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## Peter Aucoin, Mark D.Jarvis & Lori Turnbull, Democratizing the Constitution: Reforming Responsible Government

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## Book Review

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*Democratizing the Constitution: Reforming Responsible Government*, by Peter Aucoin, Mark D. Jarvis and Lori Turnbull, Toronto: Emond Montgomery Publications, 2011, 208 pages.

In the aftermath of the Prorogation of Parliament on December 4, 2008, upon the advice of Prime Minister Stephen Harper to then Governor General Michaëlle Jean, a particular theme in Canadian literature about governance has flourished. This theme is the influence of constitutionalism, democracy and legitimacy on government and politics. In the view of many scholars there is a serious imbalance between the executive branch on one hand and the legislative branch on the other. The sense of imbalance has generated proposals for changes to the practice of Westminster-style parliamentary democracy in the service of democratic legitimacy.

*Parliamentary Democracy in Crisis*,<sup>1</sup> a collection of essays published in early 2009, edited by Peter Russell, the godfather of Anglo-Canadian political science, and Lorne Sossin, now dean of the Osgoode Hall Law School in Toronto, was the first text focusing on these issues. Read in the context of the day (after the 2008 prorogation) the book laid the foundation for academic and critical response to what many perceived as the illegitimate use of power by government. These authors asserted the prorogation was a strong-arm tactic based on a misreading of, or worse, willful blindness to, the traditional understanding of the Constitution, and in particular, representative government. It is noteworthy that the foreword to that seminal work was penned by the Rt. Hon. Adrienne Clarkson, who was Governor General from 1999 to 2005.

In 2010, the Honourable Clarkson's husband, John Ralston Saul, whom some characterize as Canada's leading public intellectual, published a biography of the pre-Confederation Prime Minister Louis-Hippolyte LaFontaine and his Upper Canadian Reform counterpart, Robert Baldwin. Saul used that text to reinforce the message of these critics—the democratic legitimacy camp:

Since that day in March 1848 the heart of Canadian democracy had been lodged in the confidence of the House. We are not a fixed-term democracy or a presidential democracy. Voters do not choose prime ministers; they choose representatives. And the voters' muscle is expressed through the right of their representatives to give their confidence to the government

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1. Peter Russell, ed, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

and to remove it. If the ability of the representatives to give or remove their confidence is interfered with, we are no longer a democracy.<sup>2</sup>

Through these and other monographs, it has become clear that much of the support for constitutionalism and law-based governing lies largely with academics and intellectuals. It is this community that has critically analyzed the developments resulting from the election of the majority government in 2011 with its devastated opposition, and the impact of a largely uninformed media. For a general audience, the best formulation of the need for reinvigorated constitutionalism and legality is the 2010 book *Harperland*,<sup>3</sup> by the *Globe and Mail* newspaper journalist Lawrence Martin. For a more specialized readership the present book provides the most thorough explanation and analysis.

A significant milestone along the path leading to the publication of *Democratizing the Constitution* was a little publicized workshop held in February 2010 at the David Asper Centre for Constitutional Rights of the University of Toronto. A number of Canada's experts in parliamentary government met to discuss "Adjusting to a New Era of Parliamentary Government." Peter Aucoin, the most senior among the authors of this book, was a participant. Five recommendations were adopted at the workshop:

- where the outcome of an election is not clear, there should be authoritative guidelines to determine the proper course of action;
- guidelines on caretaker governments should be made public;
- the Standing Orders of the House of Commons should be more explicit on the subject of votes of non-confidence;
- the practices and norms of parliamentary life should be more clearly elaborated; and
- there is a need for greater public consultation and engagement regarding the role of conventions in parliamentary democracy.

The present book should be read in light of these recommendations.

The central claim in *Democratizing the Constitution* is that in Canada, in contrast to other Westminster-type democracies, the executive branch is too powerful vis-à-vis the legislative branch; thus responsible government has become seriously distorted, and too much power is concentrated in the prime ministership. The authors assert the country is heading in the direction of an undemocratic and even authoritarian form of governance.

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2. John Ralston Saul, *Louis-Hippolyte Lafontaine & Robert Baldwin* (Toronto: Penguin Group (Canada), 2010) at page 165.

3. Lawrence Martin, *Harperland* (Toronto: Viking Press, 2010).

They oppose this trend and propose a number of reforms to mitigate the threat to Canadian democracy.

The complexity of this book mirrors the intricacy of the subject matter. Democracy, the rule of law, responsible government, accountability and equilibrium among branches of government cannot be isolated from each other or dealt with separately. The most important of the principles is that in a parliamentary democracy the government must be responsible to the House of Commons, and not the other way around. This is the very point made by Speaker Peter Milliken in his ruling of 27 April 2010, on the Afghan detainees documents.<sup>4</sup>

What are the causes of the Canadian malaise Aucoin, Jarvis and Turnbull perceive?

The first source of difficulty is that in our constitutional structure too few of the fundamental rules are recorded, and they do not offer effective constraints on the misuse of power. The unwritten nature of our constitutional conventions generates uncertainty as to their application even though they powerfully supplement the written Constitution. This inadequacy renders the conventions increasingly impotent as devices to ensure the use of public power in accordance with the precepts of democracy and responsible government. The authors state: "In our view, the Canadian conventions of responsible government are inadequate and have become more so over time. Neither the governor general nor the House of Commons can effectively constrain the Prime Minister from abusing power." (57)

The authors argue that conventions ought to be in the formal text of the written Constitution. In Canada, courts are the only authoritative source on the meaning of a constitutional convention. However, the courts cannot enforce them, nor offer remedies based on them, if they are not observed. As rules of political consensus, rather than written law, conventions are thus vulnerable to the interpretation of those in power. Thus, conventions are left susceptible to the abuse of those in power.

Aucoin and his co-authors then go on to analyze the nature of the interpretation given to conventions by those in power. Their crucial and potentially most controversial line of argument is how they distinguish between the use of power and the abuse of power. In that regard, the authors point to the "good faith," or not, of the head of the government:

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4. See, e.g. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl, 3rd sess, no 34 (27 April 2010) at 1415 (Hon Peter Milliken).

The democratic system works only when the prime minister is willing to abide by the spirit and logic of responsible government and thus exercises executive powers in good faith. When the prime minister acts otherwise, the system becomes one of unrestrained prime ministerial power. (60-61)

This raises the fundamental question: what constitutes good faith? The answer lies in the distinction between decision-making in the general public interest versus that made in the more narrow interest of partisanship. In order for the system of government to function according to its design, that is democratically and for the benefit of the people at large, the prime minister must be able to rise above political party considerations and partisanship. While politics is an unavoidable although limited aspect of government, partisanship cannot be the general guiding force of public life. The prime minister must make constitutional decisions for the benefit of the country, rather than for the interests of political allies, followers and constituents.

The vital criteria of good faith holds true at all stages: in respect of the convening of Parliament after an election; in regard to the formation of the government and its initial search for the confidence of the House of Commons; in the ongoing application of the confidence convention throughout the life-span of a government; in the maintenance of equilibrium between the executive and the legislative branches; in decisions on prorogation; and, finally, in the dissolution of Parliament and the timing of elections.

According to *Democratizing the Constitution*, the Harper Government has not acted in good faith, as the authors define this concept. This observation is based on two grounds. The first is that while Mr. Harper was in opposition, he argued for reforms that would democratize the system of government then in place. Once in office, he either did not implement his own earlier proposals or implemented reforms, but then undermined them. The second is that in the authors' view, Prime Minister Harper has governed in an overly partisan manner, and has concentrated and personalized the levers of power.

The common view is that the Harper Government is particularly sensitive to criticism, and it is important therefore to properly characterize the tone of *Democratizing the Constitution*. Its analysis of governance and the interpretation of constitutional conventions is not synonymous with opposition to any particular government. The book critiques the Harper Government vigorously. However, it also does not spare a number of prior governments. It takes a balanced view, emphasizing constitutionalism, democracy and legitimacy and how these fundamental concepts have evolved in Canada for almost two centuries. Indeed, in a democracy, this

type of analysis should be welcomed as a contribution to the discussion of the public interest.

The prime minister, according to the authors, interprets conventions in a particular manner. His apparent preference is for American presidentialism and the centralization of power for the sake of unfettered unilateral action. Hence the authors examine the schools of thought that do or do not support this preference. They contrast the classic view of parliamentary democracy and the essentially populist alternative. The authors offer a trenchant critique of the populist position. This leads them to conclude that the argument which would allow a change of government to result only from a general election, but not from a vote of confidence in a new government between elections is at variance with the specifically Canadian design of the system of responsible government. The 2008 prorogation elicits the following comment:

Beyond the political rhetoric intended to keep the Conservatives in power, something else was evident in the reaction that followed the events leading up to the 2008 prorogation, and not just from the Conservatives. That reaction exposed the gaping holes of the Canadian constitution: the absence of a few clear, firm, and binding rules guiding the most fundamental aspects of the Canadian constitution has led to a high level of disagreement on our constitutional conventions for determining what the governor general should or should not decide and under what conditions. (176)

The analysis of these issues raises a fundamental question in respect of responsible government: whether, in a vote of confidence that arises at the opening of a Parliament, following a general election, or later on during the life of that Parliament, there is a presumption of confidence or of non-confidence in a government? The authors do not directly address this point, but the sense of the book is that each vote of confidence is *sui generis*. Only our future constitutional practice will inform citizens. What is clearly set out, however, is the pivotal role of the legislature in a Westminster-style system of government. A conscientious reviewer must emphasize the authors' contention that only the legislature has the constitutional authority to constrain, check and control the government on a continuous basis. (192)

*Democratizing the Constitution* is also interesting because it includes a comparative perspective. Canadian practice is contrasted with recent developments in the United Kingdom, Australia and New Zealand. Canada is depicted as the weak link in the Westminster chain, due to the lack of agreed rules, the flexibility which enables partisan advantage to

triumph, the absence of constraints on the use of power combined with an inattentive citizenry, and an inadequately knowledgeable media.

Rather than allow the reader to fall into constitutional despair at this litany of problems, the authors conclude with several integrated recommendations. The most fundamental of which are:

- Parliament be summoned within a maximum time-frame after an election;
- there be a more robust requirement for fixed election dates;
- a system of voting be adopted so that confidence in the government could be withdrawn only on an explicit non-confidence motion; and
- prorogations require the consent of the House of Commons.

These changes could be achieved through formal constitutional amendment or they could be articulated in a New Zealand-style *Cabinet Manual*. In addition the authors propose related reforms of executive power, of political parties, as well as of various other aspects of Canada's political-legal system.

This is a far-reaching set of proposals indeed. Some observers would merely lament for the nation. Aucoin, Jarvis and Turnbull have the combination of courage and temerity to make serious proposals for its modernization. Their book is the most analytical and comprehensive of the treatments of the governance of Canada following the 2008 prorogation. It is therefore essential reading for those who would understand the Canada of today.

It is with great sadness that this reviewer must note, in conclusion, that *Democratizing the Constitution* has turned out to be Peter Aucoin's scholarly epitaph. He died a few weeks after he completed his contribution to this book. It is now for others to continue his work in support of a more democratic, and therefore a better Canada.

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