

**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 and 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

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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?

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