

CONSTITUTIONAL REFORM

Alfred M. Sears

©

PART 13

THE CONSTITUTION: GAMING AND DISCRIMINATION

Since the early 1960s full-time casino gambling has been and remains the anchor attraction of the major touristic resorts in The Bahamas, without any major opposition from the Bahamian society either on moral or social grounds. However, under the Lotteries and Gaming Act, 1969, Bahamian citizens, permanent residents, persons ordinarily resident in The Bahamas or persons in the employment of the Government of The Bahamas, except with a special permit, are prohibited from taking part in any gaming and casinos in The Bahamas. While there is a complete ban on Bahamians, visitors are invited to The Bahamas to patronize casinos.

Casino operators in The Bahamas, all of whom are foreign investors, receive each year a promotional cash contribution from the Government, pursuant to their respective Heads of Agreements, to promote their resorts in which casino gaming is a core attraction. As part of the public policy of The Bahamas, the Government grants licenses to casinos, receives taxes of approximately \$15 million annually from casinos and

allows Bahamians to participate, through employment, in gaming activities in casinos, as croupiers, pit bosses and supervisors on behalf of the casinos.

On the other hand, to participate in gaming in The Bahamas, Bahamians must patronize illegal web shop operations, owned and operated by Bahamian entrepreneurs who risk, along with their patrons, arrest and prosecution. However, in spite of this risk, the local web shops have proliferated throughout The Bahamas with thousands of Bahamian patrons.

The root of this discriminatory treatment of Bahamians and permanent residents is found in Article 26 (1) of the Constitution which declares that no law shall make any provision which is discriminatory either in itself or in its effect. However, under the derogation clause of Article 26 (4) (e) it is stated that this Article shall not apply to any law so far as that law makes provision **“for authorizing the granting of licensces or certificates permitting the conduct of a lottery, the keeping of a gaming house or the carrying on of gambling in any of its forms subject to conditions which impose upon persons who are citizens of The Bahamas disabilities or restrictions to which other persons are not made subject.”**

Therefore, the Constitution allows for disabilities or restrictions, in the area of gaming, against Bahamian citizens and permanent residents which disabilities and restrictions are not applicable to visitors and foreign investors. The question is whether this blanket prohibition of Bahamians from gaming can be justified, on the grounds of public policy and constitutional principle, given the current support of and subsidy by The Government of foreign operated casino gaming in The Bahamas.

Prime Minister, the Right Honourable Perry Christie, announced in the House of Assembly on the 31st October 2012 that there will be a referendum on the 3rd December 2012 on one question: Do you support the legalization of web shops? The Prime Minister disclosed that the question of a national lottery will not be included which, in the opinion of the London based consultants, were not commercially viable and that the question of removing the prohibition on casino gambling for Bahamians will not be a part of the referendum. The Prime Minister pledged to shut down web shop and enforced the gaming laws if there were to be a majority “no” vote. If a majority of the votes in the referendum were to be in the affirmative, then the Gaming Board will issue licences to those persons who meet strict set of criteria, including possessing

the necessary experience, integrity and expertise, as well as possessing the necessary financial resources and having organizational capacity and internal controls needed to operate in an efficient, responsible and transparent manner. According to the Prime Minister, legalized web shops will pay a licensing fee of at least \$1 million and a performance bond, annual taxes, based on their revenue, contribute to the cost of implementing the new laws and regulations, create and maintain programs to protect gamblers from addiction and assist with the cost of setting up a system to rehabilitate gambling addicts.

According to the Nassau Guardian, as reported by Taneka Thompson on the 6th November 2012 of an interview with Prime Minister Christie on the sidelines of a swearing in ceremony for North Abaco MP Renardo Curry as a parliamentary secretary, the Prime Minister conceded that while a referendum is not needed to regulate the gaming sector, his Government will be conducting a referendum to glean public opinion on the issue, in the following quote: “... **Because there is nothing to do with amending the constitution; this is not a constitutional referendum . . . I’m advised legally that all of the prerequisites that go into organizing a constitutional referendum do not apply, and**

so when I get the legal opinion I will publish it so people will see that all this is, is a government seeking an indication of the opinion of people.”

According to Article 52 (1) of the Constitution, Parliament may make laws for the peace, order and good government of The Bahamas. Article 52 (2) provides that power of Parliament to make laws shall be exercised by Bills passed by both Houses, whether without amendment or with such amendments only as are agreed to by both Houses, and assented to by the Governor-General in accordance with Article 63 of the Constitution. The Privy Council in **Cobb & Co. Limited and Other v. Norman Eggert Kropp** (1966) 3 WLR 416 stated that “The phrase ‘peace welfare and good government’ is one that is ‘habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations.” Therefore, the Government, given its parliamentary majority can amend the Lotteries and Gaming Act to remove the prohibition against Bahamian participation in casino and other forms of gaming in The Bahamas. However, given the apparently divided public opinion on this issue, the Government has decided to poll the Bahamian electorate by way of referendum.

Section 2 of the Constitutional Referendum Act (1977) provides that **“For the purpose of obtaining the approval of the electors qualified to vote in an election of members of the House of Assembly with respect to a Bill submitted to them, which Bill seeks to alter an Article of the Constitution specified in Article 54 (2) or (3) of the Constitution or any of the provisions of The Bahamas Independence Act, 1973, a vote shall be taken by way of a referendum held in accordance with this Act.”** It is clear that a referendum, pursuant to the Constitutional Referendum Act, is part of a legislative process reserved to amending the Articles specified in Article 54 (2) or (3) of the Constitution or the provisions of The Bahamas Independence Order. Therefore, the proposed referendum on gambling would not fit within the legislative scheme of the Constitutional Referendum Act.

If the proposed referendum on gambling is intended to be a mere consultative or advisory referendum on the issue of whether the web shops and lotteries in The Bahamas should be legalized or not, in my opinion, there would have to be an amendment of the Constitutional Referendum Act or the passing of a new law to enable the conduct of an advisory or consultative referendum, as an advisory or consultative

referendum is outside the perimeters of the present Constitutional Referendum Act. The Privy Council, in the case **The Prime Minister of Belize v. The Attorney General of Belize** (2010) UKPC 7, held that an amendment to the Referendum Act, which is not part of the legislative process and which does not purport to alter the deeply entrenched provisions of the constitution, but is merely advisory or consultative, imposes no obligation on the legislature and therefore could not violate the constitution.

On the evening of the 13th November, 2012 Prime Minister Christie, in a mature acknowledgement to the public questions and concerns raised about the process, announced that the proposed referendum had been postponed from the 3rd December 2012 to the 28th January, 2013. The Prime Minister also disclosed that the postponed referendum will ask whether lotteries should be legalized, in addition to web shops. On the 14th November, 2012 the Government tabled a bill in the House of Assembly to amend the Constitutional Referendum Act and the Parliamentary Elections Act and provide a legal framework for the conduct of advisory or consultative referenda.

The adjusted proposal of the Government, intended to achieve the limited objective of determining whether the

Bahamian electorate supports the legalization of web shops and lotteries by way of an advisory or consultative referendum under the supervision of the Parliamentary Commissioner, will avoid controversy over the process of the referendum.

On a more substantive level, however, I urge that the Constitutional Review Commission recommend the removal of derogation clause 4 (e) from Article 26 of the Constitution, in order to affirm the constitutional norm of non-discrimination, regularize and tax the Bahamian community gaming industry and open casino gaming to Bahamian ownership, management and patronage.