



RECOMMENDATIONS ON ISSUES AND CONSIDERATIONS FOR CONSTITUTION REFORM IN TRINIDAD AND TOBAGO.

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THE NATIONAL ADVISORY COMMITTEE ON CONSTITUTIONAL REFORM, TRINIDAD AND TOBAGO

The National Advisory Committee on Constitutional Reform (NACCR) is a Cabinet-approved body of citizens, drawn from different sectors of society, who possess significant knowledge, experience, and expertise in particular fields and subject matters. The NACCR is mandated to formulate terms of reference for a national consultation on Constitutional Reform.

Paper Presented
by
The Honourable Mr Justice Peter Jamadar, Judge of the Caribbean Court of Justice
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**Recommendations on Issues and Considerations for Constitution Reform in
Trinidad and Tobago. Paper presented before the National Advisory
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INTRODUCTION

“How do the Caribbean people learn about themselves and for their own purposes with the resources they now have? How does a community, a tribe, a race, a State, a nation, a people, save itself from impending damnation? How does a culture escape from itself? How does a system generate its own fertility?”

The first thing would be to plumb the dimensions of our own predicament.”

(Lloyd Best, ‘Independent Thought and Caribbean Freedom: Thirty Years Later’, in Caribbean Quarterly, Vol. 43, No. 1/2, 1997.)

“Break a vase, and the love that reassembles the fragments is stronger than that love which took its symmetry for granted when it was whole. The glue that fits the pieces is the sealing of its original shape. It is such a love that reassembles our African and Asiatic fragments, the cracked heirlooms whose restoration shows its white scars.

¹ Peter Jamadar, LLB, LEC, MDiv, DD, JCCJ, with Suraj Sakal, LLB, LEC, Judicial Counsel, CCJ, 4th April 2024.² By plural society, I mean one in which there are various ethnic sub-groups that are relatively distinct but not separated along rigid lines of demarcation and closed off from or absolutely opposed to one another, and rather co-exist in complex relationships of distinction and intermingling, as per, Furnivall and Best. These groups, often referred to as ‘tribes’ are defined by race as well as religion, geographic location, education, socio-economic status (class), and political ideologies.

This gathering of broken pieces is the care and pain of the Antilles, and if the pieces are disparate, ill-fitting, they contain more pain than their original sculpture, those icons and sacred vessels taken for granted in their ancestral places. Antillean art is this restoration of our shattered histories, our shards of vocabulary, our archipelago becoming a synonym for pieces broken off from the original continent.

And this is the exact process of the making of poetry, or what should be called not its “making” but its remaking, ...

Poetry, which is perfection’s sweat but which must seem as fresh as the raindrops on a statue’s brow, combines the natural and the marmoreal; it conjugates both tenses simultaneously: the past and the present, ... There is the buried language and there is the individual vocabulary, and the process of poetry is one of excavation and of self-discovery.”

(Derek Walcott, Nobel Lecture, December 7, 1992.)

These two quotations, from two Caribbean icons with deep Trinbagonian associations, can shape our explorations of constitutional reform in Trinidad and Tobago (TT). Best’s invitation “to plumb the dimensions of our own predicaments” is an apt starting point, and Walcott’s insights into the remaking of Caribbean poetry as “the process of excavation and of self-discovery” is formulaic of how we can go about the process of constitution making – and as Walcott would have it, a process that must be an act of love, of genuine care and concern for a greater national good.

This Committee has an opportunity to influence constitutional reform in TT and leave its mark on changing TT for the better and for the benefit of future generations. In this short discourse, what is proposed are broad strokes that can inform the general approaches and methodologies that the Committee can take to bring about relevant and effective constitution reform in TT.

Earlier Attempts at Constitution Reform in TT, an Overview

In the twentieth century overarching constitutional reform has happened eight (8) times: 1925, 1945, 1950, 1955, 1959, 1961, and in 1962 and 1976 in TT. (Democracy & Constitution Reform in Trinidad and Tobago, 2008, hereafter ‘Jamadar, 2008’)

In 1962 Trinidad and Tobago became an independent state under a new Independence Constitution. A Governor General was the head of state. The legislature was bicameral.

In 1976 Trinidad and Tobago became a Republic under a new Republican Constitution, which is its current constitution. A President is the head of state. The legislature is bicameral. In essential structure and content, the 1976 Constitution is little different from 1962. (Jamadar, 2008)

Noteworthy in the lead up to 1976 was the establishment and Report of the Wooding Constitution Commission. However, the 1976 Constitution is not the product of this initiative, as its main recommendations were rejected, and an independent consultant engaged to draft the 1976 Constitution which was introduced into the Parliament by way of Joint Select Committee. Since 1976 there have been formal (state initiated) attempts at constitutional reform which produced accompanying reports. Most notable were the 1987 Hyatali Constitution Commission and the 2013 Trinidad and Tobago Constitution Reform Commission. In addition, there have been several other constitutional reform initiatives which have produced their own reports and recommendations (e.g. the Principles of Fairness Inc. draft constitution, 2006).

Also noteworthy, is that in August 2006 a ‘Draft Constitution of the Republic of Trinidad and Tobago’ was laid in Parliament, also drafted by the consultant for the 1976 Constitution. The significant changes proposed were (i) the establishment of an Executive President (elected by the House of Representatives after general elections and not directly by the electorate), and (ii) a re-visioned cabinet that was not accountable to Parliament but appointed as advisors to the Executive President (comprising up to 25 members of which only nine – 6 MPs and 3 senators, could be drawn from Parliament). The legislature remained bicameral but with a reimagined senate (expanded, with elements of proportional representation - incorporated and inclusion of representatives from local government bodies and the Tobago House of Assembly).

The Idea of Republic: Creating a TT Civilization

What is a constitution? And what is its value? To consider constitutional reform is to consider the kind of civilization that a country wants to create and sustain. To create a cohesive civilization requires that certain essential values and features are agreed by a sufficient cross-section of citizens (which is essential in a multi-cultural and plural society). Consensus must

be inclusive and diverse for a sustainable civilization to take shape in a plural society.² These agreed values and features form a centre around which a civilization coalesces, evolves, and responds to changing circumstances. They ought not to be rigid but rather accommodating of change while also being standard bearing/setting (hence measurable). And to be effective, these values, features, and standards must be linked to and align with core cultural realities and as well with relevant structural and institutional systems. There must be indigenous integrity between inward and outward facing realities – between sociological and cultural realities and values and proposed institutional, structural, and standard bearing/setting arrangements.

Constitution making – including standard bearing/setting values and structural institutional arrangements, is thus potentially civilizing for specific societies if it can achieve these objectives and function as an effective centre of integrity for social, political, and economic relationships for a significantly wide cross-section of society. A constitution is intended to be a foundational collective epicentre for social, political, and economic sovereignty, cohesion, growth, development, and transformation in space and time.

The fundamental conceptual and constitutional shift intended by former colonies in the progression of governance from colony to independent state to republic, is a changed relationship around sovereignty between the governed and those who govern. In a monarchical arrangement the monarch is sovereign and the governed are subjects (of the sovereign). In a republic this is inversed, the People (the governed) are sovereign and those who govern are their trustees and serve in office on their behalf and for the furtherance of their collective best interests. Diagrammatically, one may think of this shift in sovereignty as the flipping of a pyramid. This flipping has profound effects on the design of constitutional arrangements and on the shapes and lines of accountability for relationships of governance, and indeed, for relationships of power and accountability.

TT as a former British colony has moved through Crown Colony governance (full monarchical), to Independence (with a Governor General as head of state and accountable to the Crown – quasi monarchical), and in 1976 to avowed Republican status (with a President as

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head of state and accountable, in theory, to the People, structurally through the Parliament as the People's representative chamber).

Assuming that what we want TT to be is a liberal democratic state, a first issue for constitutional reform is whether we want our constitutional arrangements to reflect those of a true republic (given our avowed status as such). This issue is linked to the second issue of determining exactly what kind of democracy we really want. Though, maybe, we need to determine the second issue initially as that will help us determine our answer the first issue. A third and related issue is whether, given the 1976 Constitution, existing constitutional arrangements conduce to the effective establishment of liberal democratic and/or republican governance (as self-government among active and participating free and responsible persons), and if not, why not.

Democracy, more than just adding and stirring.

It is customary to speak of and measure democracy through five well known lenses. (Jamadar, 2008) These lenses are: (i) regular and periodic free and fair elections, (ii) universal adult suffrage, one person one vote, (iii) the rule of law, (iv) the separation of powers, and (v) majority rule. Each of these individually and together can advance democratic self-governance, but not necessarily so and do not necessarily capture the essence of democracy.

Firstly, free and fair elections can result in the election of administrations that are unaccountable during their terms of office, even to the extent that they are deemed autocracies, and so undemocratic. Secondly, universal adult suffrage has built in limitations, in TT these include age, residence and citizenship. But conceptually the quantitative idea of one person one vote as an electoral and democratic standard of equality or fairness may be flawed. In certain societies a qualitative assessment of certain groups or regions may be more conducive to democracy. Tobago is an example of this, where the quantitative allocation of seats to votes is different from Trinidad. This is so for qualitative reasons, including the demands of substantive equality (which recognises the legitimacy of differentiated treatment for different groups) and meaningful representation. Indeed, the vibrancy of democratic self-government is a qualitative assessment.

Thirdly, the rule of law, where all are equal under and accountable to the law, has also been the underpinning for, say, slavery and indentureship, and for apartheid and segregation, in

democratic states. Indeed, for the Privy Council it remains a basis for the preservation of laws in TT that are in agreed violation of constitutionally declared fundamental human rights (Chandler v The State (TT) [2022] UKPC 19). Fourthly, the separation of powers (as per Locke and Montesquieu) can help to restrain unchecked executive administrative power, but not necessarily so (*arguendo*, the President, as head of the executive, under the TT 1976 Republican Constitution). Informally, the position can be even more tenuous, and in TT the existence of ‘networks’ of influencers that exist across and in-between boundaries may undermine structural intent. As well, in TT and in Caribbean states with relatively small Parliaments, the theory of ‘separation’ between executive and legislature may exist more in default than in reality. Lastly, majority rule can also result in majoritarian exclusion of minority groups and effective disenfranchisement. In TT, where majority rule means a majority in the context of First Past The Post (FPTP), a single-seat plurality of votes can constitute a ‘majority’ and result in overall minority rule – as has happened three times post-independence.

The epicentre of democracy.

It is not enough to put together a document which contains these five elements, to add and stir, call it a constitution, and assume that the output will be democratic self-government. Though all of these five features are important, and some may argue essential for democracy, there is, maybe, a single measure that lies at the centre of the civilizing project of constitution making. That centre, that lies at the heart of the constitutional project of organising state authority in democratically legitimate ways, is: *a sovereign, free, responsible, representative, autonomous, and vibrant Parliament – one that is considered legitimate; to which the executive and judiciary are accountable and answerable in the context of an effective separation of powers, which also permits the relative autonomy and independence of all three branches operating together in an inter-dependant functionality, and all taken together in an overarching context of constitutional supremacy.* Democracy is at its heart, after all, ‘rule by the people’ (from *demos* in Greek – people, and *kratia* in Greek – rule).

Republicanism.

Maybe what we, the People of TT are aspiring to when we speak of being a republic, is a democracy that is defined and experienced as *functional, participatory, and effective self-government of a community of persons who are free and responsible, and who exist in relationships of equality, regard, and respect (as peers).* (Jamadar, 2008, 77)

Red Flags

Best's seminal questions: "*How does a culture escape from itself? How does a system generate its own fertility?*" permit a cross-reference to Peter Drucker's insight, that "culture - no matter how defined - is singularly persistent." (Peter Drucker, Wall Street Journal, 1991) In short, if we define culture as the assumptions, values, and behaviours of a society, then the insights of both Best and Drucker help us recognize that merely changing arrangements on paper will not likely change pre-existing and entrenched assumptions, values, and behaviours that drive a society.

If one thinks of a constitution in operational terms, as "a body of basic rules by which the people of a country agree to govern themselves" (Wooding Commission, 'Thinking Things Through, 1972), changing the rules without changing the governance culture will likely result in the pre-existing cultural norms shaping the lived interpretation, use, and practices that develop around the new rules. In fact, this is what has tended to happen in TT. Both culture and rules must align for sustainable change.

Coloniality and the resilience of anti-democratic Crown Colony governance have been the lived experiences of democratic governance in TT, despite the changes effected constitutionally by the 1962 and 1976 Constitutions. There is a divergence between paper (form) and practice. What operates in practice is closer to the Crown Colony model of governance which existed in TT between 1831 to 1950. It is therefore a far cry from what republicanism anticipates and aspires towards. Arguably, the reality may in practice even be anti-democratic in significant ways. (Jamadar, 2008, 66 et seq)

An example may make the point. TT prescribes FPTP as the electoral system of choice for general elections that elect representatives to the House of Representatives. However, *in practice what operates (in disguise) is a more akin to a de facto list system of Proportional Representation (PR).*

We imagine that we are voting in a single national election for a prime minister or a ruling party, rather than for forty-one (41) representatives in distinct and separate constituency elections. Our formal constitutional arrangements are in fact governed by political culture (habits and behaviours). On paper we are supposed to be having forty-one (41) simultaneous

polls for legislative representatives, not a single election for a preferred prime minister and political party. These representatives constitute the House of Representatives. On paper elected representatives appoint a prime minister from among them (whoever can command a majority). The prime minister then forms a cabinet from members of Parliament. In theory a prime minister from one party can appoint a representative from another party to be in the cabinet. Party affiliation is irrelevant in our constitutional arrangements, on paper. Voters are supposed to be concerned with electing a Parliament, not a prime minister, a legislature not a government administration. Yet we believe we elect an executive and a government. In fact, the existing system is made to operate with an emphasis on party and leadership power – not legitimate and inclusive representation.

In a true FPTP Westminster system, loyalty is first to constituents, before party. In the UK, for example, representatives regularly vote against their own party – even in the face of the party whip. This is unheard of in TT. In TT representatives do not need to have any special connection with the constituency (such as residency, or property ownership requirements etc.), and seats are distributed by a party to candidates on the basis of who it wants to win (safe seats) and be present in Parliament and to be a part of an intended cabinet. This more akin to a List PR system, where a party lists all the candidates it wants to have in Parliament in order of priority, and depending on the votes obtained some of those persons are elected based on their ranking on the proposed list. In fact, this is how the FPTP system is being operated in TT – as a *de facto* party List PR system. Constituencies *per se* do not mean much in practice, representatives are primarily seeking the favour and to do the bidding of the party and not of constituents – and actually more than even the party, the favour and bidding of the leader of the party (who is always the potential prime minister). When a choice must be made, the party/ prime minister prevails. What exists in practice is therefore really a single election based on party representation and prime ministerial loyalty and patronage, not separate elections for legitimate constituency representatives. (Jamadar, 2008, 102)

Thus, there is a split between the constitutional models adopted on paper in the Caribbean and the practices actually occurring. This may be because the models are often cut and paste transplants with not sufficient consideration for existing cultures and attention as to how to grow a TT derived model.

Constitutional reform must not just be functionally appropriate on paper, it must also work best in practice. What is required is therefore effective operational reform. Reform that will not be hijacked by pre-existing political and social cultures. Reform geared toward evolving a society that is truly reflective of our TT norms, values, beliefs, and aspirations. Reform with a mind to the future and our best visions and imaginings of who and what we are and can become. Maybe, this operational functionality is how a constitutional system of governance can ‘generate its own fertility’ in sustainable and life-giving ways for future generations (to address Best’s concern).

Constructing a sustainable Caribbean civilization

Returning to Best’s seminal questions: “*How does a culture escape from itself? How does a system generate its own fertility?*” How do we escape from coloniality and the resilience of anti-democratic Crown Colony governance and create a true democratic system that can generate its own fertility in meaningful and relevant ways for TT?

One way through, is to explore and discover indigenous, integral, and shared core societal values, and use these as the foundation and framework for constructing both constitution and civilization. Shared values are different from shared cultures. There is no doubt that TT enjoys unique cultures, expressed in all domains, that co-exist in fused degrees. These cultures are ever evolving in syncretic forms and iterations shaped by history, geography, social interactions, and cultural inter-mingling (developing from generation to generation). However, the task of building a sustainable civilization may require going behind the ‘masks’ of cultures, beyond the collective gaze,³ and discovering deeper and sustainable common values – principles that are considered fundamental to who, what, and how we perceive ourselves, as society, to be and what we stand for and aspire towards.

An example may assist in explaining what is meant. Across cultures and ethnicities, “our native sense of fairness prompts us to strongly object to ‘advantage’, the bullying and exploitation of the weak by the strong, even if it is legal.” (Jamadar, 2008, 90.) Is this value of ‘fairness’ a core

³ Earl Lovelace’s ‘masking and unmasking’, per ‘The Dragon Can’t Dance’ (1979): Aldrick, the novel’s protagonist, expresses the desire to be seen in a more profound manner than the collective gaze that observes him as he performs and revels in the dragon-mask costume that he would fabricate almost single-handedly.

civilizing value in TT, one that is cross-cultural? And if it is, how can it, as principle, shape and form our societal and institutional arrangements and relationships, our constitution making?

It is suggested that a first task of constitutional reform, is to listen deeply to the voices of the People, and in doing so to discover what Walcott calls the ‘buried language’ of our common values. This requires a Lovelaceian unmasking of what appears to be, a looking behind what is on the surface, masquerading as costume, to grasp an authentic ‘felt-sense’ of what we as People truly believe in, long for, and aspire towards – as core values. This is what one may term the ethnological function of a constitutional reform committee.

Having excavated these values, these ‘shards of vocabulary’, the second task of ‘remaking’, which is the project of Caribbean constitutionalism, must be undertaken. This involves translating these ‘felt-sense’ core values into constitutive principles and structures, into institutions and institutional relationships, into a Constitution. They must find expression in a Preamble, and also in the substantive text, and in the structure, arrangements, and processes that the constitution prescribes. This is the constructivist function of a constitutional reform committee.

For example, taking fairness as both a national core value and a constitutive constitutional principle, one asks, say, how would this shape and form the nature, structure, and processes of a TT Parliament, its electoral system, and the relationships of responsibility and accountability among the three branches of government (legislature, executive, judiciary). One would interrogate the existing electoral and Parliamentary arrangements to critically determine whether the standard of fundamental fairness is being met (using historical data and the lived experiences of citizens). And if not, what different arrangements and processes may achieve this. Indeed, and in principle, the entire constitution should ideally cohere, in integrity, in its manifestation (its engaging, encompassing, and enabling) of fundamental fairness in all aspects of its content and design.

In this way, commonly held core societal values become constitutive constitutional principles that are apparent in the text and structure of a constitution. Because these are the People’s values translated into constitutive principles, such a constitution is recognizable, can be identified with, and is therefore legitimate for a wide cross-section of citizens. And because it

is legitimate, it is potentially generative in fertile ways, and hence sustainable from the inside out. Thus, civilizing.

Unlike the fabled *Douen* of Trinidad folklore,⁴ faces uncovered and seen, our feet and faces must point in the same directions!

CONCLUSION

It is hoped that the general issues that have been focused on in this first discourse are considered useful. The purpose is really about methodology, about how we may go about the process of constitution making. The second discourse will examine specific areas and proposals for constitution reform in TT. What is however more important, is that we grasp this opportunity to advance constitutional reform in TT. It is our chance to engage the “*process of the making of poetry, or what should be called not its “making” but its remaking, ...*”; to quote Walcott and read in place of ‘poetry’, ‘a constitution’.

⁴ A legendary creature, the *Douen* (Dwen) is the spirit of a still born child, a child who died very young, or an infant who died before it was baptized. It wanders in the forest near rivers, its feet turned backwards, its big head covered with a large hat so that its face is not seen (hence they are faceless). They live in bands wandering the forests at night, crying out for their mothers.