

**Department of Law and Legal Studies  
Carleton University  
LAWS 2501D  
Law, State and Constitution  
Winter Term 2013-2014**

**Instructor:** Gordon DiGiacomo, Ph.D.

**E-Mail Address:** [Gordon.DiGiacomo@carleton.ca](mailto:Gordon.DiGiacomo@carleton.ca) (NOTE: I respond to e-mail messages ASAP)

**Office Hours:** TBA

**Class Room and Times:** Rm. 210, Tory Building; Thursdays, 18:05 to 20:55

**Prerequisites:** 1.0 credit from: LAWS 1000 [1.0], PAPM 1000 [1.0], PSCI 1000 [1.0], PSCI 1001, PSCI 1002

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You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

**Pregnancy obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Religious obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Academic Accommodations for Students with Disabilities:** The **Paul Menton Centre** for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or [pmc@carleton.ca](mailto:pmc@carleton.ca) for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your **Letter of Accommodation** at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (*if applicable*). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (*if applicable*) at <http://www2.carleton.ca/pmc/new-and-current-students/dates-and-deadlines/>

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://www2.carleton.ca/equity/>

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**Course Description:**

Law relating to the state, society and the constitution, with a focus on the historical framework, federalism, and constitutional reform in Canada. (From the 2013-14 Undergraduate Calendar, Department of Law and Legal Studies).

The course is focused on Canada. However, it will also feature references to constitutional development in other countries, as well as discussions on the common elements of constitution building.

Consistent with the approach of the Department of Law and Legal Studies, the course has an interdisciplinary “flavour,” which means that it looks at the interplay between law and politics. Judicial decisions are placed within a political context.

### **Course Objectives:**

By the end of the course, the student will have come to an understanding of:

- the key sections of Canada's constitution;
- the evolution of Canada's constitution;
- the political factors that have helped to shape Canada's constitution;
- the stages of, and key considerations involved in, the constitution-building process.

### **Major Learning Outcome:**

By the end of the course, students should know the basic components of all constitutions, particularly the Canadian, and the various stages of the constitution-building process.

### **Learning Activities:**

The objectives will be achieved through a variety of methods including lectures, presentations, class discussions, small group work, guest speaker(s), a simulation, and individual self-directed study.

### **Required Text:**

Patrick J. Monahan, Byron Shaw, Constitutional Law, 4<sup>th</sup> edition, (Toronto, ON: Irwin Law Inc., 2013).

### **Assessment:**

**(All components must be completed in order to get a passing grade)**

- 1. Mid-Term Test** – worth 35% of the student's final mark.
- 2. Simulation** – worth 50% of the student's final mark.
- 3. Class Room Work** – worth 15% of the student's final mark.
  - **Mid-Term Test** – this will be held on Thursday, March 6, 2014. It will consist of True/False, Multiple Choice, and Short Answer questions.
  - **Simulation** - students will participate in a simulation of a newly formed Constituent Assembly (CA). The purpose of the CA is to draft a constitution for the new (fictitious) country of East Rodan. More information on this simulation is provided on pages 6-11.

- **Class Room Work** – this mark will be based on in-class assignments. Attendance and class participation will also be factored in. A student who misses more than 3 classes will receive zero for his/her Class Room Work mark. A student who is absent from a simulation session will be heavily penalized. The only acceptable reasons for absence are those related to religious observance and health. If health is the issue, a note from a medical doctor will have to be provided. Travel-related reasons are not acceptable nor are reasons related to extra-curricular activities.

### **Student Writing:**

Students are expected to make high-quality writing a top priority. This means not only that punctuation marks are used properly but also that the text is coherent and written in the academic style. Writing and research skills are highly valued in the academic setting and in many workplaces. It is in students' academic and career interest to become skilled researchers and exceptional writers. For the written assignments, if there are ten or more spelling or grammatical errors, it will be given a zero on the writing component.

### **Submitting Assignments on Time:**

It is important that you get your assignments in on time. Assignments handed in late will be penalized on the basis of the number of days late; **5 marks** will be deducted each day. An assignment more than three days late will get zero. No extensions will be granted, unless a health matter is at issue. Neither work obligations nor computer problems nor travel-related problems will be considered an acceptable reason for a late submission. Extra-curricular activities and problems with accessing books and articles will also not be considered an acceptable reason for a late submission.

### **Course Topics:**

**Class 1 – Thursday, January 9, 2014 – Scope of the Course; Basic Concepts**

**Class 2 – Thursday, Jan. 16, 2014 – Canada's Creation Moment**

#### Readings:

Text, chapter 2.

Constitution Act, 1867 – [www.laws.justice.gc.ca/eng/Const/index.html](http://www.laws.justice.gc.ca/eng/Const/index.html)

G. DiGiacomo, "Ottawa's Deferential Approach to Intergovernmental Relations," in G. DiGiacomo, M. Flumian, (eds.), The Case for Centralized Federalism, (Ottawa, ON: University of Ottawa Press, 2010).

**Class 3 – Thursday, Jan. 23, 2014 – Constitutional Evolution**

#### Readings:

Text, chapters 5, 6

Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, 3<sup>rd</sup> edition, (Toronto, ON: University of Toronto Press, 2004).

#### **Class 4 – Thursday, Jan. 30, 2014 – The Constitution and State Structure – Federalism**

##### Readings:

Text, chapter 4.

G. DiGiacomo, The Supreme Court of Canada's Federalism as Expressed in the Securities Reference,  
[http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/WorkingPaper\\_01\\_2012\\_DiGiacomo.pdf](http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/WorkingPaper_01_2012_DiGiacomo.pdf)

#### **Class 5 – Thursday, February 6, 2014 – The Constitution and Rights**

##### Readings:

Text, chapters 13, 14

Constitution Act, 1982 – [www.laws.justice.gc.ca/eng/Const/page-15.html](http://www.laws.justice.gc.ca/eng/Const/page-15.html)

#### **Class 6 – Thursday, February 13, 2014 – The Constitution and Judicial and Political Institutions**

##### Readings:

Text, chapters 3, 4.

M. Böckenförde, et al., A Practical Guide to Constitution-Building, (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 2011). Available online.

**No classes from February 17 to February 21**

#### **Class 7 – Thursday, February 27, 2014 – Constitution-Making**

##### Reading:

Laurel Miller, (ed.), Framing the State in Times of Transition: Case Studies in Constitution-Making, (Washington, DC, United States Institute of Peace, 2010).

#### **Class 8 – Thursday, March 6, 2014 – Mid-Term Test**

#### **Class 9 – Thursday, March 13, 2014 – Speaker (?); Simulation Exercise**

**Class 10 – Thursday, March 20, 2014 – Simulation Exercise**

**Class 11 – Thursday, March 27, 2014 – Simulation Exercise**

**Class 12 – Thursday, April 3, 2014 – Simulation Evaluation; Wrap-Up**

**Additional Resources:**

*Books:*

Bayard Reesor, The Canadian Constitution in Historical Perspective, (Scarborough, ON: Prentice-Hall Canada Inc., 1992).

Peter Hogg, Constitutional Law of Canada, student edition, (Toronto: Carswell, 2011).

John Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism, (available online through the library site).

R. Dyck, C. Cochrane, Canadian Politics: Critical Approaches, 7<sup>th</sup> edition, (Toronto, ON: Nelson Education Ltd., 2014).

M. Tushnet, T. Fleiner, C. Saunders, (eds.), Routledge Handbook of Constitutional Law, (New York: Routledge, 2013).

T. Ginsburg, (ed.), Comparative Constitutional Design, (New York: Cambridge University Press, 2012).

Pippa Norris, Driving Democracy: Do Power-Sharing Institutions Work?, (Cambridge, UK: Cambridge University Press, 2008). Chapters 5, 6, 7.

Hanna Lerner, Making Constitutions in Deeply Divided Societies, (Cambridge, UK: Cambridge University Press, 2011).

C. Leuprecht, P. Russell, (eds.), Essential Readings in Canadian Constitutional Politics, (Toronto, ON: University of Toronto Press, 2011).

C. Forcese, A. Freeman, The Laws of Government: The Legal Foundations of Canadian Democracy, 2<sup>nd</sup> edition, (Toronto: Irwin Law, 2011).

*Journals:*

International Journal of Constitutional Law

National Journal of Constitutional Law

Journal of Parliamentary and Political Law

Web Sites:

[www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org)

[www.constitutionnet.org](http://www.constitutionnet.org)

[www.iconnectblog.com](http://www.iconnectblog.com)

[www.constituteproject.org](http://www.constituteproject.org) – includes constitutions from most countries

Organizations:

International Institute for Democracy and Electoral Assistance  
Center for Constitutional Transitions

**Some Ground Rules:**

1. Please try to get to class on time.
2. Please do not engage in side-bar conversations with other students during lectures and class discussions. If you need to speak to your seat mate during lectures and class discussions, please do so quietly and in a non-distracting way.
3. **The use of electronic devices, such as computers, smart phones, cell phones, and ipads, is not permitted in the class room.** Students determined to be infringing this rule will get zero for their Class Room Work mark. The reason for this ground rule has to do with their impact on student learning. I have found, through my university teaching experience, that, as the use of these devices has increased, student marks have suffered. This finding is supported by academic research, including two studies described in recent issues of Computers and Education. In one study, it was found that students who attempt to absorb lectures while using digital technologies for purposes unrelated to the course suffered a detrimental impact on learning. Conversely, students who did not use any technologies in lectures outperformed students who used some type of technology. In another study, the authors found that:

“participants' comprehension was impaired when they performed multiple tasks during learning, one being the primary task of attending to the lecture material and taking notes, and the other being the secondary task of completing unrelated online tasks...Second, comprehension was impaired for participants who were seated in view of peers engaged in multitasking. This finding suggests that despite actively trying to learn the material...these participants were placed at a disadvantage by the choices of their peers.”

For more information on these studies, feel free to contact me or see Computers and Education, Vol. 58 (1) and Vol. 62 (pp. 24-31).

## Simulation Exercise

### **Introduction**

East Rodan has just become independent, having seceded from Rodan. The transitional government wishes to place the new country securely on the path of democracy. Like the leadership of most newly independent states, it sees as its first step the drafting of a constitution and toward this end it recently held elections for a 200-member interim parliament. The interim parliament then created a Constituent Assembly (CA), comprised of some of the elected representatives of the interim parliament and of those appointed from outside the interim parliament.<sup>1</sup>

The CA members come from a variety of backgrounds. They include professionals, business people, workers, farmers, human rights activists, former politicians, academics, students, clergy people, military and police personnel. The CA is generally representative of the country's regions, its major ethnic, religious and linguistic communities, and its demographics. The membership is also ideologically diverse, with high representation from a number of political parties. Substantial differences exist among the members on how the East Rodan state should be configured.

Collectively, the LAWS2501 class is the Constituent Assembly. Simply stated, your task is to come up with a constitution for the new state.

### **The New Country**

The new country is situated in Eastern Europe. It is not an impoverished country, but it is not wealthy and there is a huge gap between rich and poor. It has a population of about 10 million. Those under 24 years of age are a rapidly growing segment of the population. By European standards, it is a geographically large country.

One of the countries bordering East Rodan is Bosnia-Herzegovina.

East Rodan has just come to the end of a 20-year long period of ethnic strife, culminating in independence on January 1, 2014. There has been great animosity between the French-speaking majority and the Muslim minority within the country from which East Rodan achieved independence. On a number of occasions violence has broken out. The Muslim community has long felt that it has been systematically shut out of the mainstream of economic, social and political life in the larger country. The Aboriginal community has been socially and economically marginalized in both East Rodan and the country from which East Rodan separated. Aboriginals harbour a deep anger and a deep

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<sup>1</sup> The creation of a Constituent Assembly (CA) is typically among the initial steps that a new country will take to establish itself as a democracy. The purpose of a CA is to draft a new constitution or to amend an existing one. The composition of the CA varies. Sometimes, the Parliament will double as the CA as in the case of South Africa. Sometimes, the CA members are directly elected by the citizens, with political parties competing for election to the CA. At other times, the members are elected by the members of parliament, in which case the CA may consist of elected representatives and non-elected citizens with special expertise or knowledge. India's CA consisted of members elected from the provincial legislative assemblies. A CA is temporary but sometimes the CA will morph into a country's first parliament or national assembly, as in the case of India and Namibia. For more on CAs, see Framing the State in Times of Transition: Case Studies in Constitution Making, Laurel Miller, editor.

sense of grievance.

Notwithstanding the animosity that they have for each other, both the French-speaking majority of East Rodan and the Muslim community of East Rodan were, for their own reasons, in favour of independence from the larger country.

The larger country from which East Rodan seceded may be described as an illiberal democracy. For instance, there have been elections, using a system similar to that used in Canada, but elections were very flawed events, often accompanied by violence. Rights protection is very weak. The federalism that it practices is far from exemplary. It is highly authoritarian and provincial leaders are frequently called “warlords.” Corruption is characteristic of governance at both levels. However, the liberal democratic impulses were much stronger in the East Rodan region of the larger country; hence, the drive for independence. The East Rodan region of the larger country was one of the better off regions of that country, sustained by a robust sense of entrepreneurship among the people.

Languages: about 40% of the citizens of East Rodan claim French as their mother tongue, about 30% Arabic, and about 20% English.

Religions: about 30% of the citizens of East Rodan are practising Muslims and about 20% are practising Christians. The remaining 50% consists of citizens who are Jewish, Buddhists, Hindus or Sikhs, or who subscribe to a non-traditional religion, or who no longer practice any religion.

Ethnic Communities: about 10% of the population consists of Aboriginal citizens, half of whom live in the north of the country. The Muslim population, comprised largely of citizens with origins in Lebanon, Egypt, Pakistan, Bosnia, Iran, and Libya, is concentrated in the southern part of the country. The French-speaking and the English-speaking populations are scattered throughout East Rodan.

The Economy: The economy is based on forestry. A few multinationals dominate the forestry industry but there are numerous small firms cutting and harvesting logs. A furniture-manufacturing sector is starting to emerge. At this point, it is dominated by one transnational corporation but, again, there are several smaller firms.

A vigorous information technology industry has emerged and is soon expected to be a major player in the economy.

Labour unions are a growing force in the country. They represent about 10% of the work force. They are growing not only in numbers but also in militancy. The gap between the country's economic elite and the working class is very wide and is a deeply annoying issue for the unions.

Civil Society: Civil society in East Rodan cannot be said to be well-developed. There is a strong belief among citizens in the importance of family but advocacy groups are scarce, although a few international environmental groups have set up offices in the new country. The media, with a few exceptions, is very weak. While more political parties are starting to emerge, political life is dominated by a couple of ethnically-based political parties. Associations representing the ethnic and linguistic communities are active. Organized religion is very strong throughout the country. A workers' party has emerged and has the support of the labour unions.

Education: There is a high rate of illiteracy in the country, as well as a high drop-out rate among



secondary school students. There is one university. The rate of Internet use is not yet high but it is increasing. There are few publications and few libraries. Various associations, e.g., unions, ethnic associations, maintain education and learning circles.

### **Assembly Executive Leadership**

Two students will provide the leadership of the Assembly. They are the Co-Presidents. As two of East Rodan's leading legal scholars, educated in Canadian and European universities, the two have immense credibility and are hugely respected by the other Assembly members. This credibility gives them a generous amount of latitude. Their primary task will be to prepare the final report, based mostly *but not entirely* on the group reports and on decisions made during the simulation sessions. The Co-Presidents will also preside over meetings of the Assembly, monitor the work of the groups, meet periodically with reps of the groups, and help to resolve difficulties and disputes if necessary. They may also want to consult with experts, such as other professors.

### **Assembly Issues**

Two of the important objectives of a constitution are to outline the structure of government and to limit the reach of the state. The following are the key issues on which a Constituent Assembly has to make decisions:

- the constitution's preamble;
- parliamentary system, presidential system, or semi-presidential?
- the judiciary: judicial review? Judicial independence. Who makes appointments?
- state structure, i.e., unitary or federal; overall division of powers;
- a charter of rights? Comprehensive or minimal?
- minority rights, i.e., the rights of the country's national, ethnic, and religious minorities;
- electoral system; which kind and should it be included in the constitution?
- political parties; should they be constitutionally required to have a national focus?

### **Assembly Composition**

As noted above, the CA is comprised of members with a variety of backgrounds. For instance, it has representation from:

- political parties, e.g., liberal, social democratic, green, conservative, Marxist;
- academia;
- labour unions;
- women's rights groups;
- farmer organizations;
- business associations;
- religious organizations;
- ethnic communities;
- the military;
- human rights groups.

Each of the above has a vision of how the East Rodan state should be shaped.

The class will be divided into sub-committees of 5 or 6 members each. The membership of each sub-committee should be varied; that is, the members should have a variety of backgrounds and characteristics. The Co-Presidents will seek to ensure this broad representation.

Each sub-committee will focus on one of the following issues:

- executive arrangement: parliamentary? presidential? semi-presidential?
- state structure: unitary? federal? if federal, centralized or decentralized?
- charter of rights (2 sub-committees): entrenched in the constitution? comprehensive or minimal? what rights? the judiciary;
- political institutions sub-committee: role of parliament in rights protection? kind of electoral system and should it be entrenched? should political parties be constitutionally required to have a national focus?

**Each sub-committee should approach its work with the objective of submitting recommendations that will promote stability, democracy and the protection of human rights.**

During the simulation sessions, the sub-committees will debate the conclusions that each group has come to.

### **Formal Meetings**

The purpose of the formal meetings of the CA is to discuss and debate the reports of the sub-committees.

Obviously, much discussion will have to occur before the formal meetings, within the groups, among the groups, and between the groups and the Co-Presidents.

The Co-Presidents will determine what percentage of the CA membership will be required for the CA's adoption of the recommendations of each sub-committee.

**PLEASE NOTE:** In doing their work, including in the meetings of the groups and the CA as a whole, students are expected to engage with each other. That means clearly conveying disagreement, asking for explanations and clarifications, proposing alternatives, and even confronting and challenging each other. Students may see some choices as being obvious, but further investigation and discussion may reveal them to be flawed. In real life, the work that CA members are asked to do is complex and can and does easily arouse strong emotions. Some newly democratizing countries spend months simply discussing how the CA members will be determined. For the citizens of East Rodan, as well as for the members, much is at stake. In short, the CA is not the place for easy agreement or excessive cordiality or vows of silence.

### **Grading**

Grading of the Sub-Committees

1. Report Outline – worth 10% of the simulation mark, the Report Outline should be at least 3 double-spaced pages in length. It should set out and briefly describe what issues the report will deal with and how it will unfold. It should identify the major sources to be used, as well as the duties of each sub-committee member. The document will require some research in order to determine the general stance of the report. It should be ready by February 13. One copy should be given to me and one to the Co-Presidents.

2. Sub-Committee Report – worth 30% of the simulation mark, each Sub-Committee report should be at least 25 double-spaced pages in length and should address the issues assigned to the Sub-Committee. A copy should be submitted to me, the Co-Presidents and the other Sub-Committees on March 6

3. Peer Assessment – 10% of the simulation mark will come from student peer assessments.

**PLEASE NOTE:** if a majority of students of a Sub-Committee informs me in writing that a member or members have not done their fair share of the work, I will consult that majority and the Co-Presidents on what mark should be given to those being complained about.

Grading of the Co-Presidents:

1. Peers' Recommendations – 15% of the Co-Presidents' simulation mark will be based on the assessments of the students.

2. Progress Report – one progress report, worth 5%, will be submitted to me on February 13. It should be at least 4 double-spaced pages in length. It should contain information on the work of the Co-Presidents and an assessment of the work of the Sub-Committees.

3. Final Report – 30% of the Co-Presidents' simulation mark will be based on the final report that they prepare. The report will be derived mostly, but not exclusively, from the Sub-Committee reports and from the agreements reached during the meetings. It should contain both analysis and recommendations. It is due two weeks after the final class of the course. A draft of the final report should be circulated to the CA members and their feedback sought before it is submitted to DiGiacomo. It should be at least 25 double-spaced pages in length.

*Please do not hesitate to contact me if you are uncertain about your role or objectives or anything pertaining to the simulation. I will make myself available to discuss any aspect of the simulation. A certain amount of class time can be allocated to simulation matters.*

*Also, I am open to fine-tuning the details of this simulation.*