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# Limiting the Government's Power to Prorogue Parliament

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by Guy Tremblay

*Many people feel that Prime Minister Harper's second minority government abused its power to prorogue Parliament in order to shut down embarrassing activities. The prorogation of December 4, 2008 circumvented a vote of censure scheduled for the following week that might have led to a coalition government taking power. The prorogation of December 30, 2009 dissolved the parliamentary committees. One of these committees was hounding the government about the fate of Afghans taken prisoner by the Canadian military. After the second prorogation, the opposition parties in the Commons suggested limiting the government's powers of prorogation to prevent future abuses. This article explores how the power to prorogue Parliament could be circumscribed—it would still exist, but with limits on its frequency and the circumstances surrounding its use.*

People were not convinced by the reasons given for the latest prorogation, such as the opening of the Vancouver 2010 Olympic Games in the latter half of February. Suspending Parliament for more than two months attracted widespread criticism, and the government's popularity ratings suffered as a result. One means of limiting the power to prorogue would be to pass a resolution in the House of Commons stipulating the circumstances in which prorogation would be allowed and those in which it would be prohibited. This approach might encourage the government to act with caution in the future, but it would not serve as a constraint since a resolution by a House of Parliament has no legal authority; it is simply the expression of a desire or an opinion. In addition, the House of Commons has no authority to replace the Prime Minister as official advisor to the Queen's representative.

A standing order would also be no more than an expression of the House of Commons' desire to limit the power of prorogation and would have no authority. Firstly, the House is authorized to govern its own internal operations, but it cannot then use that power to subjugate the external (royal) authority that gives it the right to sit. Secondly, a standing order

cannot oppose a law, and the power of prorogation in Canada appears to have a legislative, and indeed constitutional, basis.

## A Strict or Flexible Constitutional Amendment?

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Section 38 of the *Constitution Act, 1867*, reads:

38. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

This authority to summon the Commons includes the power to end the session, i.e., to prorogue Parliament. The expression "from Time to Time" and the principles of statutory interpretation support this conclusion. In order to limit or circumscribe the Governor General's discretionary power to prorogue Parliament, section 38 of the *Constitution Act, 1867* would have to be amended, which poses a significant problem.

At first glance, section 44 of the *Constitution Act, 1982* gives the federal Parliament the authority to circumscribe the power of prorogation. However, under paragraph 41(a), amendments to the "office" of the Governor General require the unanimous consent of the Senate, the House of Commons and the 10 provincial legislatures.

Clearly, in dealing with the "office" of the Queen's representative, paragraph 41(a) protects the

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fundamental characteristics of that office. According to a Supreme Court *dictum*, these characteristics include at very least the Governor General's power to appoint and dismiss ministers and to dissolve Parliament.<sup>1</sup> However, it is difficult to know whether the power of prorogation is also subject to unanimous approval, as constitutional experts have not addressed this specific issue. In his detailed examination, Professor Benoît Pelletier simply wrote that the office of the lieutenant-governor (or governor general) can be interpreted as including the power to convene the legislature that is stipulated in the Act of 1867.<sup>2</sup>

The 1979 decision *Authority of Parliament in relation to the Upper House* seems to offer the best example of how to counter the power of prorogation. For example, according to the Supreme Court, the Parliament of Canada could not reduce Senators' term of office without impairing the functioning of the Senate "at some point." However, Parliament was legally able to set Senators' retirement age at 75 even though they had originally been appointed for life.<sup>3</sup>

I think the same approach should be taken with the Governor General's power of prorogation. The Parliament of Canada alone could not abolish this power or substantially reduce it because prorogation is an integral part of the cooperative system that exists between the government and the Commons and that developed out of the constitutional history of the United Kingdom.<sup>4</sup> However, a law could legitimately determine how the power of prorogation is to be exercised.

To increase the chances of such a law being declared valid, it should follow the model used for fixed-date federal elections. The law could expressly maintain the right of the Governor General to prorogue Parliament and then stipulate the conditions for exercising this power, which would, in practice, be aimed at the Prime Minister.<sup>5</sup> Since constitutional conventions dictate that the Governor General never prorogues Parliament on his or her own initiative, it is understandable that the law would apply to the Prime Minister. The courts could rule that issues raised by this law are non-justiciable as they are essentially political in nature. This was the position of the Federal Court in the case of the act pertaining to fixed-date elections, which was appealed.<sup>6</sup>

### **An Amendment We Might Not Want**

While circumscribing the power of prorogation may be feasible from a legal standpoint, it may not necessarily be desirable in the Canadian context. It is a doctrinaire view of the pre-eminence of the elected Commons that suggests a government is wrong to

suspend the Commons' proceedings. In fact, based on Bagehot's insightful work, published in the 19th century, we know that the strength of the British parliamentary system is derived from the fact that the Cabinet, led by the prime minister, is not simply a committee of the Commons.<sup>7</sup>

In our inherited federal and provincial systems, the government has certain features that encourage cooperation among elected members. Its main power is, of course, the ability to dissolve Parliament and appeal to the public. The tools available to the government to control the work of Parliament, including prorogation, also help to maintain equilibrium. In continental Europe, the governments that opted for purism had to correct the resulting ineffectiveness and adopt what is known as "rationalized parliamentary government" to increase the means of action available to the government.

Of course, the government can abuse the powers given to it under the Westminster tradition of parliamentary government. However, it runs the risk of losing public support and provoking a conflict among elected members that the public will be called on to arbitrate. Politicians are fully responsible for all actions they take to assure the functioning of the State. If Prime Minister Harper had known how the Canadian public and the media would react, he might not have prorogued a second time—and he will certainly exercise this power with greater caution in the future. Canada's system of government will not improve by handcuffing the government or unbalancing the parliamentary system.

### **Notes**

1. See *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, p. 46–47.
2. Benoît Pelletier. *La modification constitutionnelle au Canada*, Toronto: Carswell, 1996, p. 148 and 191.
3. *Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 76–77.
4. See André Émond, *Constitution du Royaume-Uni. Des origines à nos jours*, Montréal: Wilson & Lafleur, 2009, p. 203.
5. See subsection 56.1, *Canada Elections Act*, S.C. 2000, c. 9.
6. *Conacher v. Canada (Prime Minister)*, 2009 FC 920.
7. Walter Bagehot, *The English Constitution*, 1867, Ithaca, N.Y.: Cornell University Press, 1966, p. 65 et seq.

**Editor's Note:** On March 17, 2010 the House of Commons adopted by a vote of 139 – 135 the following motion: That, in the opinion of the House, the Prime Minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation.