



Session 10

Constitutional law 1



Constitution defined

Definitions

A constitution can be thought as:

- law determining the fundamental political principles of a government
- written instrument embodying the fundamental principles of the State that guarantees powers and duties of the government and certain rights to the people
- written instrument embodying the fundamental principles of the state that establishes power and duties of the government and guarantees certain rights to the people
- central law of our country that sets up the creation, character, and organization of its power and how that power is exercised; the rules and principles, descriptions of the government's power, and the main rights that the people of a country or state have

ACTIVITY: classify the above definitions

Substantive v. formal:

- in the substantive sense, any organized way of conducting the business of a state or other entity make up its 'constitution'.
- in the formal sense, a constitution is a written document containing legal rules and principles claiming priority over other rules and principles.

Comprehensive definition:

Raz defines constitution as an entity with the following seven features:

- Constitutive of a legal system;
- Stable, at least in aspiration;
- Written;
- Superior law;
- Justifiable;
- Entrenched, i.e., more difficult to change than other law;
- Expresses a common ideology.

Canada



Purpose of constitutional law:

- Sets out the basic structure of the system of government
- Divides powers between the federal and provincial governments
- Renders explicit the rights of people

Sources

A [Constitution Act, 1867](#) (CA 1) – British North American Act; emphasis on a federal structure:

- union (declaration),
- executive power,
- legislative power (senate, house of commons, royal assent),
- provincial constitutions (executive power, legislative power),
- distribution of legislative power (powers of the parliament, exclusive powers of provincial legislatures, natural resources, education, uniformization of laws, old age pensions, agriculture),
- judicature,
- revenues.

Sources (cont.):

B Constitution Act, 1982 (CA2) with an emphasis on human rights:

- guarantee of rights and freedoms, fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official languages, minority languages, enforcement, application, rights of aboriginals, equalization of disparities.

C Rules and conventions by which the system of government operates with an emphasis on premier election, cabinet and political parties.

D Court decisions seeking to rule on which level of state, federal or provincial, or which institution can deal with an issue.

Areas of responsibility:

Federal state (powers):

- public debt, property, trade and commerce, unemployment insurance, taxes, public credit, postal service, statistics, defense, salaries of civil officers, beacons, navigation, marine hospitals, fisheries, ferries, currency, banking, savings banks, weights and measures, promissory notes, interest, legal tender, bankruptcy, patents, copyrights, Indians, naturalization, marriage and divorce, criminal law, penitentiaries ([CA1: s. 91](#)).

Areas of responsibility (cont.):

Provincial state (exclusive powers of provincial legislature):

- direct taxation, credit, tenure of offices, public property, health care, prisons, municipal institutions, licenses, local infrastructural works, incorporations, marriage (solemnization), property, civil rights, education, justice, punishment, other local matters ([CA1, s. 92](#)).

ACTIVITY: consider cases *Ward v. Canada* (2004: 108-109) and *RJR-MacDonald v. Canada* (2004: 117-118) and discuss with peer to highlight sources of problems between the federal and provincial areas of responsibility.

In some instances:

- Overlap (e.g. marriage)
- Local needs may not be addressed (e.g. fisheries, income distribution-funding)
- Difference in prioritizing (e.g. property, works)
- Intra vires v. ultra vires (e.g. parliament)