties play in the life of an aspiring democratic society such as Trinidad and Tobago, if there was no other cogent reason for registering them beyond the fact that they are legal entities, then it would seem that a prerequisite that they should themselves be registered in order to participate in elections just as voters are required to do, is on the grounds of rationality and equity alone justified.

The Commission has concrete evidence to support its proposal to register political parties. The evidence is in the two matters to which I will now refer.

The first: The stage is the lead-up to the general election of 2001. A split in the National Executive of a certain political party occurred which resulted in one group who had submitted its own list of candidates, challenging the validity of a list of candidates supplied by the political leader of the party who belonged to the other group, the latter list being the one the EBC had deemed acceptable. An application to the High Court for judicial review of the EBC's decision was brought by the twelve dissenting members of the party. The Applicants' motion failed. It is instructive to refer to what Justice Allan Mendonca said in delivering judgement in the matter.

“... what is very apparent from the various communications between the Applicants and the Added Respondents and the EBC is that there are disputes as to who holds office of the General Secretary and the validity of the meetings of the National Executive, the National Congress and the Special National Assembly. To simply rely on the authority purportedly given by any of these bodies to anyone would be reckless unless the EBC were to attempt to properly construe the UNC Constitution. To do so the EBC would have to constitute itself a Court of Law and determine questions of mixed law and fact which it has no business of doing. In those circumstances it does not appear to me to be unreasonable for the EBC, which is charged with responsibility for the smooth conduct of elections, to say that it will act on a list supplied by the leader of the party where there is no dispute as to the holder of that office.”

The second: On this occasion it was the run-up to the 2007 general election. The United National Congress which previously had been awarded a symbol, applied for and received a variation of that symbol in order to accommodate an alliance with another party, the conjoint name being the United National Congress Alliance. Confusion arose at the time of nomination when several candidates supported by the alliance attempted to have themselves nominated under the name United National Congress Alliance with the modified symbol which properly belonged to the United National Congress. On that occasion the anomaly had to be drawn to the attention of the Alliance candidates by the EBC and accordingly, all of them had to be nominated under the banner of the United National Congress so that ballot papers could have been printed on time.

Incidents such as the two just described would have been avoided had there been legal provisions dealing with regulations, for example, governing the naming of a nominating officer with "...responsibility for the arrangements for the submission of bona fide representatives of a party of lists of names of election candidates and for approval of description of party symbols and use of such symbols on ballot papers."

I also cite in support of the EBC's proposal to imbed in a revised Constitution the proposal contained in the preliminary report *Political Parties and the Law* issued by the Law Reform Commission in 2000, in which it was recommended *inter alia* that "... a system of registration of political parties be adopted in principle."

In addition, it is also pertinent to note that six years after the Law Reform Commission's Report to which reference was just made, the Member of Parliament for Caroni East, Mr. Ganga Singh, in a meeting of the House of Representatives' Special Select Committee on *Financing of Political Parties* held on 27th October 2006, moved a motion seeking to appoint a Special Select Committee to: "make recommendations as to what principles and systems of financing of political parties would be appropriate in the public interest." In moving his motion, Mr. Ganga Singh said and I quote "... that there is this absence of a legal basis, a legal recognition in the laws of this country of political parties in the context of their registration, so that is a wrong we must put right." (sic), and he further went on to state, in response to an intervention from the Prime Minister of the day who suggested that such recognition should be relegated to "ordinary legislation",

"... it is an integral part of the democratic process and as you seek to create the architecture for governance of your country through the Constitution, then, therefore, you ought to create a role for political parties within the ambit of that Constitution, in order to enhance the democratic process."

POLITICAL PARTY FINANCING AND POLITICAL CAMPAIGN FINANCING

I begin this part of my presentation by quoting from an article in the *Journal of Democracy*, Volume 13, No. 4, October 2002 written by renowned and acknowledged international expert Dr. Michael Pinto-Dischinsky.

“Democratic elections and democratic governance,” he writes, “involve a mixture of high ideals and, all too often, dubious or even sordid practices. Election campaigns, political party organisation, pressure groups, and advertising, all cost money. This must be found from somewhere. The financing of political life is a necessity – and a problem.”

It is the dubious and sordid practices that contrive to harm the public interest directly or indirectly by contaminating and corrupting the electoral process, and thereby influencing political decisions that primarily suit sectoral or private interests – monopoly capitalists among others usurping political power in the corridors of government in the name of democracy. These practices usually fall within six categories viz.

- (i) *quid pro quo* donations, where political parties or candidates receive financial or other resources in return for favourable consideration;
- (ii) monies received from disreputable sources;
- (iii) use of moneys or favours derived from corrupt transactions for party or campaign financing purposes;
- (iv) parties or candidates misuse of State and Public Administrative resources for electoral purposes;
- (v) bribery of voters and election management officials; and
- (vi) disregard of existing legal provisions concerning party and campaign financing.

There is at present no incontrovertible evidence of any exchange of favours surrounding campaign financing in Trinidad and Tobago but there have been of late, many suspicions and allegations in the Press and in the public domain, many calls by the media and by the general public for the enactment of legislation to control campaign financing. Incontrovertible evidence, notwithstanding a comparison, for example, of the huge levels of estimated expenditure incurred in media advertisements in recent elections, with the paltry sums allowable for election expenses in the provisions of the Representation of the People Act, suggests a high probability that sources of funding beyond the financial means of candidates and political parties were available. One may fairly ask, what is the source and what was the *quid pro quo*? Suspicions abound.

The most recent allegations of bribery in West Indian politics were made following the February 21st, 2013 general elections in Barbados. It was reported that the newly elected Prime Minister was “... perturbed at a new development that had engulfed the local politics where voters were being bribed.” Said the Prime Minister:

“In this election when these corrupters of the youth no longer feel they have to hide and commit their nefarious deals. I will be looking at all the laws relating to elections and I am going to stiffen them because an example has to be made of those people.”

These sentiments were similarly expressed by the recently appointed Attorney General of Barbados:

“When persons are willing to sell their votes, it really saddens me that this has become a part of our landscape. It means that we as politicians have to play a role and put up our hands and say that it is something we will not encourage.”

In his paper, Pinto-Duschinsky gives examples of the corrupt practice involving acceptance of money in return for unauthorised favours or the promise of such, in a sample of countries including Brazil, Croatia, Ecuador, Germany, India, Italy, Japan, New Guinea, South Korea, Spain and the United Kingdom.

In addition to the recommendation concerning the need to register political parties, the Law Reform Commission in its report on *Political Parties and the Law* which was referred to earlier, also recommended that statutory limitations be put on election expenditure.

In the presentation of his motion in the Special Select Committee of the House of Representatives on *Financing of Political Parties*, the MP for Caroni East also argued for the introduction of some legislative system whereby it would be mandatory for political parties to disclose contributions made to them by individuals or corporations. Hear how representative Singh ended his contribution.

“Mr. Speaker, it is clear that we can no longer depend on this free-for-all, laissez-faire system which is currently in place today. Therefore this motion is an attempt to bring about cross-party support by way of a Special Select Committee of the Parliament for an issue that ought to be placed on the front burner of institutional change as we proceed to the much vaunted 2020 developed-nation status.”

I am not aware that any Special Select Committee arising from Mr. Singh’s motion was ever established.

Enter Professor Ramesh Deosaran who three years later in 2009 in the Senate moved a motion on *Financial Support for Election Campaigns* seeking to have:

“... Parliament appoint a Joint Select Committee to consider establishing a legislative framework to govern the financing of election campaigns and to submit its report with recommendations to both Houses of Parliament within six months of its appointment.”

After three days of debate when the question was put, fourteen members agreed to the motion; and fourteen abstained. The question was agreed to and the resolution was passed.

If any positive action arose from the passage of that resolution then I am not aware of it.

In concluding this part of my presentation, I wish to point out that the Elections and Boundaries Commission communicated with Government by way of a Cabinet Note EBC (2011) dated 25th November 2011, recommending that action be taken to introduce legislation to deal not only with the registration of political parties but also with political-party and political-campaign financing. No response has as yet been received to that initiative.

CIVIC AND VOTER EDUCATION

The connection between education and democratic governance was made by Aristotle when he wrote:

“But the greatest of all the means to secure the stability of constitutions (...) is a system of education suited to the constitutions.”

It is therefore up to those responsible for reforming the constitution to incorporate within it a new architectural feature relating to a function that would create through whatever legislative device is used to perform it, an environment in which the values of democracy are understood and acted upon by the general public.

In Trinidad and Tobago there is a need to distinguish between civic education which is the kind of education Aristotle had in mind and which would lead to choices beyond political, ethnic, religious or other affiliations, and on the other hand, voter education which is the means to ensure voter participation in the electoral process.

The matter is of crucial importance at this juncture in the country’s development. Enslavement to ethnicity and tribalism would forever be exploited by politicians for selfish means. The result is that the country is at risk of becoming a dysfunctional democracy if it is not already one such, and heading for failed-state status.

In multiethnic Trinidad and Tobago it is necessary to declare in the supreme law of the land a function that would provide a system of civic education suited to the promotion and sustainment of democracy.

FIXED ELECTION DATES

For reasons which are self evident and therefore in no need of being repeated here, the Commission supports inclusion of a provision in the amended Constitution for fixed election dates for all national elections, viz. Parliamentary, Local Government and Tobago House of Assembly. The current state of affairs is as follows:

PARLIAMENTARY ELECTIONS

According to Section 49(1) of the Constitution of Trinidad and Tobago, every member of the House of Representatives shall vacate his seat in the House at the next dissolution of Parliament after his election.

Section 68(1) announces that the President acting in accordance with the Prime Minister may at any time prorogue or dissolve Parliament and sub-section 68(2) provides that subject to sub-section 68(3), Parliament unless sooner dissolved, shall continue for five (5) years from the date of the first sitting after any dissolution and shall then stand dissolved. But special provisions may be necessary in a case of a failure of a government in office or in the case of a bye-election.

Note: The first sitting of Parliament after the general election held on 24th May, 2010 was Friday 18th June, 2010.

LOCAL GOVERNMENT ELECTIONS

The term of office of Councillors shall be three years, and they shall retire together on the last day of every triennial period, the first of which shall be deemed to have begun on the day the Councillors were elected.

For example, the last local government elections were held on 26th July, 2010. Therefore by Section 11(4) of the Municipal Corporations Act, Chap. 25:04, the term of office of Councillors ends on 25th July, 2013.

According to Section 11(4A) of Chap. 25:04, a fresh election must be held within three (3) months of the expiry of the terms of office of the Mayor, Councillors, and Aldermen comprising the Council.

TOBAGO HOUSE OF ASSEMBLY (THA) ELECTIONS

By Section 22 of the Tobago House of Assembly Act, Chap. 25:03, the Assembly shall continue for four (4) years from the date of its first sitting after any primary election, and shall then stand dissolved, unless the Assembly by resolution dissolves itself at an earlier date.

The current Assembly was inaugurated on 24th January 2013.

It is to be noted that it is the President who after consultation with the Prime Minister and Chief Secretary of the THA fixes the date of a primary election, which date shall not be earlier than two (2) months after the dissolution of the Assembly nor later than the expiration of three (3) months after that dissolution.

If this proposal is accepted then Part III of the current Constitution which deals with summoning, prorogation and dissolution in respect of Parliamentary sessions would need to be amended appropriately, but a general statement containing the proposal in the amended Constitution could be detailed in the specific pieces of legislation dealing with Local Government and Tobago House of Assembly elections i.e. Chapter 25:50 and Chapter 25:03 respectively.

OTHER MATTERS

1. INDEPENDENCE OF THE COMMISSION

Since independence when there were two separate Commissions: one for boundaries and the other for elections and, from 1976 when they were amalgamated into a single body: the EBC, all have frequently been accused by political parties and by others of being in some way or other acting in collusion with the government of the day. This probably has its genesis in the arrangement whereby all communications with the government have been and are always through the Office of the Prime Minister. In

point of fact it is the Prime Minister who submits and presents the Commission's notes to Cabinet, a circumstance which has led some to the not-unreasonable view that the Prime Minister is the line Minister of the EBC. The perception borne of such speculation has done little to improve public confidence in the independence of the Commission.

In order to restore public confidence, the Commission feels that it must be entirely independent of government from every possible perspective and be seen to be such. It is suggested that it is only upon bedrock fashioned in the spirit of such independence that the cornerstone of our democracy could be firmly and confidently laid.

Apart from the aspect of communication to which reference was just made, other circumstances giving validity to the view that the commission is a departmental body of government is the fact that its budgetary allocations are treated in precisely the same way as ordinary departments under the control of government ministries. That is to say the budget of the EBC is subject to the dictates of the public service. Further, it is subject to the laws of delay that bedevil human resource recruitment through the Public Service machinery. As is being proposed for the Parliament Department, it is recommended that the Department of the EBC be delinked from the Public Service.

The Commission is therefore of the view that the most realistic and practical way of reflecting and reinforcing its independence and impartiality is to have it directly accountable to Parliament, its contact with that body being through the Chairman of, say, a Standing Committee of the House of Representatives. In this way the Standing Committee could, with oversight from, say, the Comptroller of Accounts and the Auditor General set the Commission's annual budget and review its development plans. Apart from its reports on Boundaries and on Elections which are submitted to the Prime Minister and others, the EBC should be required to submit annual reports on its performance to Parliament.

2. STRUCTURE AND COMPOSITION OF THE COMMISSION

As regards the composition of the EBC, the current provisions of the Constitution provide *inter alia* for a Chairman. It does not state whether this position is full-time or part-time. However, the *Deyalsingh Commission of Enquiry into the Functioning of the Elections and Boundaries Commission* took the view that there should be a full-time Chairman: "... if the EBC is to fulfil its functions under the Act." (Representation of the People Act, Chap 2:01)

The current Chairman who was appointed with effect from 4th December 2005 has been functioning, on his own initiative, on a full-time basis since then. In the *Eighty-ninth Report of the Salaries Review Commission (SRC)* and for the first time, a distinction was made between a full-time and a part-time Chairman of the EBC. In this connection it is interesting to note that the terms and conditions specified in the reports of the SRC prior to 2009 for the previously unclassified position of Chairman, which in effect applied to the predecessor of the current Chairman who functioned exclusively on a part-time basis, were simply applied to the position designated full-time in the 2009 SRC

report referred to earlier; in other words, the pre-2009 salary for part-time Chairman was identical to the salary for full-time Chairman in the 2009 salary proposal.

My experience over the past seven years convinces me that the position of Chairman of the EBC should be a full-time one. A copy of the job description for the position of Chairman, EBC is attached hereto. Further, it is noted that the organisational structure of kindred Commissions such as the Public Service Commission, Integrity Commission and the Equal Opportunity Commission includes an office of Deputy Chairman.

A Deputy Chairman's principal responsibility is to function as Chairman when the substantive holder is unable to do so for one reason or another. It is therefore recommended that a position of Deputy Chairman, EBC be established. In 2005, when the Chairman of the EBC proceeded on five months' vacation leave, to which he was entitled, ad hoc arrangements had to be made by the other Commissioners for conduct of the Commission's business.

If the recommendation for creation of an office of Deputy Chairman fails, then it is recommended that a provision be made in the provisions relating to the EBC in the Constitution similar to that in Sections 103 and 117(2) respectively in the Constitution, whereby where the office of Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of the office, a locum may be appointed by the President after consultation with the Prime Minister and Leader of the Opposition; and similarly where the Auditor General is unable to perform the functions of the office, the President may act in a similar manner as in the case of the Chief Justice.

CLOSURE

With respect to provisions relating to electoral matters this Paper makes a case for remodelling of the architecture of the current Constitution of Trinidad and Tobago to reflect tenets that should foster every manifestation of exuberant democratic governance.

The Paper does not argue for the inclusion in the Constitution itself of the nuts and bolts legislation necessary to put such principles into effect. What it is saying is that the Constitution should be so stylised as to serve as a literal and symbolic representation of the truly democratic nature of a dynamic state: a signature expression of a state affianced to democratic governance on the go.

The principles undergirding the recommendations in the Paper are based on electoral standards which have emerged from international review of practices of democratic States, and deal with the rights and responsibilities of governments in relation to (i) registration of political parties; (ii) regulating funding of political parties and electoral campaigns with a view to promoting equality of opportunity; and (iii) conducting national programmes of civic education with a view to promoting an awareness of electoral issues including familiarising the population with election procedures and encouraging active participation in elections.

The Commission considered it unnecessary, for obvious reasons, to produce argument in support of the proposal to have fixed dates for national elections and accordingly expressed its wholehearted agreement with it.

In the current Constitution of Trinidad and Tobago the obligation to register voters and conduct elections is entrusted to the EBC who implements the relevant legal provisions by way of, for example, the Representation of the People Act, Chap. 2:01. By a similar token, the recommended elements related to elections in the remodelled Constitution should be included in a widened remit of the EBC. The Representation of the People Act could then be suitably amended, and the organisation of the Department of the EBC restructured to accommodate implementation of the additional functions.

The point has also been made in the Paper that provision be included in the reformed Constitution for the EBC to be restructured by providing for a Deputy Chairman as obtains in the organisational structure of the Public Service Commission, Integrity Commission and Equal Opportunity Commission and to be completely independent of the government; its Department delinked from the Public Service and the Commission made accountable to Parliament not only for reports on the delineation of boundaries and elections but for all its activities.

The proposals contained in this Paper were previously submitted to Government sources in response to requests for comments on certain working documents received from the Office of the Prime Minister. The Commission's most recent submission to Government is a Cabinet Note dated 25th November, 2011 on the subject *Enactment of a Legislative Scheme enabling Registration of Political Parties and the Enhanced Monitoring of Political Parties and Campaign Financing*. In that Note the Commission recommended to Government "the enactment of a reform scheme enabling the registration of political parties and the enhanced monitoring of political party and campaign financing in Trinidad and Tobago. No response was received either by way of acknowledgement or otherwise, which brings me to the statement made by the late C.L.R. James in his book on *Party Politics in the West Indies* and which was quoted by Mr. Ganga Singh in wrapping up his contribution on his motion in the Special Committee Meeting on Financing of Political Parties referred to earlier in this Paper.

"Political leaders in the West Indies discuss everything except serious politics. The most backward elements in the West Indies are politicians. They are a dead weight on the West Indian People (...) not one of them, not a single one, has had the intelligence or the courage to tell the people what the real problems are. And that is particularly wicked and vicious because the people know, they are aware that all is not well, that there are realities which all the talk does not touch."

C.L.R. James wrote these words a little over fifty years ago. The question is: Do they still ring true of today's politicians? Let us through the reformation of our Constitution by giving "power to the people" prove that they do not.

N J Masson
Chairman
27th February, 2013