

Chapter 2

CONSTITUTIONAL, LEGAL AND ELECTORAL FRAMEWORK

The Legal Framework

The principal legislation governing the Presidential elections in the Seychelles are the Constitution, the Elections Act and the Political Parties (Registration and Regulation) Act, revised in 1991. The Elections Act 1995, revised in 1996, provides the main detailed legal framework for the conduct of elections in Seychelles. There are also some regulations made pursuant to the Elections Act, such as the Election Advisory Board Regulations, 2010 and the Elections Regulation, 2006 dealing with signage and the use of government vehicles to transport voters to the polls.

Election Administration

Articles 115 and 116 of the Constitution of Seychelles provide for the establishment of an Electoral Commissioner. The Electoral Commissioner must be qualified to be a registered voter and of proven integrity and high repute. The person is appointed by the President from candidates proposed by the Constitutional Appointments Authority (CAA) for a term of office of not more than seven years, though the appointee is eligible for re-appointment. The CAA comprises three members: one nominated by the President, one nominated by the Leader of the Opposition, and one nominated by both of them through consensus.

According to the Constitution, the Electoral Commissioner is not subject to the direction or control of any person or authority in the performance of his or her duties. The Commissioner may only be removed from office for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour on the recommendation of a tribunal appointed by the Constitutional Appointments Authority.

The functions of the Electoral Commissioner include:

- responsibility for the conduct and supervision of registration of voters and of elections and referenda under the Constitution, including appointing the day of any Presidential and National Assembly elections;
- keeping under continuous review the number and boundaries of the electoral areas into which Mahé and Praslin are divided;

- keeping under continuous review the practices and working, including such matters as finance, broadcast and advertising, of political campaigns in respect of elections and referenda under the Constitution; and
- having such other functions as may be prescribed by or under the Constitution or an Act.

The Electoral Commissioner is also the Registrar of Political Parties and is required to keep a register of all registered political parties. As Registrar, the Commissioner must, on or before 30 January 2011 each year, determine the total amount of financial assistance to be paid out of the Political Parties Financial Support Fund (currently set at a level of 500,000 Rupees) to each registered political party that is eligible to receive financial assistance.

Authority for the provision of financial support from public funds to political parties is found in Article 118. of the Constitution. The basis of allocation to each party is the proportion of votes received in the previous National Assembly elections. So a party receiving 50% of the votes in those elections, would receive 50% of the Fund's resources. According to section 3 of the Political Parties (Registration and Regulation) Act, the Registrar must make such payment in such manner and times as the Registrar in consultation with the parties may determine. Currently, the allocation is provided bi-annually. The Electoral Commissioner also appoints all election officials.

Previous Commonwealth and other observer reports have consistently recognised the technical competence and seeming independence of the Electoral Commissioner. This Mission was no exception. Despite this, opposition political parties continue to question the impartiality of the Electoral Commissioner, suggesting that as a sole commissioner appointed by the President, the individual cannot be independent and impartial in his actions. Previous Commonwealth Experts Teams have suggested that the office of the Electoral Commissioner be transformed into a full-fledged independent Commission in a bid to remove any perception of possibility for political influence over the Commissioner, and to build greater confidence and trust amongst political parties in its functions.

This was also recommended in the 2009 Constitutional Review Committee Report and is a matter under consideration by Government.

Independent Electoral Commission

As noted above, one of the key 2006 recommendations called for "the establishment of a permanent, independent and adequately resourced Electoral Commission" following the practice found in many other democratic countries.

Since that time, the Commonwealth Expert Team is pleased to see that the informal and ad hoc Technical Advisory Board that was formed prior to the 2006 Presidential Election has now been formalized in law as a standing body. The new Elections Advisory Board was established by regulation in 2010. Its role is to advise and assist the Electoral Commissioner in the areas of voter registration, electoral boundaries, establishing important election calendar dates, public consultation, reviewing electoral laws, and other measures to ensure good governance and transparency in the management of elections. The composition of the Electoral Advisory Board includes candidate representation in the case of a presidential election and political party representation in the case of a National Assembly election, as well as provision for independent candidate representation. The other members include the Election Commissioner, two members of his permanent staff and another 3 members named by the Electoral Commissioner.

Unfortunately, while the Board must meet at least 3 times annually according to the regulation, the candidate and political party representatives on the Board can only participate in an election year during the period between nomination day and polling day. The Electoral Commissioner has informed us that he has extended an informal invitation for party representatives to attend board meetings regularly between electoral events, but they have declined to do so. While the formation of the Elections Advisory Board is a welcome development that has the potential for improving inter-party/candidate discussion on electoral issues of common concern which could lead to greater trust, understanding and mutual respect amongst all participants in the election process, it falls short of an earlier recommendation for the formation of a permanent independent Electoral Commission.

Through the course of our discussions with Government officials, we have gained the impression that they are now receptive to the establishment of an independent Election Commission. However, our concern is that while they may very well go through the exercise of establishing such a Commission in fulfilment of our recommendation, the appointees to the Commission must be from a broad cross-section of stakeholders and the appointment process must also be, and be seen to be, a truly independent process. Presidential and Electoral Commissioner appointments to a newly constituted Electoral Commission will not quell the existing scepticism and mistrust of electoral governance and administration.

These types of appointments would lead to a repeat of the disappointment that came with the recently created Seychelles Media Commission to oversee and ensure freedom of the media. More will be said about the media in Seychelles in the next chapter of this report. Also, the mandate (powers and functions) of the Election Commission must be broad enough to have a meaningful impact on the governance and administration of elections. Furthermore, the Commission must be adequately resourced such that it can adequately give effect to its mandate and properly enforce the election law.

It is therefore recommended again that the National Assembly establish a permanent, independent and adequately resourced Electoral Commission. This Commission should not supplant the Elections Advisory Board.

Campaign Finance Laws

There is a common belief that money can have a profound influence on the outcome of an election. Some jurisdictions, therefore, control the source and amount of contributions received annually, as well as the amount of money that can be spent during an election. Article 117.(1) of the Constitution of the Republic of Seychelles requires the Electoral Commissioner to control election expenditures of political parties and candidates, as well as contributions made to these political entities. The Elections Act lays out provisions for doing so in sections 93 and 94. The 2009 Constitutional Review Committee Report also recommends that the law should provide for greater control of spending or use of funds during election time to prevent abuse of funds at the disposal of a party.

In the Elections Act, the definition of an election expense for a candidate or political party is quite encompassing and includes specifically the costs of public meetings, organising public displays, print and other advertising, and more generally the cost of presenting to the voters the candidate, the views of the candidate, or of the political party that nominated the candidate. These expenses are to be incurred only by the candidate or the agent of the candidate or party and no other person or body of persons. The purpose of this restriction is so that proper records can be kept. Candidates and political parties must keep records of and report all funds received in connection with the election and all election expenses incurred. While the required reports are generally submitted on time, there is currently no way of verifying that the reports contain a complete and accurate disclosure of all election spending or all political contributions.

There was an earlier recommendation made by the 2006 Commonwealth Expert Team for strict enforcement of the existing legal requirement to declare campaign expenditures and the declaration of political contributions. There does not appear to have been any progress on this front. The 2011 Commonwealth Expert Team reiterates this same recommendation. The Expert Team would further suggest that in addition to strict enforcement of campaign finance laws, that the National Assembly consider removing from the Elections Act the specific exemption from reporting the identity of the person or source of the contribution and the person in respect of whom the expense was incurred.

In the interests of transparency of the funds that are used to contest elections, it is suggested that the election law be amended to include a requirement for parties and candidates to publicly disclose the source of political contributions, as well as the amount. The National Assembly should

consider limiting the amount of contributions that can be received or the amount of funds that can be spent, or both.

In the interests of reducing outside influence on the electoral affairs of Seychelles, the Assembly should consider restricting the source of political contributions to persons eligible to vote in Seychelles elections. In order to improve the ability of the Electoral Commissioner to enforce campaign finance laws, reports required to be filed should first be audited by a professional auditor and the Electoral Commissioner should be given additional resources to review and investigate suspect reporting.

Voter Eligibility

The eligibility criteria for voting, eligibility for inclusion on the register of voters, and “rules” of residency were discussed with the Expert Team by several stakeholders. It should be noted that a constitutional challenge of certain sections of the Elections Act concerning voter eligibility and voter registration has been made and has not yet been dealt with by the Constitutional Court of Seychelles. The Expert Team is, therefore, not in a position to comment further about this issue.

Voter Registration

Seychelles operates a system of continuous voter registration. A register of voters is revised every year, commencing in January. The 2011 voter register certified by the Chief Registration Officer on 31 March 2011 comprises some 69,480 voters.

To be registered as a voter, the voter must:

- be a citizen of Seychelles;
- have attained the age of 18 years;
- reside in an electoral area;
- be not under any written law adjudged or otherwise declared to be of unsound mind or detained as a criminal lunatic or at the President’s pleasure at the time of the preparation of the register of voters; and
- be not serving a sentence of imprisonment of or exceeding 6 months imposed by a court in Seychelles at the time of the preparation of the register of voters.

During earlier Commonwealth Missions, the opposition did not make any claims as to the general quality of the register, though they claimed that the Registration Officer did not provide details of the register in a manner they wanted. In light of one case in which the courts upheld that one voter was wrongfully denied registration in the 2007 Parliamentary election, the registration process was implemented in strict adherence to the law (rather

than a more flexible arrangement undertaken previously which, paradoxically enabled greater engagement by political parties).

During this Mission, there was much concern expressed by opposition parties regarding the quality of the voter register. Concerns were expressed generally that there were more people on the register than there are eligible voters. Some estimated that number to be approximately 4,000 voters. The Election Commissioner also estimated that there are a similar number of inactive voters on the register due, primarily, to their inability to update and purge the register because of the unavailability of current (2010) Census information.

While we were not able to obtain independent verification of the allegations, several individuals told the Expert Team that citizenships (passports) had been sold to otherwise unqualified applicants, that the government was issuing duplicate National Identity Cards, that there were deceased persons on the register, and that the practice of including underage persons in the register as “voters in waiting” can lead to abuse. There was also concern expressed that the system of having some voters marked off in district registers and others marked off on the master voter register creates opportunities for fraud as does the practice of conducting the election over a 3-day period. Again, in response to our requests for support of the allegations regarding abuse and fraud as it relates to the voter register, no fact-based evidence could or would be supplied.

It should be noted that some of the current practices used by the Electoral Commissioner’s office in compiling the voter register are common practice in other jurisdictions. Many other electoral offices divide their jurisdictions or territory into districts, divisions or electoral areas and compile separate lists of the voters within. They also use combinations of master and separate voting area lists for efficiency in the administration of elections. Political entities also find the separate voting area lists indispensable for campaigning. Capturing information about under age or provisional voters is also becoming more popular as a means of keeping voter registers current. The availability of this information allows new voters to automatically be included on the register when they reach the age of majority.

The practice of physically including them on the official register, however, while permitted in the Seychelles Elections Act, is not advised. The provision of the law that authorises the inclusion of underage persons on the register and the cycle of updating the voters list annually in January of each year, means that the register used in an election can contain a substantial cohort of ineligible voters. It should be noted that underage and otherwise ineligible voters are designated as such on the register.

Also, many jurisdictions conduct voting over a several day period, for exigencies of geography and logistics such as in Seychelles. We were told that it would be possible to conduct voting in Seychelles on a single day, but

at a much greater financial cost to the public. It should be noted that as voter turnout declines in some countries, solutions have been sought to increasing participation by extending the time (hours and days) for voting to make it more convenient for the voter.

Keeping a voter register accurate, current and complete is a large and important task. All jurisdictions struggle with this job. However, it would seem that the Electoral Commissioner has some fairly wide ranging authority as per section 7.(2) of the Elections Act to obtain the kinds of information necessary to assist with this task. The Expert Team observed over the 3 days of voting during the 2011 Presidential Elections that the vast majority of voters were accurately displayed on the list and that only a very small number of individuals presented themselves as voters who could not be found on either the district or master register. This, of course, does not speak to whether there are duplicate voters or otherwise ineligible voters on the register. Without specifically testing or measuring the quality of the register, it is not possible to know the degree to which it conforms to the requirements of the law or otherwise accomplishes its intent.

The Expert Team also heard numerous complaints from political party representatives that the process of distributing and verifying the register leaves much to be desired. The Chief Registration Officer updates and generally maintains the register by making additions, deletions and corrections on an ongoing basis but must perform this activity at least once per year according to the law.

On 15 of January of each year, the Chief Registration Officer must publish a notice inviting persons who are or claim to be eligible to be on the register to inspect the list. They can attend a district registration office set up temporarily for this purpose. Voters can, at any time during the year, check to verify if their name appears on the register via mobile phone. A very high percentage of Seychellois possess a mobile phone. Despite what some of the political parties claim to be the practice, a person can, by law, inspect and apply for a correction of their voter information or information concerning another voter. This inspection period lasts for a maximum of 14 days.

The complete voter register is supplied to political parties in January of each year. An updated, certified list is also provided on March 31 of each year. If there is a Presidential or National Assembly election in a given year, a copy of the register is also provided to all candidates on Nomination Day which is 21 days before the election. This latter practice is not a legal requirement but, rather, it is contained in the election Code of Conduct. Three copies of the register are also placed in the Archives for public viewing as is required by law. Political parties have requested an electronic copy of the register but this has not been permitted. The political parties would like to receive a copy of the register in paper and electronic form more frequently.

Another issue regarding the voter register concerns the Electoral Commissioner's rules regarding the voting area lists that are issued to the candidate's agents for use at the polling station on election day. Agents are required to use the lists supplied by the Chief Registration Officer and are not permitted to use the lists they were previously given on Nomination Day. Political parties claim that these lists are arranged differently than the lists supplied on Nomination Day. The candidate or party agents are also not permitted to take these lists from the polling station at the end of election day. There does not appear to be a good reason for this restriction on polling day lists.

Political parties and candidates feel the process for updating the voter Register is not transparent enough nor is the register itself accessible enough to permit sufficient time for scrutiny of the list between elections. Rules regarding the return of lists used on election day contribute to suspicion concerning fraudulent inclusions and omissions on the register. It is recommended that the period of list inspection and revision be extended and streamlined to permit more time for voters to verify their information and to have it corrected. It is also recommended that political party and candidate agents be permitted to retain the district lists given to them on polling day.

Electoral Commissioner Reporting and Recommendations

The Constitution [Article 116.(2)] requires the Electoral Commissioner to issue a report to the President and National Assembly within 90 days on the conduct of the political campaigning leading up to an election or referendum and on the election or referendum itself. The Elections Commissioner, in his capacity as the Registrar of Political Parties, reports on an annual basis. A report is also prepared following a boundary review that occurs approximately every 5 years. In practice the election report is submitted first to the President and then to the Speaker of the Assembly. Once the report is submitted to the Speaker, who distributes it to all Members, the report is available to the public. In future the report will be posted on the Election Commissioner's website. Within the report, the Commissioner is also required to make such recommendations as are considered necessary for the purpose of ensuring true, fair and effective elections and referenda. Such a provision in law, particularly through its inclusion in the Constitution, is an encouraging sign of the independence being bestowed upon the Electoral Commissioner.

In order to determine how effective that authority has been, however, one would need to look at the number and types of recommendations that have been made by the Electoral Commissioner throughout his tenure, the extent of prior consultation with interested parties, and the National Assembly's record of adopting substantive changes and improvements recommended. At the time of writing this report we were not able to obtain a copy of past Commissioner's reports to see the types of recommendations (if any) included

therein. The Electoral Commissioner has also at times written to the Attorney General to suggest changes to the election laws.

It is recommended that the Electoral Commissioner consult with a wide range of election stakeholders before preparing his public reports, that he prepare a report to the National Assembly annually and following elections, and that he use the occasion of these reports as an opportunity to make substantive recommendations to amend the elections law to further enfranchise voters and to improve the accessibility, administration of elections, and enforcement of election laws.

Nominations

Under the electoral law, candidates for the Presidency and for the National Assembly are required to complete nomination forms provided by the Electoral Commissioner and also provide a deposit either in cash or in the form of a bank guarantee. The number of names and the deposit required for nomination are set by the Electoral Commissioner. These requirements for nomination should be established in law. For the Presidential Election, the number of names was 500 and the deposit is SR 15,000. For the National Assembly elections, for comparison, the number of signatures required for each candidate is 50, with a deposit of SR 1,500 per candidate. A banker's guarantee was accepted in lieu of a cash deposit for all nominations.

Nomination Day is also set by the Electoral Commissioner and there is only one day for the nomination of candidates. Nomination papers for a Presidential election are required to be submitted to the Chief Electoral Officer and are required to be endorsed by persons entitled to vote at the election to the satisfaction of the Chief Electoral Officer. Papers received after the time specified by the Electoral Commissioner are considered invalid and are to be rejected. Papers submitted before the deadline on Nomination Day are to be reviewed by the Chief Electoral Officer as soon as practicable after the deadline to determine whether to accept or reject the Paper. Under the electoral law, a candidate could object to the acceptance of a nomination paper of any other candidate on the grounds that the other candidate was not qualified to stand for the election, or that the nomination paper did not comply with the requirements laid down by law. The contesting candidates are, therefore, initially allowed by the Chief Electoral Officer to inspect each other's nomination papers on Nomination Day. The determination of the objection by the Chief Election Officer is final.

The Commonwealth Expert Team is aware of the case of Viral V Dhanjee who has claimed a serious breach of his constitutional rights by the Chief Electoral Officer and Electoral Commissioner in denying him the right to participate as a candidate in the 2011 Presidential Election by rejecting his nomination paper. This matter was heard by the Constitutional Court of Seychelles. Of

significance was the Courts judgement that the petitioner's right to offer himself as a candidate for the office of President had been violated.

The Court also observed that the Constitution requires that the number of people to endorse the candidates' nomination to the satisfaction of the Commissioner and the sum of money to be deposited are to be prescribed under an Act. The Elections Act does not prescribe either of these requirements for nomination. The setting of these criteria are left with the Electoral Commissioner.

The case of Viral V. Dhanjee is under appeal and we therefore, cannot offer further comment. The case highlights, however, a need to amend the Elections Act with regard to the nomination process and the need to review the Elections Act more broadly to ensure that it contains fair, complete and satisfactory electoral rules and procedures, as well as to ensure there is accuracy and internal consistency within the law. The Commonwealth Expert Team recommends that the Elections Act be amended to provide for a longer period for the submission of nomination papers in order that they may be properly verified by the Chief Electoral Officer. It is also recommended that that the form and requirements of the Nomination Paper be prescribed in law.

Voter Inducement and Vote Procurement

The issue of vote buying and other forms of voter inducement was very prominent in discussions the Expert Team had with stakeholders. Most stakeholders we interviewed either alleged the practices were rampant during this election, as well as in past elections, or claimed that they had heard of it occurring. Even members of the public we spoke with less formally believed the practices were wide spread.

There is clearly an element of mistrust in the voting process on the part of political participants and some members of the public alike. Part of the scepticism relates to the perceived lack of enforcement of the election laws. There are offence provisions and penalties for voter inducement, as well as for many other fraudulent acts. Participants in the democratic process must have sufficient respect and deference for the election laws and confidence that suspected and reported illegal behaviour will be thoroughly investigated and prosecuted where warranted. It is recommended that adequate funding be provided to the Electoral Commissioner so that there can be strict enforcement of the elections laws.

Voter Education and Participation

Voter education is an important element in the election process. Voter education can be conducted by the body responsible for administering elections, the political parties that are contesting the election, the media and domestic observer groups (if present). The Expert Team received conflicting

and confusing information as to whether voter education had been conducted by any of these groups in the 2011 Seychelles Presidential Elections. The Office of the Electoral Commissioner should have a mandated responsibility to provide voter education on an ongoing basis, and not only at the time of an election.

Fortunately, the voter participation rate is quite high in Seychelles elections, but more should be done to educate new voters, to try to understand characteristics of those who are not participating in the electoral process, the reasons for their non-involvement and efforts should be made to encourage the involvement of those who do not exercise their franchise. The important task of educating voters and encouraging participation by all citizens cannot be left up to the political parties. The Expert Team recommends that the Elections Act be amended to give the Electoral Commissioner a mandate to inform voters of their right to vote, the rights of citizens to participate in the democratic process, the rules regarding elections, and the voting process.