The anti-defection law in Barbados: Politics and law (Part 2)

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It is problematic, though, because these amendments should not be divorced from a deeper and wider Constitutional Reform project, such that Constitutional Reform is being cherry-picked at the partisan and political convenience of the political party. This is particularly the case, when this recommendation as per pg. 27 of the Constitutional Reform Commission's Report, and also the Parliamentary Reform Commission was not supported by the majority of the commissions. I, however, disagree with the rationale and where the commission believes the locus of power resides — when it notes that "the Parliamentarian is elected by the people, and the MP must have the ability during the Parliamentary term to act as necessary in pursuit of that mandate."

What I disagree with though is the simplification of the locus and raison d'etre of the mandate — such that it is a belief that the mandate was solely due to the individual, stripped of their partisan affiliations. If that were the case, they should also win post vacancy, all things being considered. Moreover, the view is problematic because it rests absolute power in the hand of the Parliamentarian, to determine in pursuit of their mandate their actions, ignoring any requisite procedure and processes that locate the people within such a decision-making process in a meaningful way. It is not an application of the continuous exercise of power because of the consent of the governed. It is a narrowing of liberal democracy that CLR James and Jean Jacques Rosseau warns us about, which is signing off one's rights after they have placed the x on the ballot box, in this two-second democracy. But what does the vox populi say and want?

Did one ever consider that the public may also not want this person to represent their interests, under the banner of another political party, and should not the people be provided with such an opportunity to make such a decision? Did one ever consider that these individuals have received no mandate from the opposition party or government and their supporters within the country that they are now crossing to, but they would receive it, because it is of political value to them. In a strange way, this Amendment may assist the DLP, from utilising cross-overs in contradistinction to organic political leadership which arises from the organic, deliberative process of political organisation. In fact, the continuous 'gotchu' moments would always permit the acceptance of the individuals in order to increase majorities in the house.

But this is also not novel within our body politic, as even the candidate selection process and other aspects of the political party governance remain closed book, secretive and subject to leadership determinations. Thus, while this may possibly increase the centrality of power of the party and its leadership — it does operate within an ecosystem that was already significantly powerful, as opposed to broad based run off for candidates, widening of the party membership, and a constant engagement of the people within the constituency as part of governance, such that they can continually retain their place in politics.

What is concerning though is how this was not as it should have been paired with other internal accountability provisions to hold politicians accountable to the people — i.e., power of recall of parliamentarians et cetera, in circumstances of non-performance among other considerations, beyond this informal provision of report system noted by the prime minister.

However, the amendment is not without its shortcomings. One of the main problematic components though is the utilisation of 'expulsion' from the political party as a basis for vacancy of the parliamentary seat. This is potentially problematic, because the prime minister has inevitably utilised and incorrectly so, the Barbados Labour Party's constitution as the sole data set and an assurance that the circumstances under which one can be expelled is such a high threshold, rare, and should not cause unease. Not only are political party constitutions amendable, but recent political turmoil from the DLP also should raise concern about the manner in which expulsions and their processes can be overrun, weaponised and overutilised in circumstances where a leader wants a particular seat vacant or members of the party determine they will abandon due process and other seminal procedural components of the law.

John Adams was accurate that the country must be a country of laws and not men. The law has to provide for when leaders are good, bad and every shade in between. As observed by the Caribbean Court of Justice (CCJ) in the case of BCB Holdings Ltd v AG of Belize [2013] CCJ 5 (AJ), the idea that a single minister is acting in good faith or with noble motive cannot excuse or remedy an obvious overstep of jurisdiction or serious violation of fundamental constitutional principles, such as the separation of powers or rule of law.

Certainly, this is the case when we remain aware within our political system of the colonial type powers of the leader and key members of the political party, which can be used at their whim and fancy.

But, even beyond the abovementioned it then elevates the political party constitution with constitutional footing, in circumstances where even if an implicit feature of Caribbean constitutionalism, has not been made explicit. The former, though, was because in much the same way as a search in the Constitution will not cause any results for 'separation of powers' 'Westminster system of government' et cetera, these are baked as considerations in interpreting our constitutions. In this instance, I argue that because of the political party being utilised as a vehicle in the body politic through which operationalises provisions that create Parliament, Electoral Law Provisions, et cetera, then, it can be seen as an implicit component of the Constitution.

A neater approach though would have been to finally ground the existence and regulations of political parties within the Constitution, providing it with a formal Constitutional standing. This approach should also have amended the provisions that outline the disqualifications for Parliamentarians, in order to ensure neater drafting. It however must be done carefully, recognising that the Constitution cannot identify one political party or any in the Constitution, because it would galvanise these parties in perpetuity, until there exists a supermajority for the removal of the provision.

The attendant problem, though, is that continually the courts have not always held that organisations such as these, though holding significant public responsibility and power, or of a public flavour, are amenable to judicial review. Put another way, the decisions of these organisations — though irrational, unreasonable, taking into account irrelevant considerations, abuse of power et cetera, are not always reviewable by the court of law under the **Administrative Justice Act**. The law has classified them as private entities to be assessed under other branches of law. As such, the safeguards may not be as present.

Now, the abovementioned though is reconcilable because one cannot always utilise a judicial review claim on its own, from the onset to ground a constitutional motion. Instead, one would have to file a non-bill of rights Constitutional Claim, to find redress under the Constitution as the amendment also facilitates. Luckily, though one should not have to rely on such a hope, when the provision could have easily removed 'expulsion', or provided enumerated considerations the court must consider under legal challenge of the expulsion as a valid determinant of the validity of the seat that the court would consider in assisting deciding.

In the absence of this though, it seems odd and difficult where and how one would ground the legal claim to challenge the amendment to the Constitution. It seems obscure as to what would be the basis of the challenge of the member of the House, particularly in circumstances of an expulsion. Do they argue that they were wrongfully expelled? In these circumstances, it would be elevating the party's constitution as a valid assessment, in circumstances where the party does not represent an arm of the state, sufficient to be responsive to a constitutional claim. However, in circumstances where the party is seen as symbiotic with the legislature and executive for legal analysis, then it may trigger action.

If there were horizontal application of the constitutional bill of rights, it would mean that one could have ground their claim as a breach of protection of the law, expression, association et cetera. However, if there is a connection made between the political party, executive arm of government and the legislature such that the court, is adjudicating upon the matter, will not be seeing these entities as distinct bodies, then the respondent in this fictional case can be satisfied, such that one will bring a claim versus the state machinery.

This fuzziness, though, of the abovementioned creates a worrisome constitutional mirage. And even in circumstances where the individual has won a case where their expulsion was deemed unconstitutional, their political mobility may be severely limited because of our political culture, such that they had even 'dared' to attempt to defect. However, this cannot be legislated, and it requires a different brand of politics.

It is not shy of the Caribbean court though to imbue questions of proportionality, reasonableness, legality, rationality, impropriety, abuse of power, and the conformity with the principles of the rule of law as a calculus to determine legality of a decision. Truly, the late Justice Wit is instructive when he noted that the law cannot rule if it cannot protect.

This law may be unable to protect in circumstances where the expulsions are read as immutable and unchallengeable, when the basis of the irrationality, unjust, and unreasonable nature is the expulsion itself.

And we must be continually wary and sceptical of utilising ill-advised, unnecessary and bad components of laws, and buffering it with the safeguards that the court must get it accurate, and do that which legislators are not prepared to do.

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