What is Constitutionalism?
Intro

• Constitutional Law, functional constitutional law

• Constitutionalization

• What is the Difference Between Constitutionality and Constitutionalism?

• What are the Different Principles of Constitutionalism?
Terminology - Disambiguation

- Constitutionalism
- Rule of Law,
- Democracy,
- Pluralism,
- PHR and International Commitments
- Constitutionality
- Cornerstone of Rule of Law
- Judicial Review of International Law against the Constitution
- See further: Who Protect the Constitution?
Constitutionalism – Rule of Law

• Many names, many concepts (UK, FR, DE, HU, EU)
• Legal or political notion?
• Constitutional Assistance (Venice Commission) – Elements and Concepts? Keywords
Concepts of Rule of Law

• Need of consensual definition

• Plato

“Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state”
Unity and Diversity

- Not always in the constitution (CC)
- Foundational principle
- Never precisely defined (scholars & judges, debates)
- Concepts, meta-principles
- Formal and substantive components
- Gives coherence and purpose to the whole system
- Dynamic understanding
- Historical influence
- Not justiciable itself
- Common constitutional principle in the EU
Rule of Law in Positive Law

- EU
- OSCE (Organization for Security an Co-operation in Europe)
- Common principle with differences

- National law
  - Germany
  - United Kingdom
  - France
Definition?

„All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”

(Tom Bingham)
Elements of Rule of Law

1. Legality
2. Legal certainty
3. Prevention of abuse (misuse) of powers
4. Equality before the law
5. Access to justice

CDL-AD(2016)007

Are these principles in use?
Legality

1. Supremacy of the law
2. Compliance with the law
3. Relationship between international law and domestic law
4. Law-making powers of the executive
5. Law-making procedures
6. Exceptions in emergency situations
7. Duty to implement the law
8. Private actors in charge of public tasks
Legal Certainty

1. Accessibility of legislation
2. Accessibility of court decisions
3. Foreseeability of the laws
4. Stability and consistency of law
5. Legitimate expectations
6. Non-retroactivity
7. Nullum crimen sine lege and nulla poena sine lege principles
8. Res judicata
Equality before the Law and Non-discrimination

1. In principle
2. Non-discrimination
3. Equality in law
4. Equality before the law
Access to Justice

1. Independence and impartiality
   1. Independence of the judiciary
   2. Independence of individual judges
   3. Impartiality of the judiciary
   4. The prosecution service: autonomy and control
   5. Independence and impartiality of the Bar

2. Fair trial
   1. Access to courts
   2. Presumption of innocence
   3. Other aspects of the right to a fair trial
   4. Effectiveness of judicial decisions

3. Constitutional justice
Constitutionalism - Democracy

• Direct
  • Roots – popular sovereignty
  • Popular vote
  • Popular initiative
  • Binding force?
  • ECI (EU aspect)

• Indirect
  • Popular sovereignty – Representation
  • Majority-Minority
  • Relationship to direct
  • Legal status of MPs (short)
Constitutionalism - Pluralism

- Political
- Multiparty system
- Right to association
- Recognition

- Opinions
- Worldview
- Religion
- Tolerance
- State and Church
Constitutionalism – PHR and Intl Commitments

• PHR

• Fundamental Rights in the Const
• Organs to Protect them (CC, OMB NGOs)

• International Commitments

• Provisions in the Const
• Organs to Protect them (CC, OMB, NGOs, INGOs, International Bodies)
Resources

• Laurent Pech: The Rule of Law as a Constitutional Principle of the EU
• Rule of Law Checklist of the Venice Commission [CDL-AD(2016)007 European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)]
• Tom Bingham, The Rule of Law (2010)
Questions for Self-Check

• How can you describe constitutionality?
• How can you describe constitutionalization?
• What is functional constitutional law?
• What principles can we understand under constitutionalism?
• Why is the Venice Commission important in defining the rule of law?
• What is Pluralism?
• What is the relationship between direct and indirect democracy?
• What are the most important elements of rule of law?
• What do you know about legality?
• What do you know about non-discrimination?
This teaching material has been made at the University of Szeged, and supported by the European Union.

Project identity number: EFOP-3.4.3-16-2016-00014