

Constitutional reform – Inside the News 17-9-16.

INTRODUCTION

This is a very pertinent and important topic after 33 years of experience, especially when very little has been achieved in that time by way of reform. We must however address the topic realistically. We must bear in mind that the constitution contains entrenched clauses, that is clauses which can only be removed or changed by a two thirds majority in the National Assembly followed by two thirds majorities in separate referenda in St. Kitts and Nevis. We must accept that the chances of changing any of the entrenched clauses in today's St. Kitts and Nevis are virtually nil. I will list in summary the main entrenched clauses and, if that is considered useful, discuss why in today's political and social environment, the chances of changing them are virtually nil.

There is a more realistic chance of changing some of the clauses that are not entrenched. These can be changed by the National Assembly on a two thirds majority. I will list some of those on which I advocate change. I believe however that the interests of our country at this time require that we broaden the discussion beyond purely constitutional provisions and look at governance generally. The constitution contains the framework for governance but it was never intended that it should stand alone. Every country which professes to be a constitutional democracy builds on its constitution to achieve better standards of democracy and governance. It is relevant therefore to include discussion on ways of building on the constitution to improve and enhance the structures under which we are governed and the standards applied to those who govern us. Those principles are described commonly as seeking greater transparency and accountability. Call them what you may everybody knows what I mean.

I propose to summarise those provisions which are entrenched and

which therefore are not worth discussing in detail at this time; then to look at those which are not entrenched and proposing amendments and additions; then to look at transparency legislation needed to supplement the constitution to improve our democracy and governance.

Let me end this introduction by recording that all sides of the political divide agree on the need for transparency legislation. The last government passed procurement legislation in 2012. The Procurement Act as it is called deal with processes for purchase by government of goods and services. Not surprisingly it went completely under the radar. It can and should be strengthened and enhanced for greater effect. The last government passed an Integrity in Public Life Act in August 2013. That Act was never brought into force. Perhaps in the volatile political climate the powers that were had second thoughts. That Act is severely defective for reasons which I will give. The last government, with costly outside expert assistance, held extensive discussions about Freedom of Information legislation. I was invited to participate in those discussions with a wide cross section of the community. Nothing further happened but the government of the day expressed its commitment to such legislation and I never heard it back away from that commitment.

The current Unity government based its successful campaign in 2014-15 on the need for better governance and for legislation to make it more difficult for a repetition of the governance abuses of the past. So it is a fair assumption that at least in principle the country is united in support of legislation in those areas. All political sides also claim that we need to end the political tribalism that holds back the progress of the country. What better way then, at this time when we should be taking an honest look at ourselves, than to pursue serious discussion on areas in which there is agreement?

ENTRENCHED PROVISIONS

- Chapter 1- the description and territory of the country and the supremacy of the constitution
- Chapter II- the fundamental rights and freedoms

- The establishment of the office of Governor General (GG) and the authority vested in that office.
- Establishment and composition of the National Assembly (NA), the election of Representatives and the appointment of Senators
- Establishment and composition of the Electoral Commission and the office and functions of the Supervisor of Elections
- Powers of the High Court to determine questions of membership of the NA
- The powers of the NA to make laws
- The provisions for summoning, proroguing and dissolving the NA and for the timing of elections
- Establishment and functions of the Constituency Boundaries Commission
- Establishment and functions of the DPP
- Chapter VI containing the finance provisions including establishment of the Consolidated Fund, restrictions on withdrawals from it and establishment of the office of Director of Audit
- Chapter VII providing for the Public Service
- Chapter IX containing the powers of the courts in interpreting and enforcing the constitution.
- Chapter X containing the provisions for government in Nevis and including the notorious Clause 113 on secession
- Schedule 2 providing rules for delimiting constituencies
- Schedule 5 setting out the exclusive legislative powers of the Nevis Assembly
- Provisions of the Supreme Court Order establishing the Supreme Court and providing for the appointment of the Chief Justice and Judges of the Court and the tenure and remuneration of Judges and the establishment and functions of the Judicial and Legal Services Commission all intended to protect the independence of the judiciary from the executive and legislature

NON ENTRENCHED PROVISIONS which I advocate:

1. Prime Minister and Ministers of Government- the provisions

establishing the executive i.e the office of PM and Ministers of Government are not entrenched. This means that changes can be made without referenda to the executive structure of the government. More particularly, term limits can be imposed on the Prime Minister. My preference is that, for purposes of symbolism if not legally necessary, this be done by constitutional amendment (with a two thirds vote of the National Assembly). It seems that the present Government, having promised term limits, intends to impose them by legislation. I make no comment on it as I have not seen the legislation which seems to be a secret. Suffice it to say that this would be a significant way of preventing the rule of law becoming the rule of man as it almost did. I have a whole chapter on that in my book. This amendment is badly needed to check the excessive powers given to the Prime Minister by the Constitution. These powers cause our system to be characterized by constitutional experts as “dictatorship by Prime Minister.”

2. An amendment is required to the constitution to set a time limit of 14 days for the Speaker to put a Motion of No Confidence before the National Assembly. That should go without saying but the 26 month election showed that respect does not exist across the board for that convention. St. Vincent has that provision as do other countries. The MONC is an important check on the extensive powers given to the PM. A PM and/or a Speaker beholden to him, should not be allowed with impunity to block the process. The Courts should be given express power to enforce the tabling of an MONC.
3. Other checks and balances should be added to the financial provisions of the constitution by way of a) a clause requiring a balanced budget except in exceptional circumstances and with a two thirds approval of the National Assembly and b) a ceiling for government debt by reference to GDP. This country almost blew itself out of the water in debt. Were it not for the timidity of its creditors in capitulating to the haircut the economy would now probably be suffocating. But as it is the country's reputation as a barber remains and will not go

- away quickly. Unity promised action on these measures.
4. Provisions should be added to the constitution to provide for issue ballots on specific issues. That would take the tribal politics out of important issues and allow people to vote their conscience. That would help to promote issue based politics. One issue that would be perfect for that type of ballot would be whether or not we should move from the Privy Council to the CCJ as our final court of appeal.
 5. An amendment should be made for the election of the Speaker of the National Assembly at the time of each general election. The Speaker should not be anybody's puppet.
 6. The Bryant clause should be removed. Any resident citizen (other than one who bought a passport) should be eligible for election to the National Assembly.
 7. The dual nationality disqualification should be removed.
 8. Access to the Government media should be guaranteed by the constitution. Although the courts have ruled that such access is part of the fundamental right of free speech governments have consistently ignored that right. The present government has signaled an intention to effect reform in relation to ZIZ. The best way to do that would be by constitutional amendment followed by legislation which gives teeth to the right.

TRANSPARENCY LEGISLATION

1. A Procurement Act was passed in 2012. It establishes a process for procurement of goods and services by government the stated purposes including increased transparency. I doubt very much whether the Act changes anything in the prior procurement process in that the process is still handled entirely by public servants. We know sadly the extent to which the public service has been politicized. There is a review mechanism but the Review Board is appointed by the Minister in his own absolute discretion. That process is open to the accusation that favoritism in the process can still easily be implemented. This legislation should be reviewed to give real effect to its well stated purposes so that they are not just bald words. There is

in my opinion a role here for the Auditor General but that would require his office to be buttressed and properly funded so that the proper resources and expertise can be made available.

2. The Integrity in Public Life Act 2013 has some good features. It has a Code of Conduct for public officials which is quite extensive. It requires public officials to declare their assets and liabilities and their income to an Integrity Commission but that's where its usefulness ends. The Commission comprises an independent Chairman and two members one nominated by the PM and the other by the Leader of the Opposition. But these are the very people who have to declare their assets.

That is a clear conflict of interest. The legislation does not have real teeth for enforcement. It should be revisited with the benefit of study of systems all across the world from which we can benefit. Good work has been done in Jamaica and Trinidad in this area but they are still teething. There is a highly reputable international body called Transparency International from which we can benefit in this area. The World Bank has done a lot of work in this area.

3. Freedom of Information. Some of our Caricom friends have legislation of this type from which we can benefit and there are models all over the world which can be investigated. This can be a real tool in promoting transparency.

4. Campaign Finance Disclosure. We will not have to reinvent the wheel in this area either. There are models abounding. This may be the biggest of the challenges as this type of legislation is mainly supported by politicians in opposition. As soon as they gain power that is a different story. But in small countries like ours elections can be bought and sold, There is no free lunch and he who pays the piper calls the tune. Our democracy will be seriously deficient and at risk without clear rules for disclosure of sources of campaign funding and teeth to deal with violations.

In 2005 government established an Advisory Committee headed by Sir Dwight Venner, then ECCB Governor, to review remuneration of parliamentarians and Ministers. Increases were recommended and gladly taken but the government ignored the recommendation of the Committee that campaign finance regulation is essential of the

Committee to show that our politicians cannot be bought and sold.

5. Civil Service Reform is badly needed, as promised in the Unity manifesto, to “void the political influence that is so rife”. We have been hearing about Civil Service Reform for over 20 years. If I am not mistaken there was actually a public officer at PS level charged with implementing this. How much longer will we have to wait.

6. The Public Accounts Committee is an important part of the checks and balances in Westminster style systems like ours. This Committee has not functioned as intended in all 33 years of our independence. It should be made to function by co-operation between the parties represented in the National Assembly all of whom say they are committed to transparent governance. We need to see that in action not just words.

Extract from National Assembly Elections Act on Public Accounts Committee.

“(1) There shall be a Standing Committee of the National Assembly to be known as the Public Accounts Committee.

(2) The Public Accounts Committee shall consist of not less than three nor more than five members of the House, drawn from both sides of the National Assembly, whose appointment to the Committee shall be moved by a resolution of the Minister of Finance and subject to the approval of the National Assembly.

(3) The National Assembly shall from, time to time, appoint a Member of the Committee to be Chairperson of the Committee and may appoint another member of the National Assembly to fill any vacancy in the membership of the Committee occurring from time to time.

(4) The duties and powers of the Public Accounts Committee shall be as follows:

- . (a) to ascertain that the authorised expenditure during each financial year, including supplementary expenditure, has been applied to the purposes prescribed by the Legislature;
- . (b) to scrutinise the causes which may have led to any excess over

authorised expenditure, and to verify applications of savings on other authorised items of expenditure;

(e) to make an effective examination of public accounts kept in any Department of Government; and

(d) to summon any public officer to give any information, or any explanation or to produce any records or documents which the Committee may consider necessary in the performance of its duties.

(5) The Minister of Finance may provide office and secretarial facilities to the Committee.

(6) The Public Accounts Committee shall submit its reports to the National Assembly from time to time.”

Team Unity promised changes in the six areas listed above under Transparency Legislation. They also promised a mandatory balanced budget provision and a debt ceiling for public debt. I repeat my earlier question of how much longer will we have to wait. An agenda and process should be established for the needed legislation. There must be proper research and public consultation beginning with White Papers rather than the leaders descending upon the National Assembly on two days notice with legislation which only they have seen. Further delay in pursuing this agenda will lead to suspicion that it sounded good from the opposition vantage but can be quite intrusive. I say it is intended to be intrusive and it is the price to be paid by leaders for the extensive powers with which they are entrusted. It is high time that the government gets moving on its stated agenda.

Deterrents to reform of the entrenched provisions of the Constitution.

To get constitutional reform St. Kitts and Nevis there must be a genuine cross party commitment to that reform. That type of commitment just

does not exist. The current mindset will not permit even the beginning of a serious national discussion on the topic. Until we mature in our politics, until nation is held above political party, until we change the mentality that government is a nest egg for the victor at the polls, until we end the handout mentality which has grown alongside the tribal politics, until we place greater emphasis on hard work, self sufficiency and initiative while maintaining a compassionate safety net, any discussion on constitutional reform will be an academic exercise. We should instead be delving deeper than the constitution and confronting the underlying culture, mindset and attitudes which block widespread commitment to improving our governance and which are holding us back generally as a country.

The constitution does not exist in a vacuum. It is founded and grounded in and forms part of a broader, unwritten social contract. That social contract has in one form or another existed from time immemorial in groups of human beings who live together in defined communities. It establishes the rights and responsibilities of individuals and the organization of the community aimed at the common good. By the social contract the individual, in the interest of community, gives up some of his freedoms to a body called government to which he entrusts his protection and governance. The individual also assumes responsibilities. These responsibilities include respect for the rules and norms of the community and for other members of the community. It includes an obligation to contribute individually and collectively to the improvement and growth of the community. It includes the responsibility to raise our children to be responsible citizens and to adhere to the rules and norms of the community. These responsibilities are as important as the rights of individuals.

Another critical part of the social contract is that the individual gives up some of his money by way of taxes to fund the operation of the government. Because the individual has by the social contract given up some of his freedoms and contributes financially to a powerful government the constitution serves two main functions. Firstly it establishes and protects those fundamental rights which the individual has not given up to the government. Secondly it sets up a framework of governance to regulate the exercise of those powers which the individual has entrusted to the government.

If you look around the world you will see very clear examples of communities in which the social contract has broken down and the dire consequences. Where that has happened it matters not what the constitution says.

A good yardstick in the assessment we should make is the preamble to the constitution. That preamble is intended to express the tenets of the social contract.

“WHEREAS the People of Saint Christopher and Nevis –

- a) declare that the nation is established on the belief in Almighty God and the inherent dignity of each individual;
- b) assert that they are entitled to the protection of fundamental rights and freedoms;
- c) believe in the concept of democracy with free and fair elections;
- d) desire the creation of a climate of economic wellbeing in the context of respect for law and order; and
- e) are committed to achieve their national objectives with a unity of purpose;.....”

We declare that our nation is established on the belief in Almighty God but too many, on all sides, put political party above all else and regard their party leaders as superhuman. They in turn can never admit fault.

We declare that our nation is established on the belief in the inherent dignity of each individual but those of the opposite party are hogs and dogs.

We assert that we are entitled to the protection of fundamental rights and freedoms. Those rights include the right to political opinions but those with opposing opinions should not thrive.

We believe in the concept of true democracy with free and fair elections but many will do whatever they have to for the election of their party.

We are committed to achieve our national objectives with a unity of purpose but in practice there couldn't be more disunity which clouds our national objectives.

Sad but true. After 33 years of independence and 49 of self governance we are still mired in the politics of the past. Social discipline and attitudes are declining.

We need as a nation a new paradigm of respect, tolerance, civility and maturity and a new political culture. We need as a people to practice what the preamble to our constitution says. Our leaders should by their actions, as well as talk, lead the way in reaffirming the preamble and in following the letter and spirit of the constitution. Only then will there be a new and salutary phase of our history.

The constitution contains the framework for governance. That framework needs supporting legislation to provide checks and balances on the exercise of the sacred trust of government. Checks and balances are required because human nature can sometimes allow power to go the heads of those who exercise it and ego tempts its abuse. Any discussion on constitutional reform must therefore be accompanied by a discussion on ways of controlling the exercise of power and making those who exercise it responsible to the country and transparent.