Podcast 6 – Constitutions and Law for the Law-Givers

FORCESE: Welcome back to the virtual Orientation. In this podcast, I converse with Prof Adam Dodek about the Canadian Constitution and we examine exactly what it is that constitutions do, what the Canadian constitution consists of and why it’s important for you to understand this foundational document in Canadian law. I began by asking Professor Dodek about his career and background in law.

DODEK: My name’s Adam Dodek. I teach the first year course in Public Law and Legislation, I teach an upper year seminar on the Supreme Court of Canada and I teach a first year thematic on Legal Ethics and Professional Responsibility and I also serve as the Vice Dean of research.

FORCESE: And you had a career before joining academia as well, didn’t you?

DODEK: Yes, I did. I spent some time in private practice both in California and in Toronto and I worked in government as a Senior Advisor to the Attorney General of Ontario and I clerked for three courts in three different countries, for the Supreme Court of Israel, the US Court of Appeals 9th Circuit in Pasadena, California (home of the Rose Bowl) and for and at the Supreme Court of Canada for the Honourable Claire l’Heureux-Dubé.

FORCESE: I want to focus our conversation on the public law aspects and specifically on the idea and content of the Canadian constitution. Let’s begin by discussing why a constitution is important.

DODEK: I think it’s important for many reasons. First of all, the constitution is the foundational law for a country. One way that I describe it is “the rulebook for the operation of government” and it also expresses the fundamental values for a country. So it expresses who we are as Canadians and tells us a little bit about how government works and the relationship between government and citizens.

FORCESE: Where does our Constitution come from, thinking specifically about the Canadian?

DODEK: We weren’t born in revolution the way the US was, and our Constitution was actually originally an act of British parliament in 1867, what used to be known as the *British North America Act* and then there was a long process of trying to make the Canadian constitution wholly Canadian. And there’s a special word for that; it’s called “patriation” which really only refers to that process of taking a British statute and converting it into a Canadian constitution, and that happened in 1982.

So our constitution is made up of a number of statutes. We now refer to the original constitution as the *Constitution Act, 1867*  and the new constitution as the *Constitution Act, 1982.*

FORCESE: So these documents that you’ve referred to, are they the only source of constitutional law?

DODEK: No we have in Canada what we refer to as “the written constitution” which is the law that is written down in these statutes and we also have unwritten aspects to our constitution, which we refer to as “the unwritten constitution” and that consists of practices, values and agreements (informal, unwritten agreements) that have taken place or that have grown up over time that political actors abide by and that we would say are part of our constitutional law.

FORCESE: And so can there be uncertainty as to the precise scope of Canadian constitutional law?

DODEK: Absolutely. Some things are very precise. For example, to be a senator you have to own at least $4000 worth of property in a given province and you have to be at least 30 years of age. Those are examples of things that are very specific but there are other things that are more uncertain. Section 7 of the *Canadian Charter of Rights and Freedoms* says that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, but we continue to struggle with the questions “what is liberty?” “what is security of the person?” etc?

FORCESE: How is the Constitution changed?

DODEK: In a number of ways. We have a formal amendment process that is set out in the Constitution. If you actually want to change a written provision of the constitution and there’s a number of ways to do that involves the Parliament of Canada (House of Commons and Senate), and may involve the legislative assemblies of particular provinces or of all the provinces. But there’s also a system of more gradual change where the meaning or the values protected under the Constitution can change over time, can expand or contract over time in accordance with changing values in Canadian society.

FORCESE: To the extent that the constitution is interpreted and reinterpreted over time in the manner you’ve described, does that take place in front of courts?

DODEK: Often it does. The constitution sets out that the courts are the ultimate arbiter and decider of the constitution and some of the most important things will eventually make their way to the Supreme Court of Canada for a final and definitive determination in most cases, but there are other things where the change may be a change in practice by political actors or legislative assemblies – things that change over time.

FORCESE: One of the most famous aspects about the Canadian constitution is the division of powers or federalism. What do we mean by that?

DODEK: What we mean by that is that power in Canada is divided between two levels of government. We are a federal state and what that means is that we have a federal government for Canada as a whole that is situated here in Ottawa and we have provincial governments situated in each of the the 10 provinces and then we have 3 territories. The UK used to just have one central government for the whole country. But Canada, like the US has a federal system where power is divided over certain subjects between the federal and provincial governments.

FORCESE: So how does our constitution do that division?

DODEK: Well, that’s always been one of the most important aspects of our constitution, going back to 1867. So we have two sections of our original 1867 constitution which actually list the powers: here are the powers that belong to the federal level of government and here are the powers that belong to the provincial level of government. So a dominant theme in our country’s history and our constitutional history in particular, has been the division of powers; we also refer to that as federalism, about the relationship between the federal and the provincial governments, essentially - who can legislate, who can make a law, about a particular subject matter.

FORCESE: One of the other things that the constitution does is to establish the various institutions that comprise Canadian government. There’s this concept of the different “branches” of government. What do we mean by that?

DODEK: This is a descriptive term that refers to the various features of government. Typically we refer to three branches of government: legislative, executive and judicial. The legislative branch is primarily responsible for making laws. Federally, the legislative branch is the Parliament of Canada, which consists of the Senate, which is an unelected upper house, and the House of Commons, which is an elected lower house and the Queen, or Governor General, has some formal role in that.

The executive branch, which includes the Prime Minister, members of Cabinet, the public service, ministries, departments etc. They’re responsible for administering the laws. So they don’t actually make a new law but Parliament would pass a law and they’re responsible for administering it and making sure that it goes into effect.

The third branch is the judicial branch, also known as the courts. And they’re responsible chiefly for interpreting those laws as well as adjudicating disputes between different parts of government and disputes between citizens and their government and disputes between citizens in the country.

FORCESE: One of the unwritten principles that has held this system together is known as “parliamentary supremacy” or “parliamentary sovereignty”. What is that about?

DODEK: That’s talking about the idea that basically Parliament is supreme and can make any law that it wants. I think it was Winston Churchill who famously said that Parliament could declare Sunday to be Thursday and evening to be morning etc and there was no recourse to that. We’ve always had a limited system of parliamentary supremacy because of the division of powers that you asked me about before. In 1982, our system of parliamentary supremacy was further limited with the enactment of the *Charter of Rights and Freedoms.*

That really changed our system, changed our constitution, because division of powers was a limit on which level of government could pass a law but it didn’t say that there were certain types of laws that no government could pass. The enactment of the *Canadian Charter of Rights and Freedoms* changed the constitutional equation by saying that there are some laws that no level of government can pass.

So that example that I gave you before about section 7 protecting the right to life, liberty and security of the person…If a court determines that a law or an action of government – at whatever level – violates that provision of the *Charter* and is not justifiable under a different section of the *Charter*, then that law is invalid and no level of government can enact that law.

FORCESE: In a system of parliamentary supremacy, curtailed in the way you’ve described, isn’t it the case that the Prime Minister can just tell parliamentarians what to do? Isn’t htat the system tht we have?Isn’t that what we gather when we read our newspapers?

DODEK: Well, a lot of people may have that impression, but the Prime Minsiter, like every citizen in the country, is subject to the law and that gets back to another important unwritten constitutional principle which is the rule of law. The rule of law is multi-faceted but one of the most important element to it is that everyone is subject to the law.

One of the phrases I love is “you can be a king or a street sweeper, but everybody dances with the Grim Reaper.” And that’s the essence of the rule of law. It doesn’t matter how rich you are, how poor you are, what position you hold in this country, you only have the power that is given to you under the law and everyone is subject to the law. The only reason why a prime minister has any power whatsoever is because he or she has the confidence of the elected branch of government.

That means that the people that we as Canadians elected to the House of Commons, a majority of them, support the actions of the prime minister. If they no longer do that, whether that’s by voting non-confidence in the government, in the prime minister, or by the results of an election, then the PM can no continue as the PM.

FORCESE: In other words, the PM persists in his or her office essentiall at the pleasure of the elected members of the House of Commons?

DODEK: That’s correct. The elected members of House of Commons, who we as Canadians elected, can essentially fire the PM. Now that rarely happens in our system of government, but it’s important to understand that the source of all of the PM’s power comes from that confidence of our elected House of Commons. And the same would be true of the provincial legislatures and premiers.

FORCESE: Let’s talk about the third branch of government, the judiciary which you mentioned before. There’s yet another unwritten constitutional principle (although it does have some textual reference in the written portions of the constitution) known as judicial independence. What do we mean by judicial independence?

DODEK: What we mean by judicial independence is that the judicial branch, the courts, both as collective entity as well as individual judges, have to be independent from the other branches of government. They don’t take orders from parliamentarians and they don’t take orders from the PM. We can understand this by thinking about the lack of judicial independence in some countries. In countries that don’t have judicial independence, or an “independent judiciary” (Another phrase that we use) there’s something called “telephone” justice where a minister or official of government will call up a judge and say “this is how I want you to rule in this case”. That’s a very direct example of the lack of judicial independence but there are more indirect examples.

In another country, in a controversial case, the Chief Justice of the highest court was summoned to the president’s residence and when he showed up at the president’s residence, he was met by the president in full military attire surrounded by five generals. Not much needed to be said, because the message of intimidation was quite clear. So for us, when we talk about judicial independence, we mean sufficient independence from the legislative and executive branches of government so that our courts can fulfill their fundamental role. The basic role of the courts in a democracy, and in Canadian democracy, is to make decisions without fear or favour towards any of the parties to the dispute. Canadians have a right to unbiased decision-making. And so the idea of an independent judiciary is to insulate the courts, to ensure that judges can fulfill that role and that all Canadians can have the benefit of fair and impartial decision-making.

FORCESE: how do we in preserve that judicial independence in practice?

DODEK: We preserve judicial independence in a number of ways. We set the judicial branch apart from the other branches of government Our original constitution in 1867 set up a number of ways in which judges were created to be independent. The first is security of tenure. So when judges are appointed, and judges at the federal level are appointed by the Prime Minster or Minister of Justice, they are appointed for life. They have to retire at the mandatory retirement age of 75, but they cannot be fired or suspended except through a process that is laid out in the Constitution and in legislation. They cannot be summoned to explain their decisions if the government doesn’t like them, they can’t be suspended, they can’t get a bonus if they issue decisions that the government likes.

And so the first thing is security of tenure. And with that is also protection of their remuneration and their salaries. All judges are generally paid the same level depending which court they are at and there is not a bonus or a decrease if their decisions find favour or annoy the government. And there is a rigorous process that has been set up in order to ensure that the process of determining judges’ salaries is as non-political as possible.

We also give a lot of autonomy to the judicial branch in administering the courts, so only judges or their staff can determine which judges are going to hear which particular cases and judges determine the scheduling of courtrooms and where a judge is going to, what city or what courtroom a judge is going to sit in. Because again if the government controlled those things, then the government could decide to assign a judge who they perceived to be favourable to them to hear a particular case and the government could punish a judge who they didn’t like by sending them to a remote area to hear cases. So those are just some of the ways that we have protected judicial independence and set up really a separation or a protective barrier between the courts as an institution and the other two branches of government.

FORCESE: We’ve been talking about constitutional law, which is a subset of public law. What else do we include in the category of public law?

DODEK: Within the category of public law, what we mean by that in the broadest sense is the entire area of law that relates to different institutions of government, and the relations between them, and the area of law that relates to the relationship between citizens and their government. And constitutional law is perhaps one of the biggest areas of that. Administrative law is also a very big area. I talked before about that the legislature makes the law and often in legislation, various administrative bodies are created. We have thousands of agencies, boards and commissions from the Canadian Wheat Board, the Immigration and Refugee Board, the CRTC (which regulates TV, radio, cell phone usage etc), and the law that deals with the decisions of all of those administrative bodies is known as Administrative law.

FORCESE: So if a student was interested in public law, where would they be exposed to public law in the first year program and how could they be further exposed thereafter?

DODEK: Here at the University of Ottawa we believe that we have the strongest public law program in the country. Our students take the mandatory first year course in Public Law and Legislation in their first semester, they take Constitutional Law 1 in their second semester, and then in their second year they take Constitutional Law 2 and then in their second or third years they have to take Administrative Law. Those are the four mandatory foundational courses for public law. After that, we have over 30 members of our public law course that teach probably 60, 70, 80 different public law courses. So there’s many specialized courses dealing with government lawyers, securities regulation, tax, all different areas of public law.

FORCESE: How else could a student get involved in public law here at the university while a law student? Are there opportunities extra-curricularly?

DODEK: There are formal activities extra-curricularly, in terms of there’s a public and constitutional law students’ association. There are many activities that we have at the law school where we bring in speakers. We’re in the public law capital of the country and we really try to leverage that. But there’s a lot of things that student can do on their own. They can go to the Supreme Court of Canada and watch cases, they can go to Federal Court, they can go to Superior Court and I’ve had a number of students over the years that have gone to watch cases and see some of the best lawyers in the country come to the highest court in the land and argue the issues of the day.

FORCESE: Thanks very much, Adam.

DODEK: Thank you.