Harper’s Senate Reform: An Example of Open Federalism?

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Upon entering office in 2006, Prime Minister Stephen Harper quickly professed that his new government would engage in a policy of ‘open federalism’ in an attempt to address the apparent democratic deficit in Canadian federal governance. Briefly, open federalism is the idea that the federal government should strive for open negotiations and equal relations with the provinces on key intergovernmental issues. Accordingly, Prime Minister Harper offered Senate reform as a crucial way to achieve this end. The government proposed two changes to the Canadian Senate, asserting that both could be enacted through the federal legislative process: Bill C-19, which seeks to limit the term of senators to eight years; and Bill C-20, under which senators would be appointed after having been elected by the people of each region. The government argued that these reforms would enable the provinces and the electorate to play an ongoing role in the selection process of the senators, thereby rendering the Senate independent, efficient, effective and, most importantly, fully democratic. But is the process through which the government intends to enact these changes really an example of ‘open federalism’?

Though Prime Minister Harper speaks of practising open and transparent federal governance - thereby attempting to distinguish himself from his predecessors, most notably Jean Chretien and Pierre Trudeau - his government’s proposed amendments to the Canadian Senate are arguably indicative of a more ‘closed’ view of federal relations in that the provinces are being actively shut out of the process of institutional reform. In fact, despite Harper’s intention to achieve a greater openness in the federation by encouraging the active involvement of the provinces, his preferred method of pursuing reform is symptomatic of an arrogant, if not rogue government that believes it can circumvent and disregard its constitutional obligations in order to realize its desired agenda. So, while the passage of Bill C-19 and Bill C-20 might result in a Senate that is indeed more democratic, independent, efficient and effective, the means through which Harper wishes to achieve this end are far from ‘open’.
In fact, and perhaps ironically, Bills C-19 and C-20 closely resemble Trudeau’s own Senate reform proposal of 1978. As with the Trudeau proposal, Harper’s plan has the ultimate aim of rendering the Senate more legitimate by opening the door for the provinces and the electorate to play a significant role in deciding its future make-up. In attempting this, both governments – the Liberals under Trudeau and the current Conservative government under Harper – have ignored past practices, constitutional obligations and a consultative role for the provinces in redefining the selection process and the tenure of senators.

Given the incredibly contentious nature of Senate reform and the repeated failure of past governments to achieve it, an analysis of Harper’s novel methods of reform is required. Accordingly, this paper deals with the specific legislative procedures through which the Harper government is advancing its proposals and highlights how closely they parallel Trudeau’s own failed attempt to change the structure of the Canadian Senate in 1978. The paper does not address the merits of the issue itself, or deal with the broader question of whether or not the Senate, as it currently exists, is even in need of reform. Nor does it discuss whether the current proposals will achieve the ends Harper claims that they would.

The paper begins by briefly reviewing the historical sentiments that have fuelled the desire for Senate reform in order to contextualize the Harper scheme. It then proceeds to connect the idea of reform to Harper’s notion of open federalism, which allegedly sets his government apart from its predecessors. In this way, the paper argues that, although Harper attempts to separate himself from previous prime ministers by championing the idea of open federalism, both his and Trudeau’s methods are actually examples of a ‘closed’ federalism, both excluding the provinces from having any role in helping to reform the Senate. Furthermore, the necessity of such a role has been consistently recognized by past governments and by the Supreme Court of Canada in Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference), 1980, (when the Trudeau government referred the constitutionality of its own proposal to the Supreme Court).
WHY SENATE REFORM

The fundamental composition and function of the Senate in the Canadian federation has long been a source of contention amongst western and, to a lesser degree, eastern politicians. First arising during the debates concerning western settlement, then in the constitutional debates from the 1970s through the 1990s, the issue persists today. In fact, as Roger Gibbins and Loleen Berdhal argue, “support for Senate reform, is a staple of western Canadian political discourse” (53). The core issue in this protracted debate has been the need to secure equal and effective regional representation in Canada’s federal centre, with proponents of Senate reform viewing the need to transform the institution into one that offers regional perspectives on federal policies.

But how much credence should we give to those who argue that the Canadian Senate, as an institution originally intended to represent regional interests and identities, is a failure? According to proponents of reform, the way in which the system operates now – with twenty-four senators per region, plus six assigned to Newfoundland and Labrador and one for each of the Northwest Territories, Yukon and Nunavut, appointed by the prime minister to serve until the age of seventy-five – does not reflect the political reality of contemporary Canadian federal relations. This, coupled with the fact that senators almost always accept the policies produced by the federal government of the day, calls into question the Senate’s independence from the House of Commons and, in turn, its function and role of exercising sober second thought. As a result, many question the democratic legitimacy and effectiveness of the Senate. Gibbins and Berdhal (54-55), amongst others, argue:

… the Senate makes a mockery of federal principles. Senators are neither elected by citizens nor appointed by provincial governments; they are appointed at the sole discretion of the prime minister and retain their seats until reaching 75 years of age. The number of Senate seats per province is based on the math of Confederation, which bears little resemblance to today’s demographic or federal realities [...] From the perspective of federalism or regional representation, the Senate can most charitably be described as wasted institutional space.
Since the late 1980s, the desire for reform has crystallized into a platform that calls for a Triple E Senate: elected, effective and efficient. This model of the Senate made its way onto the mainstream Canadian federal agenda mainly upon the insistence of political leaders from the West. Indeed, in this time, two constitutional packages aimed at amending the Constitution, the 1987 Meech Lake Accord¹ and the 1992 Charlottetown Accord,² included provisions for Senate reform aimed at appeasing the growing unrest of political players in the West. Both these attempts to amend the Constitution, however, eventually collapsed.³ Irrespective of these failures or maybe in spite of them, regional discontent embodied in the demands for institutional reform in general and Senate reform in particular, persists and alleviating it remains a high priority on the political agenda of the Harper government. In light of this, it is not surprising that the federal government is pursuing Senate reform.

In his attempt to deal with the issue of federal accountability, Harper speaks of engaging in a kind of open federalism that “refers to divided sovereignty between regional and general governments.” (Young 7) Robert Young has listed six core elements contained of this principle (8-9):

1. Rectitude and order in the process of federal-provincial relations
2. Strong provinces.
3. ‘Strict constructionism’.
4. Quebec is special.
5. Fix the fiscal imbalance.
6. Municipalities are provincial.

¹ Had Meech Lake been ratified by all ten provinces and the federal government, vacancies in the Senate would have been filled not on the initiative of the federal government alone; rather ‘Ottawa would [have had to] choose from a list of names submitted by the government of the provinces in question.’ This, of course, was to be a temporary solution until a new formula vis-à-vis Senate Reform was agreed upon by the political leaders. A similar formula was also proposed for the reform of the Supreme Court of Canada. (McRoberts 94)

² A Triple E Senate was in fact proposed in the 1992 Accord in which, had it been ratified, the Senate would have been comprised of an equal number of elected Senators from each province, two from each territory and representatives from the Aboriginal community (the number to be determined at a later date). The new Senate would have been effective as its powers to delay or veto a bill would have increased. (McRoberts 210) (For more detail on this proposed Triple E Senate, see McRoberts, Misconceiving Canada, Russell, A Constitutional Odyssey).

³ For the causes and reasons for the failure of these two Accords see McRoberts, Misconceiving Canada, Russell, A Constitutional Odyssey
For the purposes of this paper, the first element is most pertinent. Open federalism “is about collaboration – with every level of government – and about being clear about who does what and who is responsible for it.” (http://www.conservative.ca/EN/1004/42251) In its essence then, as Peter Leslie states, “open federalism is about procedure or practice in the conduct of intergovernmental relations: a commitment to collaborative federalism.” (Leslie 39) Given this, the ‘closed federalism’ supposedly practised in the past could be described as a type of federal relations dominated by Ottawa – in effect discouraging collaboration with the provinces in restructuring key features of the Canadian federation4. According to Harper, his ‘open federalism’ should be viewed as a clear break from the past. Indeed, in his own words, open federalism is “the very opposite of the centralist philosophy espoused by successive federal Liberal regimes, from Mr. Trudeau right up to his current successor, Mr. Dion.” (http://pm.gc.ca/eng/media.asp?id=1938) However, considering Harper’s preferred approach to Senate reform, we are quickly reminded of a Trudeau-style of governance that dismissed the provinces as equal players in the Canadian federation when he attempted to reform the Senate.

TRUDEAU AND HARPER COMPARED

On June 20th, 1978, the federal government under Trudeau tabled ‘A Time for Action’, which included a proposal to abolish the current Senate. Under this proposal, the existing Senate would be replaced by a new House of the Federation made up of 118 senators – half of whom were to be chosen by the federal government following a federal general election and the other half by the provincial governments following their respective provincial elections. Furthermore, the proposal was to be enacted under Parliament’s unilateral constitutional amending authority.

4 It should be noted that Harper’s contention that past governments practiced closed federalism is debatable. Indeed, Lester B. Pearson as prime minister was accommodating to the demands of Quebec and to a lesser extent, the other provinces. Brian Mulroney and other prime ministers, though notorious for practicing executive federalism, did engage in open negotiations with the provinces. Arguably though, John A. Macdonald and Wilfrid Laurier did engage in what can be referred to as closed federalism in their attempts to undermine the provinces.
The similarities between the Trudeau and the Harper proposals are evident. Both attempt to restructure the Senate so as to correct its commonly held inadequacy in representing regional interests and identities. According to the Trudeau government, the Canadian federation needed a “second chamber that will function as a politically effective regional forum.” (Lalonde 3) In a similar vein, the Harper government has argued that, “Canada needs an upper house that provides sober second thought [...] gives voice to our diverse regions with democratic legitimacy.” (www.pm.gc.ca/eng/media.asp?id=1306)

The procedures by means of which both governments intended to push through their proposals also closely resemble one another: Trudeau favouring a unilateral amendment to the Constitution itself; and Harper attempting to push through his amendments via the federal legislative process. According to the Trudeau government in the arguments it submitted to the Supreme Court of Canada in the Senate Reference, s. 91(1) of the British North America Act, 1867 (now s. 44 of the Constitution Act, 1982) authorizes it to make changes unilaterally to the Senate. Section 91(1), enacted in 1949, gave the federal government the power to amend unilaterally the Constitution of Canada where the amendments did not affect federal-provincial relations (amongst other exceptions including the provision that there be one session of Parliament at least once a year). Here, Trudeau held that since the Senate is included in the phrase “the Constitution of Canada” found in s. 91(1), and since s. 91(1) clearly stipulates that the federal power under this section is absolute except for the specified limitations (a list that does not include the Senate), the federal government could affirm that Parliament did have the exclusive jurisdiction under s. 91(1) to modify the Senate. According to the Harper government, because neither bill C-19 nor bill C-20 affects the constitutional provisions vis-à-vis the Senate, a constitutional amendment is not required. Rather, the reforms are held to be within the normal legislative powers of the federal Parliament and necessitate no resort to the amending formulas that require the consent of the provinces. Ordinary legislation is sufficient.
It may seem that Trudeau was much bolder in his attempt to reform the Senate by asserting an ability to do so under s 91(1) of the *British North America Act, 1867*. Yet Harper, by preferring to pursue reform through legislation passed by Parliament, would achieve a very similar end result: the exclusion of the provinces from the reform process and a repudiation of the long-established principles of constitutionalism and federalism in Canada. Indeed, the approaches of both the Trudeau and Harper governments ignore a role for the provinces in the federation by denying them a voice in determining how the federalism principle of *regional representation at the centre* should continue to be realized.

In the Senate Reference, 1980, the Supreme Court of Canada adopted Lord Sankey's understanding of Canadian federalism and the original federal bargain:

> Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federation, it is important to keep in mind that the Preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. (*Senate Reference*, para. 13)

The Court understood the federal bargain and Canadian federalism as a consensus among the constituent units in which the Senate, securing and ensuring regional representation at the centre, is a key feature. In fact, in the original negotiations that took place prior to Confederation, the less populated provinces had insisted upon securing regional representation at the centre before agreeing to join the new country. As such, the Court's ruling recognized the fundamental role played by the provinces in the original make-up of the Senate and the process of selecting senators. Furthermore, it acknowledged that there was a role to be played by the provinces if the provisions of the original contract, including the Senate, were to be changed. In this reference then, the Supreme Court found that the provinces ought to be consulted and their consent obtained if fundamental changes are to be made to the Senate. Moreover, it concluded that the federal government was not authorized to change unilaterally the selection process of senators.

Emerging from the Supreme Court's opinion in the Senate Reference is the idea that the Senate continues to play an important role in the federation because it
secures regional representation at the centre. As such, any changes to the make-up of the Senate cannot be effected unilaterally by the federal government; doing so would negate the idea of a distinctly ‘regional voice’ being expressed independently of the central government. In order to change the Senate then, the federal government must acknowledge that the provinces need to be consulted and their consent obtained. Though Harper’s proposal does not directly change the selection process – as senators will continue to be appointed by the Governor General on advice from the Prime Minister - it does so covertly by introducing elections into the selection process. In effect then, Bills C-19 and C-20 do affect the constitutional provisions relating to the Senate: Bill C-19 by limiting the tenure of senators to eight years, and Bill C-20 by ultimately transforming the Senate from an appointed upper house into an essentially elected one.

Four of the ten provinces – Ontario, Quebec, New Brunswick, and Newfoundland and Labrador - have already openly voiced objections to the manner Harper is proceeding with Senate reform, arguing that, as with Trudeau’s failed proposal, a constitutional amendment endorsed by the provinces is required. Quebec has even gone so far as to state that it is prepared to challenge in court Harper’s plans to reform the Senate. It appears that Harper, by ignoring the objections of the provinces as well as the spirit of the Supreme Court opinion rendered in the Senate Reference, is not only circumventing constitutional principles and past constitutional practices, but is also ignoring the proper role the provinces ought to play in the federation.

The ultimate effect of both Trudeau’s and Harper’s proposed actions are similar: push aside the provinces and ignore the vital position they hold within the federation. Though the Senate is a part of Parliament, its role is not limited to federal matters. This was affirmed by the Supreme Court of Canada in the Senate Reference when it pointed out that the Senate was created “to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.” (Senate Reference, para. 10). If the federal government alone can determine and alter the selection process of the Senate, and if it alone can establish
the tenure of senators, then this undermines the role of the provinces in actualizing the notion of regional representation at the centre. It negates a crucial role entrenched by a century of constitutional deliberations between the federal and provincial governments that culminated in the signing of the Constitution Act, 1867 and the Constitution Act, 1982, a role recognized and respected by the government of Brian Mulroney in its own attempt to reform the Senate through the 1987 Meech Lake Accord and the 1992 Charlottetown Accord.

The negotiations that led to the signing of the Constitution Act, 1867 included the establishment of a senate, because it was insisted upon by delegates from New Brunswick, Nova Scotia and Lower Canada (Quebec) in order to ensure a healthy respect for their sectional interests and identities at the centre. In 1982, during the negotiations leading up to the patriation of the Constitution, political leaders agreed that the powers and selection of senators, if they were to be altered, required an amendment to the Constitution by way of the general amending formula. In both the Meech Lake Accord and the Charlottetown Accord, the provincial premiers and the prime minister agreed that the proposals to reform the Senate along Triple E lines could only be put into effect after the unanimous consent of the provinces was obtained (the Charlottetown Accord was first put to the electorate in a national plebiscite). In all these cases, the provinces were actively and equally engaged in the negotiation process, and indeed, in the last thirty years there have only been two instances in which the federal government chose not to consult the provinces or obtain their consent when pushing through their proposals for Senate reform. In these two instances, the governments of Trudeau and Harper chose to ignore the long established principles of Canadian federal relations by minimizing the role of the provinces in the federation.

When discussing Harper’s Senate proposals then, in addition to considering the constitutional element of the proposal we must also consider the federalism factor. Harper describes himself as a proponent of open federalism. Yet, despite this, the attempts of the Mulroney government to reform the Senate appear to be more ‘open’ than Harper’s as they included a provincial voice through federal-
provincial negotiations. Harper’s approach contradicts the way Canadian federalism vis-à-vis Senate reform has evolved over the past two decades, and ignores the authoritative understanding of the relationship between the Canadian federation, the Senate, and the federal government rendered by the Supreme Court in 1980. In a similar fashion to Trudeau then, Harper is attempting to circumvent constitutional practices and obligations. And as with Trudeau, there is little indication that employing a strategy that circumvents the established mechanisms for reform will produce a more open federalism.

WORKS CITED


