

Speaking Notes on Referendum - 10th January, 2013

Salutations....

Introduction

Let me first publicly thank the organizers for this panel discussion. I trust that it proves useful during this time in our nation and perhaps more importantly I trust that it will assist those who intend to participate in the upcoming referendum.

I also wish, by way of introduction, to say that tonight marks the 46th anniversary of Majority Rule. I therefore wish to salute those brave men and women who played a role in ushering in the Quiet Revolution, which changed the course of our collective history. They paved the way for our democracy and through their enormous sacrifices we have reaped a bountiful harvest in our nationhood.

Now, to the issue at hand...permit me to start my brief presentation by framing what I deem to be the national/collective ethos of the Bahamian people. And I deem it as such not so much because we may blindly abide by it as a creed, but rather because we should continuously strive to live true to its core values and principles.

The preamble to our Constitution states:

“AND WHEREAS the People of this Family of Islands recognize that the preservation of their Freedom will be guaranteed by a national commitment to Self-discipline, Industry, Loyalty, Unity and an abiding respect for Christian values and the Rule of Law; ... We the

Inheritors of and Successors to this Family of Islands, recognizing the Supremacy of God...DO HEREBY PROCLAIM IN SOLEMN PRAISE the Establishment of a Free and Democratic Sovereign Nation founded on Spiritual Values and in which no Man, Woman or Child shall ever be Slave or Bondsman to anyone ...or their Lives frustrated by deprivation.....

The Preamble in many respect strikes the appropriate starting place for this discussion as it makes a declaration which is fundamental to the existence of these Islands and her people. And that is, simply, that we will be a people governed by the Rule of Law and by dignity of self-preservation and self-determination or self-identification.

That very basic yet powerful statement in our Preamble is the back drop for my two broad opening points, which are the framework for my presentation this evening:

- The intended Referendum and its machinery violate the cardinal principles of the Rule of Law and may be unconstitutional and should be challenged in the Court.
- The Government and Parliament are acting in violation of the constitutional power and jurisdiction under Article 52; which provides; that “...**Parliament may make laws for the peace, order and good government of The Bahamas.**”

I shall endeavor to do my best to develop these two broad themes during the remainder of my presentation.

- **The Rule of Law (RoL) and Process**

What is the Rule of Law? There is no singular definition. Broadly speaking the Rule of Law is a concept, guiding principles that have been recognized for centuries and are at the vanguard of promoting “good governance”. It is also true that the RoL is intended to prevent arbitrary and inequitable use of state power. Taken broadly, the concept of the RoL invokes the notion of people (and governments) obeying the law and being ruled by the law. It does not mean rule by men; but rather it embraces the principle of legality, that is, doing what is right, decent and honorable (you know it when you see it to be right).

The RoL is also a political ideal. The concept that a political system and culture will act at all times in a fashion and manner that feeds legality and equality of the law. This also mandates that the Government must lead and in this instance, the Government has miserably failed to lead.

Whilst the RoL may be an abstract concept, it has been judicially recognized as a core principle of western democracies. Therefore it was of no surprise that it found its way into our Preamble and remains at the foundational level of our democratic system.

What is striking is that for weeks the Honourable Prime Minister was telling the country that there was a legal framework in place to hold such a referendum. This meant that the Executive/Cabinet of the Bahamas was content to proceed in holding the referendum in circumstances where they would have violated the very basic concept of the RoL, and thereby engaged in an illegal act (and ignorance of the law is no excuse!).

Now, it is my view that the Parliament’s passage of the Amendment to the Constitutional Referendum Act to hold this non-constitutional referendum (that is, its provisions will not amend any provisions of the Constitution) does not cure the illegality as the amendment violates the principles of the RoL. The Amendment is legally deficient in several respects:

- There is no machinery in the Act which allows for and guarantees a fair, balanced, honest and open debate on the questions posed in a non-constitutional referendum.
- There is no provision or mechanism in the Act that addresses the funding of the campaigns for No and Yes votes. That is, one would expect in such an exercise that democracy would demand that either the Public Treasury by way of the Parliamentary Commissioner would fund the process of public debate so as to ensure that no one side has a better or greater advantage over the other or that a method would be incorporated in the Act to curtail possible abuses of disproportionate spending designed to stifle an opposing view. The process must be one which allows both sides to have EQUAL access to the public so that the will of the electorate/people is not undermined.
- The Act fails to provide a framework to ensure the active involvement of all segments of the community in the public discourse. That is, there ought to be no group or no community that is shut out of the national dialogue.
- More fundamental in my view, the Act by failing to create the office of an Umpire or Fairness Commissioner or an ombudsman so as to ensure that the process is managed in a free and balanced approach and all voices are heard during the national debate, has undermined the will of the electorate.
- The Act treats a referendum as if it is similar to an election of members to the House of Assembly, which is an open political process. The holding of a referendum is not political in nature; it is a part of governance!

These 5 broad omissions from the Act, are, in my view, a fundamental oversight in the Law and they go to undermine the integrity of the process and fail to reaffirm the cardinal virtues of the RoL (during the process).

Additionally, the Act, fails to recognize that the process of a referendum is one that at its very root **MUST INFORM** the electorate of the law that is intended to be brought into effect (subject to the results of the referendum). **This is a striking and another major oversight and it also undermines the very integrity of the process.**

So, if the majority of the electorate votes yes to any of the questions in this referendum, there is no means by which the electorate can evaluate the intended laws. It is therefore possible that those who vote yes may be opposed to the actual Act which is brought into effect to legalise the National lottery or to tax/regulate web shop gaming. This can and will likely lead to state abuse and can allow the Government to adopt a position that it has a broad mandate far beyond the scope of the questions (in their normal language).

Additionally, the Rule of Law has been violated because the Government has determined to hold a referendum on an illegal act without **FIRST** curing the illegality. It must also be accepted that web shop gaming is currently illegal. To hold a referendum without first ensuring that the current law of the land is being upheld is a gross violation of the Rule of Law. The Government by its very decision is seeking to make the electorate complicit in a breach of the law. This process is cancerous and acts as further affirmation that our approach to governance and law making is corrupt. The proper course for the Government is to first stamp out the illegality and then move to make the operations legal by way of the passage of law and regulations.

The questions in the Referendum

Question 1 on the ballot is in glaring violation of the RoL and the concept of fairness and equality before the law. There are several fundamental flaws with this question:

- The question presupposes that web shop gaming is presently lawful in The Bahamas. The question does not seek to solicit the electorate's views on the legalization of web shop gaming. To regulate and tax an activity by necessary implication means that it is lawful!
- No one - I suppose other than members of Cabinet - knows or understands what is meant by "web shop gaming". This is a term which has not been defined and this is precisely why a Bill should have been passed in Parliament prior to the holding of the referendum which would have set out the definitions and the intended activities captured by web shop gaming. It begs a question as to what is the intent of such a term and whether it is possible in law to have a workable and legally recognizable definition.
- No details have been offered by the Government, either by way of a white paper or a draft bill, to shed any light on the likely mechanism which is intended to be employed to regulate/tax web shop gaming. Will the system be designed to favour those presently engaged in the activity, to the exclusion of others? Will there be preferences given to those who are now in the gaming industry? What will be the requirements for regulation? What will be the capitalization requirements to secure a licence? Must it be wholly Bahamian owned and operated? How will the winnings be safeguarded and how will the government seek to ensure that non-honouring of winnings is eliminated? Are winnings intended to be taxable?

These all in my view are weighty questions that demand that the electorate has a right to read and understand the law and the regulations prior to casting a vote. And it is even more critical because thus far the Government has shown that it is incapable of getting small things right with respect to this Referendum, and therefore, it is more critical for the

full details to be unveiled to the Bahamian people prior the vote. By voting “in the dark” is a violation of the electorate exercising an informed will and the RoL.

- We must also ask how does the Government propose to regulate a rapidly evolving internet based and driven industry? And considering that the internet has made the world much smaller, how does a government propose to regulate the circumstances where a Bahamian can play a USA based lottery from his home’s computer? And so, we can all vote yes, but exactly what does that yes vote means at the end of the day. None of us knows.
- The question also invokes a view that the Bahamian electorate is not entitled to dissect and analyze information and facts so as to make an informed decision. The process of this referendum feeds into a culture of ignorance and further breeds contempt into a growingly suspicious electorate of the abuse of state power and the wide held perception that the government is simply incompetent.

As for **Question 2**: (**Do you support the establishment of a National Lottery?**) similar observations can be made as were noted for Question 1 – however, the important issue is who will run, manage, operate and regulate such a Lottery? How will a Lotto’s purse be derived and will the winnings be taxable? Does the government intend to run the Lottery? Will there be clear rules and a scheme to determine who can participate?

Again, the electorate ought to demand to see the Bill or propose Law before casting their ballots!

I would therefore suggest that the process at its very core has been corrupted by a law that is patently bad and by a process and two (2) questions that feed into illegality and amount to a blatant departure from the core principles of the Rule of Law.

- **The watering down of Parliament's law making powers**

Article 52 of the Constitution conveys to Parliament, and Parliament alone, the right **to make laws for the peace, order and good government** of The Bahamas. There is no other body in our law that has the right to make laws to regulate the conduct of persons and commerce in The Bahamas.

The right to make law means that the process of Queen in Parliament must be carried out, as a machinery to ensure the legitimacy of the law-making process.

It is important to note that in a constitutional referendum Parliament must first debate and must pass the bills which seek to amend the provisions of the Constitution, before the questions are put to a vote to the electorate. The Constitutional Referendum Act (in its original form) recognizes and give credence to the view that ONLY Parliament has the ability to create law.

In this non-constitutional referendum, there is NO legal requirement for any bills to first be passed by Parliament prior to the holding of the referendum. The Act refers to a referendum being held on **“any matter of national importance”** – without defining the term. And in this regard, the Act therefore miserably fails to ensure that the intended legislation is first passed by Parliament and this therefore means that Parliament's

constitutionally recognized law making power has been hijacked by a referendum which must too be unconstitutional.

In other (civilized democracies) commonwealth countries where non-constitutional referenda are held the law will generally first be passed in Parliament and then made subject to the results of the referenda. I suggest that this is the best and proper course because the Constitution is CLEAR that only Parliament has the right to make laws for the Bahamas. The electorate has NO law making powers in our democracy. The electorate elects Parliamentarians and they are bestowed with the authority to make law. The current process therefore is lopsided and is patently WRONG!

This process is therefore fundamentally flawed because what the Government is purporting to do is to make Parliament's (constitutional) law making powers subject to the votes of the electorate. This is a dilution of Parliament's supremacy in constitutional law and it also sets a very bad precedent as it alters the authority of Parliament as set out in Article 52 of the Constitution.

Conclusion

I end by how I started. What would the framers of the Constitution say about this process and how would they vote in this referendum?

The case for a NO vote is a compelling one. Just as the Bahamian people rejected the constitutional referendum in 2001 due to the bad process embarked upon by the government, the electorate should similarly send a strong message that as a people we abide and have a deep respect for the core principles and values of the Rule of Law.

By voting NO we will restore our nation's path to a democracy that honors and protects its constitutional traditions.

I thank you very much for the kind invitation and for your attention.

.....THE END.....