

OPINION: POLITICAL INSTITUTIONS & ELECTION CAMPAIGN 2011

Viability of our political institutions being questioned

There's a growing list of misadventures that threaten to undo the Parliamentary fabric that has held the country together for nearly 150 years.



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On Feb. 3-4, 2011, a workshop on constitutional conventions was organized by the Faculty of Law at the University of Toronto. The brainchild of Peter Russell, it brought together constitutional scholars, experienced officials in government and Parliament, and individuals well-connected to the leaders of all the Parliamentary parties to consider the dysfunctional state of Canada's Parliament.

Their report entitled "Adjusting to a New Era of Parliamentary Government" can be read as a reaction to the growing list of misadventures that threaten to undo the Parliamentary fabric that has held the country together for nearly 150 years.

These incidents include the fixed election date fiasco, the questionable use of prorogation to avoid defeat, the misuse of the confidence convention by both the Martin and Harper governments, the unprecedented twisting of the concept of contempt to bring down a government, the nonsensical debate over the legitimacy of coalitions and the disingenuous musings over whether a party must have the most seats to be called upon to form a government.

By themselves, each of these mini-dramas may not appear very important to the electorate. But taken together, they have brought into question the very viability of our political institutions. Occurring within the context of minority governments, these events have exposed a general confusion over the functioning of our system of government. It is unfortunate, therefore, that, for a number of different reasons, the initiative being led by Prof. Russell, far from clarifying our constitutional situation, would only make it worse.

To begin with, instead of concentrating on the essential features of the Westminster model, Prof. Russell and his colleagues took as their baseline the lowest common

denominator in the Parliamentary world: multi-party systems (largely driven by proportional representation), in which no one party is ever expected to win a majority of seats.

To help Canada adjust to this Parliamentary reality, the group of experts thinks it desirable to produce a manual of principles that would reflect a consensus agreed upon by the political leaders of the day and that could be applied at critical junctures in the life of Parliament and in the formation of governments.

In our view that is the wrong way of thinking about unwritten conventions. In fact, in our mixed (not purely democratic) form of government, the political leaders are not the ones who make, unmake, or defend conventions. Our system provides for certain individuals whose role is to ensure the integrity of the unwritten conventions.

The obvious one is the Governor General, but there are others whose role is to exercise moral authority rather than political power. A short list of such other individuals would include the Speakers of the House and Senate, the Clerk of the Privy Council, the Clerks of the two Chambers, the Supreme Court and perhaps some Parliamentary officers such as the auditor general and the chief electoral officer.

If the leaders of the political parties could establish conventions by agreement among themselves we would have seen the final report of the auditor general on the G8/G20 released, despite the convention and even legislation that prohibits the tabling of the documents when there is no Parliament. The reported willingness of the party leaders to overthrow this practice speaks volumes about what would happen if we leave it to the political actors to establish the rules of the game.

Among the constitutional conventions examined by the workshop are those pertaining to confidence votes; prorogation; dissolution; caretaker governments; and the formation of new governments. Further evidence of how misguided this initiative is can be obtained from examining what the workshop had to say about each one of these five critical junctures:



Photograph by Jake Wright, The Hill Times

Stop, in the name of the law: The fixed election date fiasco, the questionable use of prorogation to avoid defeat, the misuse of the confidence convention by both the Martin and Harper governments, the unprecedented twisting of the concept of contempt to bring down a government, the nonsensical debate over the legitimacy of coalitions and the disingenuous musings over whether a party must have the most seats to be called upon to form a government have brought into question the very viability of our political institutions.

For determining what constitutes a *vote of confidence*, the group supported the view that this should be worked out by Parliamentarians themselves and reflected in a rule that could be added to the House of Commons' Standing Orders.

With regard to *prorogation*, again the workshop would leave it to the political leaders in the House of Commons to determine the modalities for granting a prime ministerial request for prorogation.

With regard to *dissolution*, the workshop lent credence to the idea that the electorate decides who should govern and indicates its choice by giving one party more seats than the others. This is the democratic solution. Any form of ganging up by different opposition parties is, in this view, undemocratic and therefore illegitimate. While it should be pointed out that this view was not supported by the working group the very fact that it was discussed seriously is troublesome. To state, as the workshop does, that there is a "traditional view" and a "reformist view" is simply nonsense.

With regard to *caretaker governments*, the workshop has created a problem where none exists. There is no concept of 'caretaker government' in a classic Westminster system. Strictly speaking, the only time there is a "caretaker government" is immediately following an election where the party in power has been clearly defeated and an opposition party has

won a majority of seats. In these circumstances, there is no problem as the party in power is quite prepared to leave office as soon as possible, while the incoming party is of course anxious to take over as soon as possible. By raising this as an issue one is led to wonder if the real goal of the workshop is to move away from the Westminster model towards a more continental form of government.

With regard to *the formation of government*, instead of just allowing the party in power to meet the new parliament and to test its support in the House of Commons in the event that it failed to get a majority of seats, the workshop spent time considering the different ways in which a winner could be determined before the new parliament met and, how, for example, the Governor General could be kept informed of political discussions among party leaders.

In conclusion, what the workshop of experts failed to understand is that constitutional conventions are ontologically prior to the formation of political parties. They transcend the dynamic of party politics. The political leaders of the day are the last people to be involved or consulted in trying to clarify our constitutional conventions.

It seems to us that a more useful workshop would have taken one of two directions. Either it could have made a clean break with the Westminster model and attempted to

identify all the changes required to make our system more democratic and more similar to other forms of Parliamentary government to be found all over the world.

Or it could have focused on the ethical norms that are intimately related to the unwritten conventions of a Westminster-style Parliament and on the moral authority that erects it as a social institution. In this regard, it is instructive to consider our Parliament, in the first place, as a special kind of court for the airing and resolution of popular grievances (its practices should bear therefore some analogy with those that we find in society's law courts); and, in the second place, as a playing field where excellence and the best outcomes can be achieved through the confrontation of two evenly matched sides abiding by notions of sportsmanship and fair play. These two analogies, we suggest, make for a starting point that is truer to the Westminster model and a more faithful guide as we attempt to find our way out of our constitutional malaise.

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