TERM LIMITS, RECALL AND SECOND BALLOTS: The Constitution (Amendment) Bill 2014

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ABSTRACT

On 4th August, 2014, the Prime Minister of Trinidad and Tobago, Mrs. Kamla Persad-Bissessar, SC, MP, told the House of Representatives of the intention of her Government to bring to Parliament a Constitution (Amendment) Bill 2014 which came at the conclusion of reports submitted by a Constitution Reform Commission.

The essence of the proposed reforms were (i) to introduce time limits on the Office of the Prime Minister (as opposed to term limits), (ii) to introduce the right of constituents to recall their Members of Parliament, and, (iii) to introduce a system of runoff elections in cases where no candidate for a constituency earned less than fifty percent of the votes cast at an election in the constituency.

The Bill only required a simple majority in both Houses of Parliament and was passed with amendments in the Senate. At the time of writing the proposal for this paper, the Senate amendments were to be ratified by the House of Representatives. On 11th June, 2015, the Prime Minister told a post-Cabinet news conference that she was not proceeding with the Bill and that further consultation would take place in her second term, if re-elected. Parliament was dissolved on 17th June, 2015.

This paper will examine (i) the impact of a time limit of ten years and six months on the tenure of office of a Prime Minister; (ii) the impact of a one-time attempt to recall any MP two and a half years after taking his/her oath of office after election; and, (iii) the impact on the political configuration of the House of Representatives in cases where no candidate is elected with more than fifty percent of the votes cast at the first election and the formula to be used to elect the remaining MPs who will emerge after the second ballot is held fifteen days later.

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INTRODUCTION

On 2nd March, 2013, the Government of Trinidad and Tobago appointed a Constitution Reform Commission to consider the issue of constitution reform for Trinidad and Tobago. The Commission consisted of the following persons :

1. The Honourable Mr. Prakash Ramadhar, MP, Minister of Legal Affairs;
2. Mr. Justice Sebatian Ventour (Retired High Court Judge);
3. Madam Justice Amrika Tiwary-Reddy (Retired High Court Judge);
4. Dr. Hamid Ghany (author of this paper);
5. Dr. Merle Hodge (Retired University Lecturer in the Humanities);
6. Mr. Carlos Dillon (Tobagonian hotelier).

The Commission held seventeen public consultations, fourteen in Trinidad and three in Tobago, between March and May 2013. It submitted its report [1] to the Prime Minister, the Honourable Mrs. Kamla Persad-Bissessar, SC, MP, on 27th December, 2013. After the report was made public, there were four more public consultations (three in Trinidad and one in Tobago) in February 2014 to get feedback on the report. A subsequent Addendum to the Report [2] was prepared and submitted to the Prime Minister on 18th July, 2014 further to the feedback received.

The Government announced at the opening of the Fifth Session of the Tenth Republican Parliament on 4th August, 2014 that it would bring a Constitution (Amendment) Bill 2014 for debate in the House of Representatives on Monday 11th August, 2014. In piloting the Bill, the Prime Minister told the House of Representatives that she was lifting the doctrine of the collective responsibility of the Cabinet for the vote on the Bill and all members of her government were free to exercise a conscience vote when the final vote was taken.

As it turned out, all nineteen (19) members of the United National Congress led by Mrs. Persad-Bissessar voted in favour of the Bill, while two (2) Cabinet Ministers who were members of their coalition partner, the Congress of the People (COP), the Minister of Foreign Affairs, the Honourable Winston Dookeran, MP, and the Minister of Public Administration, the Honourable Mrs. Carolyn Seepersad-Bachan, MP, voted against the Bill. The Minister of Social Diversity and National Integration, the Honourable Rodger Samuel, MP, also a COP member, abstained at the final vote on the Bill. The other two COP members voted in favour of the Bill as well as the two Tobago Organization of the People (TOP) members in the coalition government.

All members of the Opposition voted against the Bill, namely all members of the People's National Movement (PNM) present in the House, at the time of the final vote, led by the Leader of the Opposition, Dr. Keith Rowley, MP, and the lone member of the Independent Liberal Party, its political leader, Mr. Jack Warner, MP. The two PNM MPs who were absent at the final vote were the former Prime Minister, Mr. Patrick Manning, MP, and the MP for Port-of-Spain North/St. Ann's West, Mrs. Patricia Mc Intosh. The MP for D'Adadie/Omeara and former Minister of Sport, Mr. Anil Roberts, had resigned his seat with effect from 31st July, 2014. The final vote was 23 for, 14 against, and one abstention.

Essentially, the Bill had three main reforms which were (i) the introduction of time limits on the Office of the Prime Minister (as opposed to term limits), (ii) the introduction of the right of constituents to recall their Members of Parliament, and, (iii) the introduction of a system of runoff elections between the top two candidates in cases where no candidate for a constituency earned more than fifty percent of the votes cast at an election in that constituency.

The Bill was amended at the final vote in the Senate on 28th August, 2014. This was largely due to the fact that the Government does not have an automatic majority in the Senate owing to the fact that of the thirty-one Senators, sixteen are appointed by the President on the advice of the Prime Minister; six are appointed by the Leader of the Opposition on the advice of the Leader of the Opposition; and, nine are appointed by the President in his own discretion from among outstanding persons from economic or social or community organizations and other major fields of endeavour.

In the circumstances, the balance of power is held on all legislation by the nine Senators appointed by the President in his own discretion because the President of the Senate is usually selected from among the sixteen Senators recommended by the Prime Minister.

At the final stage of voting, the time limit of ten years and six months for the Prime Minister was left intact. However, the provisions for the recall of MPs by their constituents and the holding of runoff elections in constituencies where no candidate earned more than fifty percent of the votes cast in an election were amended.

In the case of the recall petitions for MPs, the original proposal was for an additional ground to be established in section 49 of the Constitution whereby MPs would be required to vacate their seats. This would have been done by way of a notification to the Speaker from the Chairman of the Elections and Boundaries Commission advising the Speaker that an MP would have to be recalled and a bye-election held because a successful petition for the recall was supported by the votes of two-thirds of the registered voters in the constituency of that MP.

The original Bill provided that such a recall election could not take place before the expiration of three years or after the expiration of four years. An application for the issuance of a petition for the recall of an MP could be made by two persons who reside in the said constituency. Ten percent of all registered voters in that constituency must sign such an application for the recall petition to be issued by the Elections and Boundaries Commission for a vote in the constituency to be held on it. Such a vote would be held within seven days of the issuing of the petition after publishing the petition in two daily newspapers in circulation in Trinidad and Tobago and on the Commission's web site.

The petition would have required two-thirds of the registered voters in such a constituency to vote in favour of it over a period of twenty-one consecutive days except on public holidays between the hours of 8.00 am and 4.00 pm.

The period of time before which an application can be made for a petition to be issued was amended from three years to two years and six months and the percentage required for an application to be successful was increased from ten percent to twenty percent. The following excerpt from the Senate Hansard for 28th August, 2014 at page 156 captures the essence of these amendments :

"**Mr. Chairman**: Hon. Senators, the question is that clause 6 be amended as circulated and be further amended by 49A 'before the expiration of three years'. In the proposed section 49B(2)(a) you are deleting 'three' and have 'two years and six months'—that is correct?—and then renumbered subsection (5). In the renumbered subsection (5) delete 'ten per cent' and replace it with 'twenty per cent'. In renumbered section 6(4)(a) delete 'three years' and replace it with 'two years and six months'. In (7) paragraph (b), you delete 'ten per cent' and insert 'twenty per cent'." [3]

In respect of the runoff proposal, the Senate amended it to permit more than two contestants to participate in a runoff election if the third contestant earned twenty-five percent of

the votes cast and was within five percent of the second-placed contestant. The Senate Hansard for 28th August, 2014 at page 221 captures the essence of the amendment as follows :

Mr. Chairman : AG, you said you had something on clause 11, which was already passed and recommitted.
Sen. Ramlogan SC : Yes, it is just below clause 11. Chair, may I ? I beg to move that clause 11 as amended and circulated—clause 11 is a consequential amendment to the election rules. [Crosstalk] In the proposed amendment to rule 101 of the Election Rules, delete subrule (1)(b)(ii) and substitute the following: '(ii)that a supplementary poll shall be held within fifteen days-
(A) between those candidates who earned the highest and second highest number of votes;
(B) where there is an equality of votes between two candidates obtaining the highest number of votes, between those two candidates; or
(C)among the candidates referred to in sub-subparagraphs (A) or (B) and any other candidate – who earned at least twenty-five percent of votes and whose votes fall within a margin of five per cent of the votes earned by the candidate obtaining the second highest number of votes or the candidates referred to in sub-subparagraph (B),'
Question put and agreed to.
Clause 11, as circulated ordered to stand part of the Bill.
Question put and agreed to:
That the Bill, as amended, be reported to the Senate." [4]

The amended Bill remained on the Order Paper of the House of Representatives from September, 2014 until the dissolution of Parliament on 17th June, 2015 for the Senate amendments, standing in the name of the Prime Minister, to be ratified. On 11th June, 2015, the Prime Minister announced that she was not pursuing the Senate amendments owing to the need for further consultation on the proposals.

The Creation of Hybrid Systems

These amendments to the Constitution of Trinidad and Tobago represented a policy tilt in the direction of the evolution of the political system into a hybrid parliamentary-presidential one. The Constitution Reform Commission had recommended a hybrid system in its December 2013 report as follows :

"The system of government being proposed is a hybrid of parliamentary and presidential features (elements of Westminster and Washington). It is designed to foster political consensus and power-sharing; a clearer separation between the Executive and the Legislature, with neither dominating the other; stricter scrutiny and accountability; and increased citizen participation." [5]

The Commission continued with this trend of thought in its Addendum to the December 2013 report in July 2014. The recommendations for what were originally term limits for the Prime Minister (that became time limits) and the right of recall of MPs, both from the 2013 report, as well as the introduction of the second ballot from the 2014 Addendum, were all based on a philosophy of creating hybrid institutions.

The recommendation in the Addendum was for the Government to attempt those reforms that required a simple majority in both Houses of Parliament first, and to attempt to pass those amendments that required special majorities to amend entrenched provisions at a later time. The specific portion of the Addendum that dealt with this matter read as follows :

"6. The proposals for constitution reform should be separated into different Bills requiring special majorities or simple majorities as the case may be.
7. The Commission felt that there were recommendations that fell into different categories of required majorities in relation to section 54 of the Constitution as it pertains to its alteration.
8. To that end, the Commission arrived at the conclusion that different Bills requiring special or simple majorities ought to be taken to Parliament for consideration in order to allow an up or down vote on specific line item issues as opposed to the use of an omnibus Bill which may or may not result in the accomplishment of constitution reform.
9. **Recommendation**: Separate the recommendations into individual Bills that require either simple or special majorities as the case may be." [6]

The Commission recognized that there were obvious political challenges involved in presenting an omnibus constitution reform bill to Parliament which would require a three-fourths majority in the House of Representatives and a two-thirds majority in the Senate. The piecemeal approach that involved the separation of simple majority amendments from special majority amendments was designed to ensure legislative success for those measures that could be accomplished as stand-alone reforms regardless of the legislative success or failure of the special majority measures that required the votes of the Opposition in the House of Representatives and the Opposition or the independent Senators in the Senate.

In the circumstances, the Government accepted the recommendation of the Commission and prepared the Constitution (Amendment) Bill 2014 that dealt only with those sections of the constitution that required a simple majority for the listed reforms.

The effect of the reforms would have assisted in the commencement of building a hybrid parliamentary-presidential system. The reforms would have introduced a presidential-style term limit for the Prime Minister that was time-specific so that it could straddle more than one term if there were early dissolutions alongside the introduction of American-style mid-term elections through the application of the rules surrounding the right of recall with a French electoral model for the initial choice of who the parliamentarians should be.

What was also recommended by the Commission in its December 2013 report was the introduction of fixed election dates. [7] However, this particular reform required a three-fourths majority in the House of Representatives and a two-thirds majority in the Senate. This would not be easily accomplished as the Opposition was not inclined to support the idea as it was not included in their list of constitutional reforms published in August 2014. [8]

Time Limits on the Prime Minister

The proposal for the introduction of time limits on the person holding the office of Prime Minister introduced a different dimension into the debate about term limits for the holder of the office of Prime Minister. Instead of copying the American model of applying a two-term limit in a system that operates on the uncertainty of the length of a parliamentary term, the proposal actually imposed a time period of ten years and six months on anyone who held the office of Prime Minister.

This thinking was driven by the fact that the longest period of time available for the existence of a parliamentary term was five years and three months. As a consequence, multiplying this by two would create a ten year six month term. The wording of the actual amendment that sought to amend section 76 of the Constitution read as follows :

"(1A) No person shall hold the office of Prime Minister for more than ten years and six months, whether or not such service is continuous or has been interrupted, and on attaining that length of service the Prime Minister shall vacate his office.

(1B) In calculating the length of service of a Prime Minister, no account shall be taken of any time spent serving as acting Prime Minister without having been appointed Prime Minister.

(1C) Where, after the first poll of a general election, one or more supplementary polls are, or are to be, held in accordance with section 73(4), the President shall not appoint the Prime Minister before the results of all the supplementary polls have been declared, but the current Prime Minister and Ministers shall remain in office until they are required to vacate office in accordance with section 77(2)(a) and (3)(a), respectively." [9]

These provisions clearly sought to convert the term limit on the office of Prime Minister into a time limit that could take into account the reality of a prime Minister going into Opposition and then returning at a later date to become Prime Minister.

A term of office could be as short as the period within which another election can be held immediately after a swift dissolution of Parliament following an election. For example, in St. Lucia in 1987, there were two general elections in April that year, one on 3rd April and the other on 30th April. That would have constituted one term if the American model was being used as the guide.

The political effect of the amendment would also force political parties to address the issue of succession planning in respect of their leadership. This would alter the political culture whereby an external stimulus would be placed on the political system to ensure internal party transitions of leadership within dedicated time frames.

The main challenge with this would be the impact of the traditional "lame duck" status that applies to all US presidents. Unlike the presidential model, a Prime Minister operating under a time limit may face challenges within and without the Cabinet that could undermine his/her authority. Without the ability to use a power of dissolution as a weapon against political infighting, the office of Prime Minister could be further compromised if fixed dates for elections were introduced that made an exception for early dissolution on the basis of a motion of no confidence. In many respects, fixed dates for elections with time limits for the Prime Minister may make that office weaker.

The Right of Recall

The proposal to introduce the right of constituents to recall their MPs was proposed by the coalition People's Partnership in their general election manifesto in May 2010. The Constitution Commission recommended this measure in its December 2013 report.[10] However, it must be noted that the Commission recommended a reform of the Parliament in such a way that the House of Representatives would only preform parliamentary duties and not be the source of appointments to the Executive branch of government. The Senate was recommended as a body that should be elected by the Hare method of proportional representation and that the Prime Minister and other Ministers should be appointed from that House. The House of Representatives should continue to be elected by the first-past-the-post system and no ministerial appointments should be made from that House.

In its place, parliamentary committees should be populated from the House of Representatives so that there could be a balance between the Houses with the available members of the House of Representatives being able to scrutinise the Executive branch, while Ministers would be appointed from among the Senators who would earn their membership through selection from party lists in the Senate. It would be possible that there might be no clear majority in the Senate which would force consensual or consociational methods of governance in an environment where no single party was likely to dominate the Senate.

The implementation of a right of recall as described above would create the equivalent of mid-term elections in a parliamentary system that would allow greater citizen participation in the

parliamentary process after two years and six months (down from three years). If the other reforms for the Senate and the appointment of Ministers could not be accomplished owing to the fact that they required special majorities, then the parliamentary system could still function on the basis of the Executive being tested at the halfway point in the parliamentary term. There could be a renewal of the mandate with either a larger or slimmer majority or the creation of a minority government which could lead to a motion of no confidence and a subsequent general election.

This measure might suit voters and create a stronger environment of checks and balances between government and opposition. The use of an application and then a petition in the recall mechanism proposed could prevent abuse of the process, while simultaneously demanding higher levels of performance from MPs on all sides, not to mention the performance of the government in the policy formulation and implementation process.

The Second Ballot Runoff Elections

The second ballot runoff election system was proposed in response to the many complaints about the first-past-the-post system that were heard by the Commission during the public consultations. In the December 2013 report the first-past-the-post system was recommended for retention for the House of Representatives, while the Hare method of proportional representation was proposed for the Senate.

Further discussion at public consultations after the December 2013 report was published and further discussions among commissioners led to the search for a fairer method of the first-past-the-post system in order to ensure that no MP would be elected on a minority basis. This led to the runoff system being considered by the Commission in the preparation of its July Addendum as a means of seeking a fairer method of the first-past-the-post system.

This proposal was deemed to be the most controversial one of the three in the Constitution (Amendment) Bill 2014. There were demonstrations outside the Parliament with supporters of both the government and the opposition voicing either their support or their disapproval for the measures.

One former member of the Commission changed her mind about the proposal on the basis that it was being brought too quickly to Parliament after it was proposed (18th July recommendation for an 11th August debate) and also that she felt that proportional representation would have been better. Another former member of the Commission felt that the timing of the debate was too soon after the recommendation was made.

As it turned out, the Government had to accede to amendments in the Senate that changed the intent of the proposal by permitting the possibility of three candidates contesting a runoff election if the third-placed candidate earned 25% of the votes cast and finished within 5% of the second-placed candidate. This was a fundamental deviation from the initial proposal in the Bill.

The data that drove the recommendation for the second ballot runoff election model was drawn from local election results between 1961 and 2007. These results revealed that there were several instances where electoral outcomes produced winners with less than 50% of the votes cast in several constituencies. In a small Parliament that had 30 MPs in 1961, 36 MPs between 1966 and 2002, and 41 MPs since 2007, this can have the effect of creating distorted outcomes.

The following is a breakdown of the constituencies between 1961 and 2010 that produced electoral outcomes where the winning candidate earned less than 50% 0f the votes cast :

YEAR	NUMBER OF SEATS	OUTCOMES LESS THAN 50%	SEAT ALLOCATION
1961	**30 seats**	**1 winner less than 50%**	**20-10**

1966	**36 seats**	**3 winners less than 50%**	**24-12**
1971	**36 seats**	**None**	**36-0**
1976	**36 seats**	**6 winners less than 50%**	**24-10-2**
1981	**36 seats**	**10 winners less than 50%**	**26-8-2**
1986	**36 seats**	**3 winners less than 50%**	**33-3**
1991	**36 seats**	**11 winners less than 50%**	**21-13-2**
1995	**36 seats**	**1 winner less than 50%**	**17-17-2**
2000	**36 seats**	**1 winner less than 50%**	**19-16-1**
2001	**36 seats**	**2 winners less than 50%**	**18-18**
2002	**36 seats**	**None**	**20-16**
2007	**41 seats**	**14 winners less than 50%**	**26-15**
2010	**41 seats**	**None**	**29-12**

The 1991 and 2007 general elections produced parliamentary outcomes where the party that formed the government, the People's National Movement (PNM), did so with manufactured majorities. In 1991 they got 45.1% of the votes cast for 21 of 36 seats and in 2007 they got 45.85% of the votes cast for 26 of 41 seats. In 2001, there was an 18-18 tie with the two seats where there was a minority winner being split between the PNM and the other main party, the United National Congress (UNC).

Runoff elections could have altered the final seat allocation which could have altered the outcome as to who would form the government in 1981, 1991, 2001 and 2007. The proposal was initially advanced for a system in which the House of Representatives would no longer be the one whose membership would determine the Composition of the Executive branch of government.

The reform, however, could stand on its own as part of the wider package of reforms advanced for the Parliament as well as it could be regarded as a stand alone reform in its own right. The Government decided to treat it as a stand-alone reform in the first instance. Whether it will be brought back as a reform measure in the Eleventh Republican Parliament will be seen after the 7th September, 2015 general election.

ENDNOTES

1. Report of the Trinidad and Tobago Constitution Reform Commission, Ministry of Legal Affairs, 27th December, 2013.

2. Addendum to the Report of the Trinidad and Tobago Constitution Reform Commission, Ministry of Legal Affairs, 18th July, 2014.

3. Hansard (Senate) 28th August, 2014, p. 156.

4. Hansard (Senate) 28th August, 2014, p. 221.

5. Report of the Trinidad and Tobago Constitution Reform Commission, p.2.

6. Addendum to the Report of the Trinidad and Tobago Constitution Reform Commission, pp. 1-2.

7. Report of the Trinidad and Tobago Constitution Reform Commission, p.24.

8. Trinidad Express, 8th August, 2014.

9. Constitution (Amendment) Bill, 2014

10. Report of the Trinidad and Tobago Constitution Reform Commission, p.24.