

PSCI 1100 A- September 18, 2015

The constitution is a good beginning to understand politics in our country. It is not only a point of access to understand the basic legal frameworks, it also indicated what a society considers to be its goals and values. It articulates significant things in a society and determines political culture.

Examining various Constitutions at a glance

1. Saudi Arabia
 - a. Islamic and Arab state
2. France
 - a. Independent social republic
 - b. decentralized
 - c. equal access
3. China
 - a. socialist state people's' democratic dictatorship
 - b. sabotage of socialist state is prohibited
4. Canada
 - a. obscure pre-amble
 - b. identifies foundational principles: federally united, Parliamentary system of government
 - c. municipal governments within Canada have no constitutional standing
 - d. similar in principle to the Westminster model of government

Some countries do not have constitutions (Ex: Great Britain) Tradition, practice and culture affect what is constitutional.

The most fundamental principles of Canadian politics are not specified in constitution. They are: the supremacy of parliament, responsible government and the office of prime minister.

Supremacy of parliament: Parliament has the most power and authority in Canada. they can enact, repeal or modify anything within its jurisdiction. There are no limits of what parliament can do within the areas that are assigned to it. (this is modified by the Charter of Rights and Freedoms.

Responsible government: There is no actual reference within the constitution to the fundamental principle of responsible government.

Baldwin was a leader of the reform movement that pushed for the extension of the principle of responsible government from Great Britain throughout the colonies. Louis Lafontaine and Baldwin led a responsible government in 1848 in the colonies. Responsible government is for the executive to remain in power, the elected assembly (legislative branch) must have

confidence in him. If confidence is lost from the majority of the elected assembly (House of Commons) a new executive is put in place. It grants legitimacy to power. The executive is responsible to represent Parliament, and through parliament is answerable to the people. This applies at both the federal and provincial level. An unelected executive can only act on the advice and support of the majority of the legislative assembly. We no longer have an unelected representative.

The consequences and implications of Canadian constitution are:

1. there are no separate of powers between the executive and legislative branches. The United States has a clear divide and our both elected. However, in Canada the prime minister is elected but also a member of the legislative. Who becomes Prime Minister is the result of elections although there is not an election specifically for Prime Minister.
2. The second consequence is the government that loses the confidence or doesn't maintain support falls. Government may be dissolved and there is an election or the government can also resign and replace the party without an election.
3. In our system, elections can happen any time because there is always a possibility of a minority government and the government could fall.
4. A government with a majority in the assembly is virtually un-opposable. Prime minister is one of the most powerful executive positions in the world.

A government could fall if:

1. it loses a vote of confidence
2. it loses in relation to its speech from the throne (the right of reply from opposition)
3. Any motion that is specifically a confidence vote is lost
4. A motion that a government states as a confidence vote is lost

The government is not necessarily or automatically the one that has the most seats in the assembly. The government is the party that can maintain the confidence and support of the house. The government can be a coalition government. Coalition governments are completely legitimate.

There is strong party discipline within Canada. The leader of a party is supreme and sign off on all MP's. This is not to say that each candidate will be voted in. But the leader can choose who will and will not run. Party is a product of the leader.

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Review of Last week

In this country in our system, we have what's called a Westminster style system, and we don't elect a bunch of parties who then as in some countries, get together and decide who will govern. We ask people to make a choice of a government. And so I think that the party that wins the most seats should form the government. –Prime Minister Stephen Harper (Mansbridge debate) *Read below for clarification on this statement*

We **do** elect a bunch of parties. We **do not** elect our government. There is nothing undemocratic about this as the decision is who gets to form the government is taken through their elected representatives.

Consequences/ Implications of responsible government

1. No strict separation of powers: the executive is not elected independently as in the U.S. where there is a sharp separation between president and congress or executive and legislative
2. A government that loses confidence of the elected assembly falls: this typically results in dissolution/ election or government resigns and another one is formed without elections
3. The government is not automatically the party with the most seats. Rather the government is whoever can maintain the confidence (i.e. support) of the majority in the elected assembly.
4. Responsible government tends to result in stricter party discipline/ strong parties.
5. Elections may take place anytime unlike U.S where election dates are fixed.
6. A majority government is virtually un-opposable.

Coalition government

Coalitions are legitimate. However, if a leader of a party has clearly stated that they are against a coalition, an argument can be made about the leader's deceiving the electorate. Although there is no constitutional ruling against this, it can create a messy government.

Lecture Notes

Executive and Legislative powers (focus on the senate)

Should the senate be abolished or should the senators be elected?

Proclamation of 1867- Section 9: The executive government is to continue to be vested in the queen (monarchy). The government is part of the legislature. The real executive power is identified in section 11: there shall be a counsel to aid and advise the queen's privy council. The queen's privy council is the real executive power in Canada. **There is no specific reference to the position of Prime Minister constitutionally- it is a convention and a custom. Prime minister is not an office recognized in the constitution although it has more power than almost any other position. The only way to remove a prime minister is by the people through an election. There are no provisions for removing or censoring a prime minister. **

Section 17 of the constitution: "there shall be one parliament for Canada consisting of the queen the upper house styled the senate and the house of commons" Similar in principle to the UK – monarch, senate, house of commons. There must be agreement between all of these institutions to pass a law. That means the senate is a fundamental part of our parliamentary system of government. On the basis of that principle alone we are entitled to ask the question: can the prime minister refuse to appoint senators? Is that legitimate in the constitution?

Section 24: it specifies that there **shall** be senators appointed. What do we do about it? Or do we need to proceed through the constitution? How will laws get passed without the senate?

The senate is discussed in sections 21-36 of the constitution. It is an unelected body. It is appointed and therefore undemocratic. The senate was fully intended to be undemocratic. It was not an accident. The senate was designed with the intention of reviewing and revising legislation. It controls and regulates and is a chamber of sober second thought. There is nothing in the constitution that would clearly indicate that the senate is less powerful or important than the House of Commons. By making the senate appointed it would be able to preserve its independence and not be affected by public opinion. If you have two elected assemblies (House of Commons and senate) you can have deadlock.

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Lecture Notes -The Senate

- The senate was meant to act as a counterweight over the dominance of central Canada. (representation by region rather than representation by population)
- The senate was intended to represent regional interests.
- There is not equal representation by province, but rather by region
- An independent chamber acting as a counterweight to the House of Commons
- Senators often have a partisan affiliation
- There was no intention of the senate breaking up into caucuses and partisan affiliations as it does in the House of Commons, and yet, that still occurs.
- The senate is seen as only approval for the House of Commons
- It has had difficulty remaining independent
- Is it illegitimate because its unelected? Or do Canadians not like the senate because its not an independent chamber as it states it should be within the constitution.
- Rather than representing regional interests as was intended, an argument can be made that the senators actually only represent partisan interests.
- Arguments can be made that the governments and leaders of provincial governments act with respect to regional interests more effectively than senators do.
- Articles 21, 26 and 28 in the constitution discuss appointing the senators.
- Within article 23, owning property in a region could be seen as a proxy for actually living in that region depending on interpretation. (Duffy scandal)
- Reform of the senate could involve abolition of the senate, making it into an elected body or limiting and reducing the power it has
- In Britain within the house of Lords, there is no salary and there is an appointing process that avoids partisan interests. There are many differences between the Canadian Senate and the British House of Lords.

The House of Commons

- The House of Commons is the only elected system in Parliament and is accountable to the people.
- Responsible government: The government must maintain the confidence of the House of Commons, or else the government falls

- All money bills have to be introduced into the House of Commons- they can not be introduced to the senate. Any law or proposed law that involves money, funds and taxes must go through the House of Commons. (no taxation without representation)

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Federalism:

Federalism definition: a method of dividing governmental power between a general government and regional governments. Both governments are elected directly by the people. Each level of government is sovereign or independent within those powers that are given to it by the constitution.

- Federalism is referred to in the preamble of the constitution. This reference is stated but not defined.
- The responsibilities of each level of governments must be defined as clearly as possible in the constitution to protect the rights of the sovereignty of these powers. It is important to know which area of government is responsible for which areas.
- In the constitution section 91 defines federal powers and section 92 defines the provincial powers. There will be overlaps and conflict between the responsibilities of governments in certain areas.
- Because the levels of government are elected by the people, they are accountable to the people. The governments are not accountable to each other. Federal governments do not need to report to the provincial and vice versa.
- There is flexibility and diversity that is allowed by having separate provincial and federal governments. There is no homogeneity between levels of governments. This is reflected politically by having different parties voted in on provincial or federal levels.
- There is no correspondence between policies in the federal and provincial governments.
- Neither level of government can alter or change the responsibilities of another level of government. The powers of provincial governments are granted to them by the constitution not by the federal government.
- Our federal system only recognizes the federal and provincial governments as valid powers. There are municipal governments across Canada, but they are not recognized in the constitution. Municipal governments are subordinate to provincial governments.
- Territorial governments also have no constitutional recognition. The territorial governments are subordinate to the federal government.
- Aboriginal self-governments have no constitutional recognition in Canada. In section 91 of the constitution number 24, the federal government is given responsibility over first nations and reserves. Aboriginal government can be revoked or changed by the federal government.

Historical nature of federalism

- A federal association was dictated by a) the French Canadians who would not have accepted a unitary form of government and b) the existence of the maritime provinces who had their own customs and traditions who would not have accepted their communities disappearing off the map politically.

- A notion is developed that Canada is fundamentally a pact between the English and French. Creighton denies this but acknowledges where this notion comes from.
- Federalism can be dangerous according to MacDonald. The flaw is that the association is too heavily laid on provincial governments.
- Federalism is also necessary in Canada according to MacDonald, as long as we avoid the dangers.

The features of the constitution in regards to federalism and centralist tendencies

- Section 58- each province will have a lieutenant governor (the role of the governor general at the provincial level. The lieutenant governor is appointed by the governor general. They are essentially a representative or agent of the federal government. This is significant as in section 90 it is stated that the lieutenant governor has the power to reserve disallow, or nullify provincial legislation. The federal government is given power in the provincial governments through the position of the lieutenant governor. This feature is not used modernly, but is still constitutional.
- Section 91- lists all federal responsibilities. Any powers not specifically granted to provinces belong to the federal government
- Section 92- lists all provincial responsibilities.
- Section 91 and 92 are directly opposite of the American constitution as all responsibilities not listed within the provincial government are given to the federal governments.
- Section 91- federal government have unlimited capacity to raise money. Gives federal government spending power.
- Section 92- provincial governments have limited capacity to raise money.
- Section 92:10- the provinces are responsible for local works and undertakings other than some exceptions that allow the federal government to intervene.
- Section 93- Education- which is a provincial responsibility- is able to be altered by the federal government in regard to protection of publically funded religious schools.
- Section 96- federal government has the power to appoint provincial judges.

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The bicultural nature of the constitution

- Section 92: Outlines the powers of the provinces. 92:13 grants provincial governments power over property and civil rights. This clause is significant because a number of things are included under property and civil rights. This allows Quebec to have a system of civil law rather than common law. This concession is a direct result of accommodating French Canada to maintain control over their civil law tradition, over their ownership of property and over everything that is included under property and civil law.
- Section 94: Related to section 92 as it recognizes the distinctness of civil law in Quebec. The parliament of Canada can make revisions to the civil law in Ontario, nova scotia and Quebec. Quebec gets special treatment as its not part of the common law system.

- Section 133: Either English or French may be used by any person in debates in the Houses of Canada and parliament. Reflects linguistic duality of the country. (Later to become the two official languages of Canada)

The federal nature of the constitution

Procedures for amending the constitution:

- There is recognition within the constitution that both levels of government- provincial and federal- must be involved in making any amendments to the constitution.
- Recognition of the equality of the provinces. No province has more power than another. Ontario and Quebec used to have veto power, but in 1982, the system had been fixed to create provincial equality.

Four ways to amend the Constitution of Canada

1. **General Amending Formula:** Section 38 and 42 (1982) – The 7 50 rule. For amendments to the constitution in general, you need consent from the federal parliament and the senate and resolutions from seven provinces with a combined population of 50% of the total population of the provinces. (not 50% of the population as a whole so this excludes the territories) Due to the requirement of 7 provinces, no province has veto power regardless of how populated it is. Specifies a certain amount of things that can be amended within the general amendment formula. The provinces are represented in the House of Commons based on their population (number of seats). To change that system, you would use the 7 50 rule. Any change in the constitution regarding the powers of the senate and election of the senators also requires the general amending rule. Changes to the supreme court of Canada, the establishment of new provinces and the extension of the territories into the provinces all require the general amending procedure as well.
2. **The unanimous consent procedure:** Section 41- all things outlined in section 41 require the unanimous consent of all provinces and the federal government to make any amendments to the constitution. The senate of Canada is a fundamental institution and thus can only be abolished using the unanimous consent procedure. This system grants veto to any province or the federal government upon disagreement.
3. **Resolute of the senate and House of Commons and legislative agreement with the provinces involved:** Only involves the federal government and the governments of the province or provinces involved.
4. **Unilateral Amendments by province or by federal government:** Things that only affect federal government can be changed unilaterally by the federal government. Things that affect only a province can be unilaterally changed by that province only. the federal government can make certain changes on its own to the senate without needing approval of the provinces. Subject to sections 41 and 42. Section 45- the legislature of each province can amend that provinces constitution.

The Charter of rights and freedoms

The third pillar of the Canadian constitution. (Parliamentarism and federalism are other two) The Charter of Rights and freedoms was only embraced as a pillar of the constitution in 1982. The amending formulas were recognized at the same time. Freedoms and legal rights were still upheld before this official recognition as they were part of parliamentary system. Prior to 1982, the institution of parliament was recognized as the primary institution of defining the scope of our rights and freedoms. The notion of the supremacy of parliament. "Parliament has the authority or power to enact, repeal or modify any law within its jurisdiction". There are no substantive limitations of the power of parliament as long as it is exercising its powers over matters that are given to them under the constitution of Canada.

Effects of Parliamentary Supremacy

1. Parliament in effect has unlimited power to make law. There is no power above parliament. Parliaments are elected, but a subsequent parliament can change law. No parliament can bind a subsequent parliament.
2. The role of the courts is essentially limited to interpreting the law as it laid down by parliament. Courts cannot invalidate the laws that have been enacted by parliament.
3. Judicial review-courts power to review and interpret the law- is to decide whether or not a law is within the power of competence of a certain level of government is infringed upon when parliament is supreme. (Federal or provincial)

Comparison of Charter of Rights and Freedoms to its predecessor Bill of Rights

In 1960 the bill of rights was introduced, recognizing basic human rights. This is much different than our current Charter of Rights and Freedoms (1982).

The Bill of Rights was an act of the federal parliament. This could be amended and dissolved by any other governments as it held no constitutional standing. It did not apply to the provinces as it was a federal statute. There was also no specification that any law that was inconsistent with the bill of rights was invalid. Charter of Rights and Freedoms is enshrined within the constitution of Canada and therefore can only be changed using the amending formula. It applies to all governments, provincial and federal. The constitution is part of the supreme law of the land, any law that is inconsistent with this is invalid or inoperative. The Charter of Rights and freedoms enshrined within the constitution is a direct challenge to the supremacy of parliament.

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Charter of Rights (1982) vs. Bill of Rights (1960)

Before the Charter of Rights and Freedoms was made, the bill of rights is the document that was made to uphold rights. The charter governs the relations between governments and individuals. The charter does not govern relations between individuals and other individuals.

Charter of Rights

Bill of Rights

Enshrined in the constitution
So can only be changed using
The amending formula.

A federal statute/law which
Could be amended by the
Ordinary process (i.e. an act of
Parliament that could be
Changed by Parliament)

Applies to all governments.
Federal and provincial.

Applied only to the federal
Government; did not apply
To the provinces

Supreme law of the land, so
Legislation inconsistent with it
Is inoperative.

Did not specify that legislation
Inconsistent with it was inoperative
Or invalid.

Wide range of rights including:
-Fundamental Freedoms
-Democratic Rights
-Mobility Rights
-Legal Rights
-Equality rights
-Language Rights
-Education Rights

Limited number of rights including:
-Fundamental Freedoms
-Legal rights
-Equality rights
-Property Rights

Fundamental Freedoms

- (a) Freedom of conscience and religion;
- (b) Freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;
- (c) Freedom of peaceful assembly; and
- (d) Freedom of association

Negative Rights: Rights that protect the individual from the state.

The notwithstanding clause: Supports the supremacy of parliament as it says the government has the power to go against the charter. The law is supreme. Mr. Trudeau Senior and the provincial government instilled this clause.

Guarantee of Rights and Freedoms

1. The Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The limitations must be prescribed by law; it cannot be based on a generally accepted prejudice. You can't limit a freedom with vague unspecific material. This allows us as citizens to regulate our behaviour.

There are limitations to laws prescribed in a liberal democratic society. We can look to other similar societies as comparisons and examples.

There is nothing within the Charter that actually defined a reasonable limitation. The Supreme Court has developed a test that is designed to test the extent of a limitation which is known as the OAKES test. Named after the first case it was used and implemented in. this test

OAKES Test

1. The legitimacy of the states objective or goal that the government is pursuing in bringing about this law that violates rights and freedoms
2. The balance or proportionality between the way the government attempts to achieve this objective and the burden it places on the right of being violated. Is something sufficiently pressing to violate rights and freedoms.

4 Steps of the OAKES Test

1. The objective of the law must be important enough to warrant overriding a Charter Right (i.e. it must relate to concerns that are pressing and substantial in free democratic society)
2. There must be rational connection between the limit on the Charter right and the legislative objective. (i.e. will the law achieve the goal?)
3. The limit should impair the Charter rights as little as possible.
4. The benefits produced by the law should outweigh its negative effects (i.e. is the benefit too high a price to pay?)

Laws are not required to pass the OAKES test to still become law. The test may be utterly ignored.

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FINISHING UP THE CHARTER OF RIGHTS AND FREEDOMS

Starting on section 3: (The first two were the fundamental rights)

These are democratic rights. There are two broad categories: rights that apply to everyone, and rights that apply only to citizens. Section 3 says that any citizen can vote or run for public office.

This has led to the issue of "is there anyone who is not able to vote?" The charter says that literally every single citizen can vote, even prisoners and mentally ill people.

There's a growing motion that there should be a law making voting mandatory, though this will likely be subject to a charter challenge. The right to vote is just that: the "right" to vote. That means you have the right and freedom to choose whether or not you want to vote.

Another example is freedom of expression. We can express ourselves however we want, but you're not obliged to. No one can force you to express yourself if you don't want to.

The next issue: are spending limits for advertising in a campaign constitutional? Don't we have the freedom to campaign and run for office how we want to?

Section 6: Movement rights. Every Canadian has the right to enter, remain in, or leave Canada. Every Canadian can move or take up residence in any province, and may pursue a livelihood in any province.

There was an issue where the government sends criminals with dual citizenship to the other country they have citizenship with. Problem is, they would have the right to stay in Canada, so we can't ship them away.

Section 7: Everyone has the right to life, liberty, and security of the person, and the right to not be deprived thereof except in accordance with the principles of fundamental justice.

This is a major clause in dealing with assisted suicide and abortion.

It follows logically that we have a right to privacy, though it is never explicitly stated.

Section 15: Equality of rights. Every law and liberty is equal and is supported by law, without discrimination because of race, sex, religion, age, mental or physical debilitation, and more. Many things are not explicitly stated, but that's the point. The list is not exhaustive so that it can change with the time.

Section 15 did not come into effect until three years after the constitution was finalized in order to give the governments the chance to make sure they had no laws in place at that point that went against it.

Section 16-23: Official languages and minority language rights.

Pierre Trudeau, architect of the constitution, insisted on Canada being bilingual from coast to coast.

This has caused some tension with Quebec, because it states that minority language education must be made available where there is a sufficient population for it, and Quebec will always have a large amount of Anglophones.

Section 24: Enforcement (interpretive clauses).

Section 25 says that the charter should not be interpretive in a way that it interferes with any aboriginal treaty or any other rights or freedoms.

Section 33: The notwithstanding or "override" clause.

This ties in with the supremacy of parliament. Parliament has the unlimited power to make laws according to that principle, but the charter seems to put a damper on it by restricting it. The section 33 maintains parliamentary supremacy by letting them just choose to ignore the charter.

It applies to sections 1-2 and 7-15. This means democratic rights and language laws are exempt from the override effect.

The supreme court unanimously said that the law against assisted suicide is wholly unconstitutional because of section 7.

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Political Theory

When you consider human nature and the order of things, you are considering political theory.

Liberal democratic regime

Regime- What defines a political community and gives it its basic identity/character. The regime is the basic framework of a political community and expresses its basic values/ attitudes/ beliefs/ assumptions about what constitutes a good/well ordered society.

A democratic regime should enhance the democratic rights and freedoms of all members of society. Assumptions about the nature of human beings and the order of things are being made.

Modernity

Our modern approach to politics is based off rejection to classic and medieval traditions. To properly understand modern thinking, we must understand the ways of thinking that we reject consciously or unconsciously.

Classical Greek Political thought

The guiding theme and standard of classical political thought is nature. All living things have a nature (Aristotle). Something makes them what they are instead of something else.

Human beings have a distinct nature. One of the parts of this nature is that we engage in politics. Human beings are, by nature, political animals. We naturally tend to live in communities. We are herd animals. We interact with other human beings- we are social animals.

Our life in common with other people is regulated by assumptions about right and wrong. Therefore, we form perceptions of "the good life" or what makes life valuable. We regulate our actions based on the perceptions of what is good and bad or right and wrong. The good life actualizes what is good and what is best for human beings. The good life is life in accordance with virtue. The good life is much more than living how you want to-its living how you should or how you ought to.

Human beings by nature are susceptible to certain virtues: the pursuit of knowledge etc.

Anyone who simply lives to pursue wealth, comfort, freedom, or pleasure is not living a true human life. These are conditions of a "good life" but are not goals that should be sought after by themselves.

The guiding question for classical politics is: "what type of political regime is most likely to help actualize human virtue and human excellence?"

Medieval Political Thought

The guiding standard or theme of political thought is God or the divine. Politics tends to be understood in light of divine revelation (bible, Quran, etc.) Medieval politics is inseparable from religion. It is informed by religion. You cannot study medieval things without reference to religion or the divine. Everything is created by God- including politics.

The guiding question for medieval politics is "What is the proper relationship between human law, and divine law?". What are the requirements of the law and my faith?

Neither Medieval and classic traditions accord to the notion of the individual or individual rights and freedoms. They tend to focus on a communal or collective identity.

Modern Political thought- Rejection of classical political thought

The way of thinking that begins to emerge in the 16th and 17th centuries. Referred to as the modern world. Modernity is a way of thinking that constitutes a self-conscious rejection of the Greek and medieval thinkers.

Modernity- rejection of the belief that humans are part of a natural or divine order that prescribes how they should act (i.e. prescribes a certain moral stance)

The main consequence that follows this belief is that if there is no natural order or law, human beings are by nature free. Human beings have no responsibilities or duties to fulfill in their lives.

Human freedom is the fundamental premise of modernity.

Because of the emphasis on freedom, there is also a greater emphasis on the individual and fostering individualism/ the rights and freedoms of the individual. In a way of thinking where freedom is seen as a fundamental characteristic, politics becomes revolved around individual rights and freedoms.

The guiding question for modern politics is: "What political regime will maximize the rights and freedoms of individuals within the basic requirements of social existence?"

On Liberty-John Stuart Mill

Exam

- 3 hours' long
- 3 sections
- A list of terms or expressions that have been explained and discussed in class. There are 10, we must define 6 of them and explain their significance. (30%)
- 6 questions, choose and answer 3 of them. Compare, explain or identify. About half a page in length. (30%)
- 3 questions. Answer 1 in the form of an essay. (40%)
- For test review, use all notes from class. Readings will assist with answering questions, but there will be no specific questions regarding the readings.