

Fixed election date not necessarily best option

This is an edited version of a speech given by Senator A J Nicholson, attorney-general and minister of justice, to the Rotary Club of Ocho Rios on August 16, 2006.

THE question that I wish to emphasise today concerns the date for general elections in the country. This question presents itself on at least two levels. In the first place, at the level of basic political manoeuvres, we know that in the Jamaican system political campaigners are apt to call for elections whenever they feel the time is right. That, of course, is their prerogative under Jamaican law.

Our electoral system allows for the most strident calls for elections now, tomorrow, or at any time that the prime minister decides to call them. This is part of our democratic tradition — and I daresay, it is a healthy part of that tradition. When the Opposition places itself in election mode, when it gathers resources from various funding sources and pulls its team together, when it can avoid falling in popular support for months at a time, these things will keep the Government on its toes.

These things will cause those in power for more than the once-proverbial two terms, to remain vigilant. Power must not be taken for granted; it must not be abused; it must be seen as a sacred trust bestowed on the Government by the electorate. A vigorous Opposition — like healthy competition — can only serve to energeise the Jamaican polity.

Therefore, the open election system that we have in place helps to fight against complacency. Members of both the Government and the Opposition will be obliged to remain active — and one part of the tonic for this activity is the fact that no one, save the prime minister, can be sure of the election date.

Constitutional Rules

At the second level, however, it is also important for us to consider the constitutional arrangements concerning the fixing of the election date in Jamaica. Section 64 of the Jamaican Constitution sets out the main rules. It states that the governor-general may at any time dissolve Parliament. In the exercise of this power, however, the governor-general shall act in accordance with the advice of the prime minister. This is the rule that gives the final say on the fixing of the election date to the prime minister. Is this rule justifiable today, or should we make arrangements in favour of a fixed term of office for each Parliament and each Government?

I have already noted that this rule helps to keep both the Government and Opposition charged and ready for elections. This advantage helps to preserve a link between the elected representatives and their constituencies, and in this way, promotes mutual confidence — an essential feature of good governance, as pointed out by the English political journalist Walter Bagehot from as early as the 1860s.

Secondly, the practice of allowing the prime minister to determine the election date may promote democracy in times of uncertainty. If the election date is fixed by law, there will be no opportunity for the Opposition to bring a motion of “no confidence” against the Government.

In independent Jamaica, there have been to date no successful “no confidence” motions against a government, but this possibility places pressure on the government to defend its wicket. Now, defending its wicket requires the government to retain its links with the electorate, so this helps to promote democratic governance.

Thirdly, it is to be noticed that the tradition of allowing the prime minister to determine the election date is a deeply ingrained, if not inherent, component of the Westminster tradition, of which we are a part. In Britain in earlier years, there was some debate about the precise limits to the rule concerning the prime minister's power to dissolve Parliament.

So, for example, Sir Ivor Jennings points out in his monumental study, *Cabinet Government*, that there were constitutional arguments in Britain about whether the prime minister needed to inform the Cabinet before calling elections. And, at other times, there have been arguments about whether the King or Queen could refuse to support the prime minister's decision to call elections.

Those controversies, though interesting from a historical point of view, need not detain us today; for the Jamaican Constitution speaks with clarity: the Jamaican prime minister does not need to consult with the Cabinet about her decision, and the governor-general cannot refuse to act on the advice of the prime minister. But I mention the past controversies in Britain to demonstrate that the matter of prime ministerial discretion has been firmly set from well before the start of the 20th century.

Westminster Practice

Indeed, there are other indicators of how firmly the Westminster system supports prime ministerial discretion in setting the election date. I have recently had occasion to examine the law on this issue in most Commonwealth countries. Not surprisingly, every single Commonwealth country — falling within the Westminster tradition — leaves the decision on the election date to the prime minister.

From Australia and New Zealand in the south, to Canada in the far north, from Papua New Guinea and Tuvalu in the east, and throughout all the countries that will host next year's Cricket World Cup, the rule is the same: no Commonwealth country has adopted a fixed election date system.

At Independence, the framers of the various Commonwealth constitutions acted uniformly to retain this component of the Westminster system. A fixed date system has been introduced in some constituent parts of Canada and Australia, as well as for the new assemblies in Scotland and Wales, but this system has not been applied to Central Government.

Moreover, if I may refer specifically to Jamaica again, the framers of our Constitution, reflecting different strands of local political opinion as well as British perspectives, considered it appropriate to entrench prime ministerial discretion in the Constitution. In other words, they not only adopted the Westminster approach, they also concluded that any change to this approach would require two-thirds majority support from both houses of Parliament.

This is significant, for it suggests that the framers of our Constitution believed the rule in favour of prime ministerial discretion was an important part of the checks and balances that are in place in our system of government.

Crossing Floor

This takes me to the fourth point in support of prime ministerial discretion — concerning checks and balances. Within the Westminster system, it is possible for persons in the House of Representatives to cross the floor. There is, of course, the topical question whether one may also cross the floor in the Senate, but that issue need not detain us right now, although I might mention in passing that Senator Hugh Dawes appears to have done so in the 1990s, and Senator Horne gave it much publicised consideration in the present decade.

It is accepted, however, that persons may legally cross the floor of the House, and offer their support to another party. Now, if a sufficient number of persons move from the Government to the Opposition, this may change the balance of power so significantly that the prime minister may no longer command majority support in the House. And, when this happens, the prime minister will be obliged to act.

The system offers two main alternatives. The prime minister may resign from office and hope that those departing the party may return; or the prime minister may call for elections. If the prime minister takes the latter route, this will reinforce the checks and balances in the system.

All prime ministers are vulnerable in the Westminster system to what one may call a rebellion; but in return the system gives the prime minister the right to go to the people for a mandate, when members of the governing party are about to rebel, or have rebelled. In this way, there are checks and balances applicable to both the prime minister and to the parliamentarians who are prepared to switch.

In sum, the following points may be made in favour of prime ministerial discretion: it fights political complacency, it allows for "no confidence" motions, it is ingrained in the Westminster system, and it promotes constitutional balance with respect to rebellious parliamentarians.

But prime ministerial discretion also has its critics. Lloyd Barnett, in his Constitutional Law of Jamaica, impliedly raises one of these criticisms. He notes that:

"The prime minister is ... able to select the moment for a dissolution which he considers most favourable to the electoral prospects of his party and by virtue of his control of the machinery of Government he can engineer the creation of these favourable circumstances as for instance by employing the publicity agents of Government to direct special attention to the most successful sections of the Government's activities and by seeing to the implementation of such schemes as will conduce to popular

enthusiasm for his administration."

This is a risk implicit in the current system — namely, that the prime minister will wish to portray his or her government in the most positive light. That, however, would probably not be any more problematic than in the fixed date system; for, in the fixed date system, one would expect the prime minister to be trying to put a positive light on government's initiatives just as much as in the discretionary system.

Another criticism of the discretionary system goes a step further. I recall — because, of course, I am obliged to study these things — that the National Democratic Movement's General Policy Document No 1 in 1997 argued that a fixed election date would be preferable because it would reduce political tension in the society. The NDM argued that the discretionary system gave an advantage to the prime minister's side, or at least the prime minister: the prime minister knows the election date and can arrange things in her party's favour.

The prime minister's party may arguably, for instance, manipulate fiscal and other conditions to suit election objectives, giving rise to short-term advantage for the party, but long-term disadvantages for the country as a whole.

This is true to some extent, but we should note the limits to the

point. If a prime minister openly abuses his or her discretion, voters may find this crass and offensive, and may react strongly against it. Also, a prime minister who is inclined to abuse the system should always remember the prospect of change: if you abuse the system today, the Opposition will be encouraged to abuse the system when they come to power.

And, I should add that the ability of the prime minister to favour his or her side does not really come from control over the election date: if anything, it comes from other aspects of governmental power, and in particular the power to put a positive light on governmental achievements. If, for argument's sake, a prime minister is prepared to act contrary to law in the allocation of the proverbial "scarce benefits and spoils", then the prime minister will do so irrespective of whether the election date is fixed or variable.

Overall, therefore, this is a matter that merits further consideration. I believe we should be open to further arguments, but I do not believe that changing from a discretionary system to a fixed date system will necessarily bring about the advantages that supporters of the fixed date system now advocate.

The fixed date system has tended to operate within presidential systems of government that have various other features, including direct voting for the Head of Government, that we do not (yet) have in Jamaica. We should be careful, therefore, to consider changes as a whole, so that we can see how the entire system fits together.

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