Recent Constitutional Developments in Canada: directions and debates

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Research context

- Longstanding interests in Canadian government and politics; intergovernmental relations; and, social policy

- Current research on Aboriginal peoples – Canadian state relations
Relevance of this topic

- Constitutional practices relate to classic as well as contemporary legal, social, and political issues
- PM Stephen Harper interested in reforming certain aspects of the Canadian constitution
- Interesting comparisons with constitutional reforms and debates in the UK and elsewhere
Methodological notes

- **Sources**: academic literature, media reports, court decisions, legislation, treaties, political speeches

- **Methods**: central questions; key concepts; classifications; time period (post-1993)
The constitutional order

- Comprises fundamental rules and practices relating to the governance of a society
- Powers and relationships of state institutions (branches and levels of government)
- Individual rights and responsibilities – citizen to state
- Relations between collectivities – group to group
Types of constitutional change processes

1. Mega-constitutional politics
2. Constitutional normalcy
3. Informal constitutional change
Forms of constitutional change: formality/rigidity – flexibility

- **Entrenched**: fundamental constitutional law and judicial interpretations
- **Enacted**: statutory law, common law rules
- **Emergent**: constitutional conventions, customary practices, and understandings
Elements of the constitutional order under consideration

- Formal amendments to the Constitution
- Federalism and intergovernmental relations
- Parliament and Legislatures
- Supreme Court of Canada and the Charter of Rights and Freedoms
- Voting and Electoral Systems
Formal constitution amendments

- **1993**: New Brunswick English and French linguistic communities a right to distinct cultural and educational institutions
- **1997**: Nfld. to replace church-based education system with secular school system
- **1997**: Québec to replace denominational school boards with ones organized on linguistic lines
Formal constitution amendments

- **1998**: Nfld. enabled to end denominational quotas for province’s religion classes

- **1999**: Nunavut granted representation in Parliament

- **2001**: Nfld. Change of name to Nfld. and Labrador
Federalism and Intergovernmental relations

- *Constitutional Amendments Act, 1996*
- *Clarity Act, 2000*
- Parliamentary motions on the status of Québec/Québécois in Canada (1996, 2006)
Federalism and Intergovernmental relations

- Harper’s “open federalism” (2006-today)
- Limit federal spending power in areas of provincial exclusive jurisdiction (2007)
Parliamentary reforms

- Representatives for Nunavut in House of Commons and the Senate (1999)
- Fixed terms for House of Commons and for a number of provincial legislatures
- New parliamentary watchdogs created (2004-08)
- Extended coverage of Access to Information
New parliamentary watchdogs

- Conflict of Interest and Ethics Commissioner (2004/2007)
- Commissioner of Lobbying (2007)
- Public Sector Integrity Commissioner (2007)
- Parliamentary Budget Officer (2008)
Parliamentary reforms: Senate

- Appointed provincially elected Senator (2007)
- A bill on fixed terms for new Senators: Constitution Act, 2007 (Senate Tenure)
- A bill on senate appointments: Senate Appointment Consultations Act
Supreme Court of Canada & Charter of Rights and Freedoms

Three topics:

- Appointment of judges to the top court
- Leading constitutional decisions
- Access of social groups and movements to the courts on fundamental rights issues
Appointment of judges to the Supreme Court of Canada

- Traditionally, PM advised the Governor General of nominees
- New review processes since 2006 involve MPs and legal specialists
- Feb. 2006: Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada
- August 2008: Supreme Court Selection Panel (suspended by Harper September 08)
Leading constitutional decisions: recent opinions and judgments

- Reference re secession of Québec
- *R. v. Powley* (on the meaning of Métis)
- Reference re same-sex marriage
- Reference re parental and maternity benefits under the *Employment Insurance Act*
- *Chaoulli v. Quebec* (on public and private health insurance)
- *Charkaoui v. Canada* (on security certificates and procedural fairness)
Access of social groups to the courts

- Cancellation of the Court Challenges Program by the Stephen Harper government in 2006-07
- Program provided funding for groups to participate in court cases dealing with equality rights and other sections of the Charter of Rights and Freedoms
- Most adversely affected by this cancellation are women’s groups, Aboriginal peoples, and organizations of and for persons with disabilities
Voting and Electoral System

Issues of:

- Extending enfranchisement to certain groups
- Outreach to marginalized groups of voters
- Singling out Muslim women voters
- Financing of political candidates and parties
Extending the franchise

- Off-reserve Indians eligible to vote in Band Council elections, though need not possess exactly the same voting rights (Corbiere v. Canada, 1999)
- On-territory non-Aboriginal citizens: limited rights of representation (e.g. Nisga’a)
- Incarcerated electors: right to vote by prisoners under sec. 3 of the Charter of Rights (Sauvé v. Canada, 2002)
Outreach to marginalized groups

Actions by federal and provincial elections offices to enhance registration and voting by groups with low rates of voting turnout:

- Persons with low literacy rates
- Homeless people
- Persons with disabilities
- Youth (aged 18 to 25)
- Aboriginal peoples
Singling out Muslim women voters

- Present election law enables electors to vote without needing to reveal their face if they produce two pieces of approved forms of personal identification.
- Proposed federal legislation would require women who wear veils of burkas to uncover their faces to election officials in order to be identified visually.
Financing of political candidates and parties

- Reforms contained in the *Federal Accountability Act, 2006*
- Political contributions by corporations, unions, and other organization prohibited
- Ban on gifts and trust fund transfers to political candidates
- Individual political donations to parties and candidates limited to $1,000 a year
Conclusions: questions

- So, what kind of constitutional politics are being practised of late in Canada?
- How might we characterize the constitutional developments of the past 10 to 15 years?
- What lies ahead for constitutional debates and developments in Canadian politics?
Conclusions: observations

1. Canadians are living in relatively quiet constitutional times:
   - Unity of the country is not in crisis or even a serious concern
   - Constitutional reform low on public and political agendas, especially the large-scale restructuring packages of the mega-style
Conclusions: observations

2. But, this is not an inactive period of constitutional ideas, reform proposals and actual amendments:
   - Change is occurring in incremental and piecemeal ways
   - Indeed, recent years have witnessed far more constitutional changes than most Canadians realize, mostly through enacted and emergent processes
Conclusions: observations

3. While comparatively quieter today than in the 1980s and 1990s, our constitutional politics are not static, nor bland or singular:

- Several referenda enabling citizen engagement and popular expression
- Even so-called small-scale reforms engender strong emotions, strong debates and surface competing notions of identity, community, and citizenship
Conclusions: observations

4. Peter Russell calls Canada’s modern history of constitutionalism an “odyssey”

- Thinking of it as a long journey, it is more a maze than a labyrinth: a labyrinth has just one path, however winding it is, with basic choices of direction and pace; whereas, a maze has unknown cul-de-sacs, multiple crossroads and uncertain choices of adventure or misadventure.
Conclusions: What lies ahead for the constitutional order?

On the Harper agenda are:

- Plans to pass legislation placing limits on the use of the federal spending power
- Senate reform proposals on term limits and nomination process
- Supreme Court nominee and nomination process decisions
- Voter identification Bill that may be re-submitted
Conclusions: What lies ahead for the constitutional order?

- Extending the application of the *Canada Human Rights Act* to on-reserve communities of First Nations
- Devolution of additional responsibilities to territorial governments in the North
- A few more third order Aboriginal governments