



4TH FUTURE OF DEMOCRACY CONFERENCE

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The Prospects of Constitutional Reform

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I'd like to begin by giving my congratulations to Dr. Ian Strachan for conceiving and bringing to fruition this wonderful symposium that encapsulates an amazing number, and a no less amazing variety, of topics and themes of national interest, all of them efficiently compressed into a tight time-frame. This is a rare but welcome addition to the national discourse. We need more events, more Arenas of Thought, such as this one. And I thank Dr. Strachan for inviting me to be a part of this one.

I was asked in a chat group earlier today what I would be speaking about tonight. I thought it might be useful to begin with the answer I gave so that there can be complete clarity from the very outset as to what I will be talking about this evening and, conversely, what I will not be talking about.

The answer I gave was this:

"I am speaking only on "The Prospects of Constitutional Reform", not on the Constitution generally. As the framing of this topic itself foreshadows, my focus will be on what I think is realistically achievable in the way of constitutional reform (in the near and medium) having particular regard to the political dynamics of our country as revealed by the two failed constitutional referenda we have already had.

"What do these failed experiments teach us about the challenges of constitutional reform in our country and what lessons need to be drawn from them as we move forward to future exercises in constitutional reform amidst ever-deepening public cynicism, distrust of government, and general disillusionment?

"That is what will inform my discussion of "The Prospects of Constitutional Reform".

"If anyone is expecting some sort of learned treatise on any specific area of constitutional reform, they can forget it. I am not a constitutional scholar nor a constitutional law specialist, and I have never held myself out to be either one. I chaired the last Constitutional Commission (in 2013) which included amongst its members experienced constitutional lawyers and experts and which, moreover, canvassed the views of the leading constitutional law specialists at the Bahamas bar and in academia. But to be clear, I was not one of these specialists or experts. I was simply the Chairman of a very diverse 12 person Commission (all of us unpaid, incidentally) which was responsible for distilling our own views, the views of the scores of persons we interviewed, and the views expressed by the wider community in the numerous town hall meetings we had up and down the country. The result was the 245 page report (with its 73 recommendations), published in 2013 and still freely available online."

So that is what frames and pretty much pre-ordains what I will be speaking about this evening. But I should hasten to add that in speaking to what I think is realistically achievable in the way of constitutional reform, I will be identifying specific planks or items of constitutional reform that may – all things being equal - lend themselves to a more ready popular acceptance than was the case unfortunately in the two earlier constitutional referenda.

We should remind ourselves that more than half a century has now passed since we became independent. Our constitution is now exactly 52 years old. In all that time, however, our constitution has remained static; it has remained unchanged, except for the Constitutional (Amendment) Act of 2017 which brought about a transfer – devolution is the technical term for it - of the Attorney-General's prosecutorial powers to an independent Director of Public Prosecutions. That singular change, however, was to a non-entrenched provision of the Constitution and therefore did not require a referendum. Instead a simple majority in Parliament was all that was needed.

I pause here to observe that unlike a great many other Commonwealth jurisdictions, the Bahamian Constitution reposes very considerable power in the Bahamian people – the Bahamian electorate – by requiring their approval in a national referendum for a great many things under the Constitution. These are changes that can go nowhere, and can never become law, unless they are approved by the people.

By contrast - in Barbados, for example, - a constitutional change as symbolically and psychologically momentous as the transition from a 500 year old monarchical system to a republic – did not require a referendum; it merely required parliamentary approval. Thus, it came to pass that Barbados became a republic on the strength of a simple Act of Parliament without the people having any say in the matter at all.

But I want to speak about the difficulties in obtaining popular support for constitutional reforms.

The two previous constitutional referenda failed miserably. The irony of it all – the travesty really – is that if the anecdotal evidence is to be believed, the reasons for these failures had more to do with deep suspicions about hidden agendas of the government and disenchantment with the government over completely unrelated things. The referendum in each instance presented the opportunity to spank the government hard – “to give them their just desserts” – as a sort of dress rehearsal for the even more definitive rejection that was to come in the then approaching General Election.

Significantly, both rejections came during the final year of the five-year election cycle when the Ingraham govt in the first referendum and the Christie govt in the second referendum were each at a very low ebb in the realm of public opinion. A big part of the electorate was just not listening to them about anything and instead was just itching to punish them. This transcended the actual referendum issues and effectively smothered any rational discourse on the constitutional changes that were being proposed.

A big part of this rejection was centred in deep distrust over what people suspected were hidden agendas. In the last referendum, for example, the aim of establishing complete parity, complete equality, between men and women, such that they would be equally protected from discrimination fell largely on deaf ears. Instead, people got it in their heads that it was all a smokescreen to legitimize, nay, to constitutionalize the LGBTQ Agenda; that the government was attempting to bring in same-sex marriage under the cloak of constitutional change.

Nothing, of course, could have been further from the truth but because the government had become so unpopular for other reasons (not the least of these other reasons being the repudiation of the electorate's position in the gaming referendum), the electorate, by a clear majority, simply did not believe the government or its perceived spokesmen when they said that the equality-of-the-sexes amendment had nothing whatever to do with same-sex marriage; that it would not change the legal prohibition against same-sex marriage; and that it had nothing to do with any LGBTQ agenda; that instead it was simply endeavouring to constitutionally consecrate the principle that men and women, as biologically defined at birth, were to be equal before the law.

The added problem with this sort of public cynicism and distrust that everything gets swept off the table. So, for example, in the 2002 referendum, the big-ticket proposed constitutional changes - like putting Bahamian women married to foreign men on the same basis as unmarried Bahamian women for the purposes of transmitting citizenship to their children born abroad; that proposal was rejected in the same way that what should have been non-contentious changes on the same ballot like slightly increasing the retirement age for judges were rejected as well.

Other examples can be cited but the point need not be belaboured.

The key takeaways from the failed constitutional referenda are twofold:

1. **Don't wait too late to bring it on.** It would behoove the next government to stage a referendum early on – within, say, the first 12-18 months following a General Election – when its popularity and, by extension, the marketability of its constitutional reform proposals are likely to be in comparatively good shape. Historical experience demonstrates that if instead you go deeper into the five-year term, the risk of referendum-defeat increases in tandem with the government's increasing unpopularity. However inoffensive the constitutional menu for change may be, it will inevitably be conflated in the electorate's mind with other completely unrelated grievances against the government, and, mixing metaphors, will sink the ship.
2. **Get people accustomed to the idea of changing the Constitution by starting with smaller things, low-hanging fruit.**

The Bahamian people evidently have a keen sense of proprietorship when it comes to changing the Constitution – “dis we tings”. So, instead of starting with big, blockbuster

heresies such as “men and women should be treated equally”, we should start from smaller, less shocking reforms.

It's important to get the electorate comfortable with the idea that it's OK to periodically review and alter the Constitution to meet changing circumstances and to introduce innovations that may help improve the rules under which we live – remembering that fundamentally, at its deepest level, the Constitution is not intended to be immutable like Holy Writ – indeed Art. 54 with its elaborate and precisely constructed methodology for changing the Constitution demonstrates that it was contemplated from the very beginning that the Constitution, over time, would require tinkering and adjustment to ensure its continued relevance, adaptability and viability.

So, in this the final part of my remarks, I'd like to identify some of the low-hanging fruit that should be considered for the first few phases of constitutional reform – not doing them all at once – no, electorate-overload is to be avoided at all cost. But how the items that I'm about to mention should be queued up or phased in for the near-term constitutional reform agenda can be sorted out by the political directorate in close consultation with the Opposition and with the representatives of civil society. This triangulated set-up is much better than leaving it entirely to the politicians to orchestrate.

Some of the Low-Hanging Fruit....

1. There is a curious anomaly in our Constitution which should be corrected. Article 1 is not entrenched. Art 1 says that **“The Commonwealth of The Bahamas shall be a sovereign democratic state”**. That's it.

Because it's not entrenched, the House of Assembly and the Senate could, in theory, by a simple majority (a) change the name of the country and (b) declare us not to be any longer a “sovereign” or “democratic” state. Surely, if something as momentous as that were to be attempted at some time in the future by an adventurous government and legislature, the people should have the ability to stop it through the vehicle of a referendum. But that is certainly not the case as the constitution now stands.

So, there should be a simple amendment that entrenches this provision such that to change it would require a 2/3rds majority of both House of Parliament AND passage by a majority of the electorate in a national referendum.

(While on the subject of non-entrenched features of our Constitution and especially for the benefit of all the hangmen out there who want to get rid of the Privy Council and replace it with another ultimate court of appeal – e.g. the Caribbean Court of Justice (the CCJ) – this prospect is already baked into the Constitution (see Art 105) such that it would only require an ordinary Act of Parliament to bring it about – no special majorities, no referendum. I should add, however, that it is extremely doubtful, based on the evolving jurisprudence of the CCJ, that they would be much different from the PC on the matter of the death

penalty. So, the idea of making such a substitution for the purpose of improving the chances of hanging people, may be a bit of a fool's errand.

2. Second low-hanging fruit....Our **national symbols** (national flag, coat of arms, national anthem, national pledge of allegiance) 3. 4. 5. 6. 7. should also be adopted by our constitution and entrenched in the same way as is proposed for the nation's name.
3. **English** should be declared and entrenched as the sole official language of The Bahamas; and no official bilingualism as in Quebec!
4. **The land and sea areas** of The Bahamas should be descriptively encapsulated in a schedule to the Constitution to give recognition to the archipelagic nature of our nation and to bring clarity to our geographical configuration and content.
5. The ability of the Executive to **enter into treaties** should be controlled such as to require that they be pre-approved by Parliament, not just ratified after the fact.
6. **The Ombudsman** – the person who investigates and reports on abuses by the Executive – should be a constitutionally recognized and protected position (with the same constitutional security of tenure as judges). This should not be left to ordinary legislation, as is presently the case.

In the same way that the Commissioner and Deputy Commissioner of Police are constitutionally recognized and protected (although our political history suggests that these provisions may have been honoured more in the breach than in the observance), there are no **corresponding provisions for the Commodore of the RBDF** – for the obvious reason that at the time the Constitution was being framed there was no RBDF. So this would essentially be an updating exercise and a good example of how the Constitution needs to keep up with institutional changes as our society evolves.

8. **The Right to vote** should be constitutionalized.
9. **Ability to declare localized states of emergency** for specific areas rather than having to do it for the whole country is another matter that calls for adjustment. Why should an uprising in Inagua require a State of Emergency for the whole Bahamas?
10. The **GG, CJ and Pres of COA should always be Bahamian citizens**. Thus should be made a constitutional requirement just as members of the legislature and the executive branches of govt must be Bahamian citizens.
11. The **retirement ages for judges** of both the SC and COA should be modestly increased as proposed in the Report
12. The **Parliamentary Commissioner and the entire electoral apparatus – and**

the whole electoral boundaries commission need to be re-vamped; need to be removed from ministerial direction and instead placed under a new independent and constitutionally protected Electoral and Boundaries Commission. Of the dozen changes I have just described, this one is probably not “low-hanging fruit” when all is said and done but as to its desirability in the interests of deepening democracy and improving transparency and fairness, I have no doubt. It is long overdue and on that ground deserves close consideration for early constitutional change.

We can start with the changes I’ve identified, parcelled up over time in a series of referenda.

Lets get people accustomed to change.

And then we can move to the big-ticket items like expanding the fundamental rights and freedoms and instituting measures to make the Executive, Legislature and Judiciary more accountable.



BIO:

Sean McWeeney KC was called to the Bahamas bar in 1978. He was appointed to the Inner Bar in 2009 as Queen's Counsel (since re-designated King's Counsel). He served as the Attorney-General of The Bahamas from January 1989 to August 1992. He is internationally recognized as the leading trust law specialist in the Bahamas.

Mr. McWeeney also served as a Senator from 1985 to 1992, and Leader of the Government in the Senate in the latter part of his parliamentary tenure.

During his service as the Attorney-General, Mr. McWeeney was widely acclaimed for his improvements to the judicial system, including the introduction of computerized court reporting, the introduction of night courts and the conversion of the Court of Appeal from an itinerant court into a year-round sitting court.

In 1998, on the occasion of the Silver Jubilee of Bahamian Independence, Mr. McWeeney was awarded the Silver Jubilee Medal for Outstanding Contribution to National Development in the area of Law.

In April 2000 and again in 2002, Mr. McWeeney was appointed the Chairman of the first ever Judicial Remuneration Review Commissions. Between 1999 and 2002, he also served as the Chairman of the Steering and Implementation Committees responsible for overseeing the re-structuring of the Royal Bahamas Police Force.

Mr. McWeeney has also served as the Chairman of the Clifton Heritage Authority, and the Chairman of the most recent Constitutional Review Commission. He has also served as a member of the National Security Council and as the first Ambassador from The Bahamas to the Vatican.

Mr. McWeeney is also a published historian. Notably, he is the author of the book Breaching the Gates – the Civil Rights Struggle of the Bahamian Free People of Colour 1802-1834; and a number of historical papers, including Not Far from the Madding Crowd dealing with the effect of the Haitian Revolution on The Bahamas.

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