

## Chapter Ten

### Free and Fair Elections

Free and fair elections are fundamental ingredients of a true democracy. The words free and fair have different meanings. The word free connotes that persons who are entitled to register as voters and to vote in elections are not unreasonably impeded (by fear or compulsion or otherwise) in their exercise of those rights in accordance with applicable laws. Fairness is a more elusive concept but is generally accepted to connote that there are laws which reasonably provide for the conduct of elections, that there provide genuinely equal opportunities for all competing, that the electoral process is under control independent of the politicians and that there are transparent regulations as to how persons are registered to vote.

In a small country such as St. Kitts and Nevis, with a constituency and ‘winner take all’ system and approximately 30,000 registered voters, a few votes can make the difference in deciding who gains the government in an election. The slightest abuse or distortion of or error in the system can therefore have a significant effect.

By and large elections in St. Kitts and Nevis have been free but their fairness has been questionable. I will point out some of the reasons for the unfairness and make suggestions for improvements.

### Constituency Boundaries

The constituency boundaries have remained unchanged since 1984. Since then vast changes have occurred in the numbers of inhabitants in several constituencies to such a degree that the largest constituency in terms of voters was almost five times the size of the smallest constituency in the August 2022 election. That clearly contravenes the constitution. Boundary changes are therefore imperative.

The constitution establishes a Constituencies Boundaries Commission the composition of which is entirely political and favors the political party or parties in power at

the time. That has been a major factor in the delay in changing the current boundaries. The composition of the Boundaries Commission should be reviewed to restrict gerrymandering and other abuse. A clear and democratic process should be agreed between all political parties for public and professional consultation on the establishment of new boundaries.

It is important to keep in mind the basic principle in the boundary process set out in Schedule 2 of the Constitution that all constituencies shall contain as nearly as equal numbers of inhabitants. To apply this law there should be regular and fair reviews. The exact provision is as follows:

*Rules for Delimitation of Constituencies*

1. *There shall be not less than eight constituencies in the island of Saint Christopher and not less than three constituencies in the island of Nevis and if the number of constituencies is increased beyond eleven, not less than one-third of their number shall be in the island of Nevis.*

2. *All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient to take account of the following factors, that is to say,*

- (a) the requirements of rule 1 and the differences in the density of the populations in the respective islands of Saint Christopher and Nevis;*
- (b) the need to ensure adequate representation of sparsely populated rural areas;*
- (c) the means of communication;*
- (d) geographical features; and*
- (e) existing administrative boundaries.*

Overseas Vote

This is a highly contentious issue. The arguments on both sides are well known. It is important to note that the right to vote is not a fundamental right given by the constitution to all citizens. It is a right which can be circumscribed by legislation. It is incorrect therefore to assume that citizens resident overseas have an automatic right to vote. A large number of countries tie the right to vote to residence in the country. The United States is one country which does not but, it is important to note, the United States makes all citizens wherever resident pay income tax on their worldwide income. Those who inherit from them are also liable to death duties on the deceased citizen's assets worldwide. To that extent US citizens wherever they reside pay directly in taxes for their government and have a direct interest in the election of their government. The US has a population of three hundred and thirty million and an electorate of over one hundred and fifty million people. A few thousand overseas votes do not have the same impact in the US as a few dozen votes here which can decide an election. Citizens of St. Kitts and Nevis who reside abroad do not have to pay income taxes here. While I agree that some pay property taxes and many bank their money here or send remittances that number is small compared to the tens of thousands who have no vested interest whatever in the country but are eligible to register to vote in elections here. Many do not put foot here except to register and to vote.

In this regard I quote from the late Sir Lee Moore, former Premier of St. Kitts-Nevis and a revered member of the Labour Party, as reported in the edition of The Labour Spokesman newspaper of November 2, 1983:

*'the people living in St. Kitts and Nevis could find their wishes overruled by people living abroad' ... [this can...] " subvert democracy, making the exercise of the franchise of no effect and giving rise to instability in the country.'*

The same Labour Party blamed its defeat in the 2015 election on the late arrival of 2 of its 20 plus charter flights. Its leader gave the exact numbers of persons who were on those

flights intended to vote in two named constituencies. That was a blatant admission that it was relying on the overseas vote. It is an abomination that plane loads of citizens can fly in just before, vote on election day and fly out the same or next day. At least ten per cent of the voters in the 2015 General Election were overseas voters.

I recall the true story of a well-dressed lady who was asked at the ferry terminal in Basseterre on an election day where she was coming from. She said in her American accent that she was coming from Nevis where she had just voted. She continued *'I did not know Nevis was so nice.'* Can we really have fair elections when tourists can decide the result?

How did we get there? The first election under adult suffrage took place under the Constitution and Elections Ordinance 1952. Under that law residence was an absolute requirement for registration as a voter. That law remained in effect until November 8, 1983, less than two months after Independence Day, when it was changed by the National Assembly with the PAM/NRP majority. The amending law gave the right to register to vote to a citizen of St. Kitts and Nevis of the age of eighteen years or upwards if resident or domiciled in the country at the date of registration. Residence was removed as an absolute requirement for a citizen to vote. Domicil is a nebulous legal concept and should not be used as a criterion for voting. To qualify as domiciled in the country all a citizen resident abroad has to say is that one day he or she intends to come to St. Kitts or Nevis to live. That question is not even asked of those who register. No rules were put in place to determine to which constituency an overseas voter belonged for registration purposes. That meant that a citizen could essentially choose where he would register. You do not have to be a rocket scientist to realize that overseas voters could be registered to suit the interests of the party which they support. And that is exactly what happened. And, not surprisingly, the practice developed of moving residents citizens around to suit the interests of the party they support.

I asked a senior member of the PAM Party long after that party had lost power in 1995

why they decided on so lax a law. He said that they did not intend the free for all that has resulted but that, under the old system, some of their members, who had moved to the Virgin Islands and wanted to come home to vote, had been knocked off the voters list on objections from Labour representatives. I said to him cynically in reply that they had opened a Pandora's box which they no longer had the opportunity to close.

This issue should be resolved by a referendum. If it is decided to continue the practice the rules for registration in a constituency should be tightened and not allowed to continue as a free for all.

It may not be untimely to consider also the ramifications of the inevitable call in future, as technology improves even further, for online voting or voting by overseas voters at designated polling stations at embassies and consulates in the diaspora. Why should an overseas voter have to come home to exercise what so many argue is a fundamental right. Then maybe those who favour the overseas vote now will then realize that there are far more citizens resident abroad than in the country.

Another option, suggested by the late Justice Lloyd Williams, was the creation of an overseas constituency so that all overseas voters will vote for a single Representative to represent their interests. That is an interesting compromise.

### Voter Registration

It is important to review the history on this subject.

As indicated above the original post-independence legislation was passed in 1983. The voter registration provisions were very loose and manipulable and allowed voters to register easily in constituencies in which they did not reside. In 2006 the Labour Government initiated a reform process which, it said, resulted from the review of the report of the Commonwealth Expert Team of the 2004 elections, the report of the Caricom Observers of the 2004 election and the report of the Commonwealth Assessment Mission of 2005. The

Government said that the review would implement the commitment given by the Labour party in its 2000 manifesto *'to overhaul the voters list to eliminate any perception of fraud.'*

A very elaborate process was designed including five committees, one being the *'Electoral Reform Consultative Committee.'* The process was intended to be concluded by 2007. The Reform Committee (as I will call it) consulted with the public and with civil society groups. The PAM party, the creators of the mess, refused to participate.

The Reform Committee issued a report which recommended a complete re-registration of voters. A Commonwealth Assessment Mission recommended likewise. It referred to the existing system as archaic and recommended its replacement with "a modern system" and "a clean list". However, instead of starting afresh a politically contrived process called 'reconstruction' of the old list was introduced by the Douglas regime. Under reconstruction a voter on the old list could 'confirm' his registration by a fixed time if not he could be struck off the list on reconstruction. On confirmation (sounds like a religious ceremony) the voter would receive one of the new ID cards. Persons eligible to vote who did not confirm their registration or who had not previously registered could register anew in compliance with the new provisions for resident and overseas voters.

As noted, the amending Act retained the overseas vote. The amendments did not establish the transparency so badly needed to determine the constituency in which a voter would be registered nor did it provide a workable and fair dispute resolution process to deal with objections.

To compound matters, the new law maintained the unfair and ridiculous requirement that a person objecting to registration of a voter based on his place of residence has to prove that the voter does not live where he says he does. Most countries require the voter to prove his residence by documentary evidence - utility bills, social security registration, passport, driver's licence. The Chamber of Commerce presented to the Reform Committee a detailed

form which it proposed be completed by each applicant to be registered to verify his residence under sanction of perjury. The Chamber suggested adoption of the system used in Trinidad where registration officers verify residence by visits to the address given by the applicant. That would be very workable in a small country.

But none of these recommendations were accepted. Instead the prior fraud was entrenched and it is just as easy for new fraud to be perpetrated. The result is that we have a system which is better only in having voter ID cards and in having removed the names of dead persons from the voters list. Thus we continue to have free but not fair elections.

I quote from the Report of the 2005 Commonwealth Assessment Mission:

*The Mission was inundated with complaints about the possibility of party supporters from stronghold constituencies to register in marginal ones in order to boost the party's chances of winning seats. If true this practice would make a mockery of the present constituency system, which is the basis for the First-Past the-Post electoral system, which obtains in St. Kitts and Nevis.*

That mockery remains as another reason for our brooding democracy and is a serious threat to our maturity as a nation.

#### Proof of Residence

The rules governing proof of residence are grossly inadequate. There is so much official documentary proof of residence that it should not be difficult to agree on a comprehensive set of rules.

One can only assume that failure to impose strict rules is due to the overseas vote with legislators pandering to the strongly held sentiments of residents who feel strongly that if overseas voters can in effect choose where they vote so should they.

#### Dispute resolution as to voter registration.

It is a grave deficiency to give laymen registration officers the power to resolve

disputes as to voter registration. This process is a legal one which requires due process including the taking of evidence from and cross examination of witnesses, the careful consideration of arguments as to the facts and written decisions. Even if there were a transparent process for the appointment of registration officers it is not a power which should be exercised by such officer. That process should be assigned to legally trained officials, either a Magistrate, a Master of the High Court or a High Court Judge. The legislation should mandate the expeditious hearing of disputes of this type and require the government to provide all resources required for the purpose.

#### Electoral Commission

The highest authority in the conduct of elections is not the Supervisor of Elections it is the Electoral Commission. The Electoral Commission comprises only three persons one nominated by the Prime Minister, one by the Leader of the Opposition and the Chairman appointed by the Governor General acting in his own deliberate judgment. The Chairman must be a legal practitioner with at least seven years of practice of the law.

The function of the Electoral Commission is to *'to supervise the Supervisor of Elections in the exercise of his functions.....'* For the Commission to carry out its function more effectively a larger Electoral Commission is needed with stronger provisions to ensure independence of the Commission from political interference. The budget provided for the electoral system should include adequate funding to enable the Commission to have its own secretariat and its own office and to take independent legal and other advice. The Commission should be required by the Constitution to issue a full and complete report after each election. The electorate should not have to rely solely on reports from outside observers.

In its Report on the August 2022 elections the OAS Observer Mission noted that it detected signs of strain in the working relationship between the Electoral Commission and the Supervisor of Elections. That should not surprise anyone when some Supervisors of

Election have acted like a law unto themselves with the support of the political party in power. The Mission commented that the Chair and members of the Electoral Commission typically remain in the background during electoral processes. Too often in the past the Supervisor of Elections has ignored the above quoted provision of the constitution which gives the Electoral Commission power to supervise the Supervisor of Elections in the exercise of his functions. Some Supervisors of Elections have considered themselves as having the primary role in the electoral process and have defied the Electoral Commission. The Electoral Commission must assert its role and the Supervisors of Election must as provided by the constitution take directions from the Electoral Commission.

#### Supervisor of Elections

The public officer responsible for the day to day operations of the electoral process is the Supervisor of Elections whose responsibility is given by the Constitution as '*to exercise general supervision over the registration of voters in elections of Representatives and over the conduct of such elections.*' That role should be carried out entirely independently of politics. The Supervisor of Elections is appointed by the Governor-General acting in his own deliberate judgment after consulting the Prime Minister and the Leader of the Opposition.

Another way of facilitating the Supervisor of Elections in acting independently is to extricate him or her from any direct reliance on the Prime Minister or Cabinet for administrative or financial support. The entire electoral system should be given an ample annual budget voted by the National Assembly after consultation with the Electoral Commission. Appointment of every officer in the Electoral Office should be made, on application, by the Supervisor with the approval of the Electoral Commission. The administrative structure of the Electoral Office and the names, qualifications and duties of every such officer should be published in the local newspapers. The names of every applicant for any electoral position should be published in advance of appointment to allow

representations to be made to the Supervisor and the Commission as to the suitability and independence of the applicant.

### Campaign Finance

Election campaigns have become an expensive process. While it is important to our democracy that those seeking office get their message out and that costs money, there comes a point at which money can undermine the system. Those who provide vast sums expect a return on their investment and that return is usually provided not by those who received the money, but by the country. I cannot put the argument any better than did the President of Trinidad and Tobago. He said ‘..... *Election campaign financing is a veritable juggernaut that results in financiers arrogating political power unto themselves and thereby undermining the system of governance.*’ He continued ‘*The time has come when we must bite the bullet of campaign financing reform and introduce appropriate transparency and accountability in the management of the country’s electoral system.*’ We should take that advice.

The need for campaign finance laws is even greater here because of the overseas vote. Some legal minds think that it is electoral bribery to provide a charter for overseas voters, but whether that is good legal opinion or not, the public has the right to know who provides the money for the charters and the other massive spending on election campaigns. Even if the overseas vote is eliminated, that right to know should in my opinion be recognised as a fundamental right in the constitution, which should also set out the structure of the system of disclosure. That would set the framework for the necessary legislation and make it more difficult to frustrate the right.

Campaign finance legislation is essential also to avoid aspersions being cast against politicians who receive large donations for themselves or their party that they are in the pocket of political donors. Such legislation was one of the recommendations made in the May

2005 report of the Advisory Committee on remuneration for Members of the Federal Parliament in St. Kitts and Nevis. The government of the day readily accepted the pay increases for Parliamentarians and Ministers of Government recommended in the report but ignored the recommendation for campaign finance legislation. It is important for democracy that the citizenry can feel confident that their representatives are not on the take. Corruption usually starts from the top and, where it is perceived rightly or wrongly, to exist it spreads like wild fire throughout the public service. There are examples of this all over the world.

I set out one of the comments of the Advisory Committee on this subject:

*We fully endorse this expressed need [in the Venner Report quoted above] for priority attention to be afforded to some meaningful statutory regulation of electoral financing, and recommend accordingly. Left unaddressed, this has serious potential to undermine the democratic gains made in Caribbean societies. There is ample scope for St. Kitts and Nevis to become a leader in the region in this regard. To fail to address this issue in a timely manner is to run the real risk of the Caribbean being perceived by our own people and others further afield as a region in which public life can be degraded by unscrupulous practices. We recommend that specific legislation with concrete and effective measures be put in place urgently to guard against this risk. Our history demands not only that our leaders not be bought or sold, but that we proudly proclaim that this is virtually impossible and that any attempts to do so would be subject to criminal sanctions imposed by law.*

#### Confidence in the Electoral Process

In its report on the August 2022 election the OAS Observer Mission noted that the Code of Conduct prepared by the Coalition of NGOs, which invited political parties, candidates and supporters to observe responsible forms of behavior and language was not adhered to in practice.

The Mission also noted *some distrust surrounding and within the authorities responsible for the organization of the elections. Stakeholders advised that challenges with past Supervisors of Elections have resulted in lingering misgivings around that office and that as the Chair and members of the Electoral Commission typically remain in the background during electoral processes, distrust of the Supervisor's office has the potential to influence the electorate's perception of the overall electoral process.*

The OAS Mission commented in its report that it found no evidence that any action had been taken to implement or consider implementing recommendations made by previous OAS Electoral Observer Missions in 2020, 2011 and 2015.

In his book Commonwealth Caribbean Constitutional Law Sir Fred Phillips made a vital statement which should always be borne in mind.

*We hope in the preceding pages we have shown that a Constitution is not an end in itself, it is how a constitutional instrument is permitted to work that matters. The most well-intentioned instrument may easily become entirely counter-productive.*

Elections are particularly vulnerable to disquiet and worse which stem from mistrust and lack of confidence in the system.

Fair elections therefore require competent and impartial authorities to earn the confidence of the electorate. They require high quality management and organization.

They require the direct participants to show respect for the law and the system.

#### Commonwealth Citizens

The Constitution provides for citizens of Commonwealth countries to vote in elections here subject to conditions established by legislation. The legislative provisions have since independence set a residential requirement of a minimum of one year. Many Commonwealth countries allow nationals of other Commonwealth countries this right but the

residential requirement varies. In Antigua for example the residential requirement was three years and has recently been increased to seven. In a small country where margins of victory are often small, one year is in my opinion too short a period for a Commonwealth citizen to establish a connection with the country that gives him or her a real stake in its governance.

There is a growing community of Commonwealth citizens residing here. I welcome law abiding Commonwealth citizens who can contribute to our economy without marginalising the local citizens. However they should not be able to swing an election with their votes which is now a real possibility. A businessman of Indian origin boasted to me that he controls 400 votes in East Basseterre of Indian nationals resident there. An exaggeration perhaps, but the margin of victory in that seat was 4 votes in 2015.

The minimum residential requirement should be seven years to coincide with the period after which a resident of a Commonwealth country can obtain permanent residence. Consideration should also be given to allowing long term residents of any nationality, not only Commonwealth citizens, to register.