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Unpacking the Senate appointments debate: The law and the politics

The complete annihilation of the Democratic Labour Party (DLP), the main opposition party in Barbados, for the third time, for many reasons including but not limited to, the first past the post electoral system, has continuously sparked the debate about the Senate composition and appointment process.

As is well known, our winner takes all political system, could as it has in the past three elections, cause a political party, the BLP, to capture all of the electoral seats; thus causing the Parliamentary Opposition to be able to appoint senators, and perform other constitutional and legislative roles, to represent their constituent interests and act as a check and balance against the government.

It is for this reason that many have continually called for a radical departure from the winner takes all electoral system, with a concomitant replacement of proportional representation, which would provide a Parliament that is more reflective of the wishes and mood of the people.

Be that as it may, even if one utilised Proportional Representation in this election, the Democratic Labour Party, may only have been able to capture eight seats out of the 30 electoral seats. It is only through a radical departure from Westminster though that the opposition can be provided with the avenues to perform their functions, represent constituents et cetera, recognising that they have not been able to excite the imagination of the Barbadian public, due to among other things, poor leadership, lack of ideological and programmatic clarity and programmes of action, organisational confusion, party fracturing, Motley factor, government performance et cetera.

Any other tinkering at the edges, or minimalist reform to provide them with an opportunity to be part of governance, though laudable, would not be a radical inclusion of them in the body politic.

Interestingly enough, the DLP has neither called for such radical reformation, nor taken any of the gestures provided for their inclusion in the democratic fabric, as they view it with great suspicion.

In fact, it is this minimalist reformation, that has become the centre of discussion and debate again.

Prior to the minimalist reform though, the Governor General of Barbados, from 1966 as per section 75 of the Constitution, has provided that in circumstances where there is no Leader of the Opposition, the Governor General, now President is to act in his/her own discretion in relation to any function where he would ordinarily act in accordance with the opposition leader's advice, as there is no Leader of the Opposition, due to there being no legislator or legislators who do not support the government in the house of assembly.

One of the most obvious circumstances where this has occurred, is where the President would act in their own discretion to appoint opposition senators within the Parliament, recognising the absence of an opposition. This is what occurred in 2022, under the previous President.

However, as one may recall, the government attempted to remedy this malaise of the President entering the political fray, beyond their impartial neutral arbiter position by engaging in political appointment decision making of the opposition senators. They noted in effect, albeit withdrawing the Bill, that there should be an amendment to the Constitution such

that, it now divests the power of advice to the President for the appointment of opposition senators and other related functions, to the opposing party which obtained the second highest number of votes in the general election following the dissolution of Parliament. In fact, the Constitutional Reform Commission Report, in 2024 on page 162 adopted such a recommendation.

If one's position though, is akin to Bob Marley's view that "it feels like total destruction is the only solution", then this minimalist recommendation would not seem laudable or even tenable. It would seem like, one is tinkering at the edges or dealing with mere symptoms of Westminster as opposed to curing the 'Westminster' disease itself.

However, it is laudable, from a reformist position, because it provides the power of decision making on such political appointments, squarely and solely within the hands of the political parties themselves, as distinct from the unseen, unquestionable hand of the President, in order to still provide a check and balance on the government within the Parliament of Barbados.

What must be noted though about the President's discretion is that constitutionally, and under branches of Public and Administrative Law, the President's discretion has been held by the courts to be subject to an ouster clause which is a complete bar to judicial review and challenge.

Put another way, when the President is empowered to exercise their discretion in their deliberate judgement, one can disagree but not legally question the merits, demerits, nature, circumstances et cetera of the President's exercise of discretion.

Phillip v. AG of Bahamas is instructive when it noted in effect that, "an ouster clause shields a determination from an appeal or review, unless the person or authority empowered to make such a decision, unless it is a nullity because it goes outside the prescribed jurisdiction or fails to obscure the rules of natural justice."

As such, one cannot legally question the independent nature of the independent senators, nor can they question the opposition senators chosen, as that would descend the President's decisions into the political fray, contrary to the nature of the office.

Therefore, even the provision of merely two names to the President by the Democratic Labour Party, was an indirect narrowing of the exercise of the powers of the President, such that if he chose both of them, albeit one cannot challenge the decision, it would appear as if he was not exercising his deliberate judgement, but abdicating his Constitutional authority and considering irrelevant considerations from the DLP.

A more sinister motive though would be to think that the DLP provided the two names, hoping that the President would not have a wider pool from within their party to choose from, thereby ensuring their placement.

However, the Senate appointments of the President clearly demonstrated the folly of this view. In fact, the President demonstrated a wider lens one could argue, taking into account the various political parties that contested this election, and appointing from among them the senators.

In fact, the DLP had a fundamental public policy, political, negotiation question to have asked themselves in 2022, which is coming back to proverbially bite them now which is 'do I accept and work within the system to ensure I can provide critique of

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government policy within the established structure, recognising my wilderness position, or alternatively do I mount a 'people's parliament' response outside of the formal structure?' Certainly, either or, could not have been the best political calculation, but had to have been a combination of the two, as opposed to the rejection of the above-mentioned by the DLP at the time.

All it did was to provide the government with a plausible excuse to sidestep their engagement and note that 'we tried to include you, but you did not take it.' The politics of deliberate exclusion in this instance only causes greater harm than good, especially if good governance is one's objective. It also provides constant political fodder for the government.

The way forward though must countenance not only the continuous advocacy for Bob Marley's call, but for a possible consideration of the opposition Senate appointments being considered by and from the opposition political parties themselves who ran in the previous election, to recommend and determine, who from among them should serve as Senators.

For lawyers, this may seem 'messy' and not 'neat', but democracy is not supposed to be neat experiments, but continuous processes of consensus building, through negotiation, experimentation, debate, et cetera.

Further, all the abovementioned debate shows is that contrary to the popular scholarly opinion that the Constitution does not recognise political parties, it clearly does implicitly, recognising that by convention, a political party is the main route overtime that one can represent people within constituencies.

In fact, the data demonstrates to us that independents rarely win their seats in the election, and the concepts of 'opposition', and 'government' operates within the Westminster style Constitution as emanating from political parties.

Political parties continue to exist as the main organised instrument through which one can attempt to capture state power and governmental authority, of which the Constitution implicitly recognises. It is because of this the President can also exercise his authority to appoint senators from opposing political parties in Barbados, as distinct from anyone walking on Swan Street.

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