

# What is A Constitution?

CCLGT

# Introduction

- What “Constitutes” A Constitution? (Past, Present, Future?)
  - Functions, Concept, Form and Content
- *How Constitutional Frameworks Develop (US, UK, FR, DE, CEE)*

# What “Constitutes” A Constitution?

- Constitute (verb) = “to be part of something bigger”
  - Regulate ONE specific segment of international legal order
    - What ONE specific segment? *Cf. What is a State?* (Territory, Population, Public Power – Political Will)
- How to “Constitute” A Constitution?
  - Existing Institutions and Procedures

# What "Constitution"? (Historical)

## Historical (Unwritten) – Uncodified

- Organic legal development over 100s of years
- E.g. UK
- Unspecified number of laws constitute the body of the constitution – all special for different reasons

## Chartered (Written) – Codified

- Adopted through special procedures, by special institutions (created for this purpose) – ceremonial (charter)
- One specific document?

# What “Constitution”? (Theoretical)

- **Procedural Constitution**

- Defines structures
- Sets limits of power
- Protects democratic processes and human rights

- **Prescriptive Constitution**

- Fundamental function: charter of ‘state identity’ – goals and values
- Strong emphasis on social content and “ideological” legal and political content

# What “Constitution”?

- “*A rose by any other **name** would smell as sweet*” (?)
- Not only states, **international organizations** also have **constitutions**
  - ILO, IOM
  - Some *states have Basic Laws, Fundamental Laws*
- **Function** matters: create *rights and obligations* + creates *institutions that have powers to change, protect and enforce* the constitution

# Why Compare?

- Putting the 'Comparative' in Comparative Constitutional Law is necessary for a **contextual understanding of legal institutions in law and politics.**
- *Learning differences and similarities* of the different Forms of Government **helps understand basic legal and political structures operating in a State** *(as a framework of exercising public power over the population within the sovereign territory)*
- **Lessons of a comparison** can be important inputs into interstate and international relations (*convergence of problems and solutions*)

# Why Compare?

- Different cultural and historical traditions, circumstances are meant to be understood (*cultural relativism*) in any comparison
- “*Cross-fertilization*” – ideas and models of different institutions need to be observed (*patterns of development*) – to thoroughly improve domestic legal and political cultures and institutional frameworks
- CCL serves **legal and institutional capacity-building** (e.g. ENP finances institutional development in EU candidate countries – work usu. based on international models and patterns) – **legal competitiveness**



# “Constituting” the Boundaries of the Political Community

- In Geographical Terms

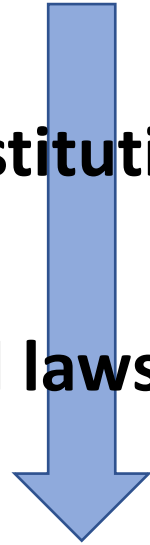
- Borders
- Territorial Integrity
- Territorial/Administrative Structure
- Territorial Claims

- In Personal Terms

- Members of the Political Community
- Citizens
- Other groups

# “Constituting” Limits of Sovereignty

- *Self-imposed limitations* on the exercise of sovereign powers:



- By the **constitution** (separation of powers, checks and balances, etc.)
- By **national laws** (governing rights and obligations)
- By **national legal institutions** (guaranteeing rights and administering/overseeing procedures)

# “Constituting” Identity

- Preambles or Foundations – general historical, cultural, etc. narrative,
- “messages”,
- value judgments and evocation of certain principles

- Identity – Symbols of Sovereignty
- Emphasis on Religion / Language / Culture
- Declarations and Commitments

# “Constituting” Authority (cf. Sovereignty)

- Holders: Form of Government (representative of sovereignty) + source of power?
- Representative: Head of State (normally)
- Source: People

- Powers:
- Exercise of sovereign powers through direct OR indirect democratic means
- Parliamentary representation OR
- Popular vote / Referendum

# “Constituting” Constitution-Making Authority

- **Direct + Indirect Democracy**
- Legislation and constitution-making in one hand
- Special majorities for special procedures
- Optional: referendum before or after

- **Separate Organ Created (through Constitution/Legislation)**
- Dies with the adoption of the Constitution
- Convention (Philadelphia, France, etc.)

# “Constituting” Power and Institutions

- Checks and Balances of the Three Branches of Power
- Church and State – “Religious Identity” (Pluralism)
- Institutions, Processes
- Separation or Cooperation (if yes, for what purpose)
- Power-sharing: geographically / culturally defined
- Secularism?

# Doctrines and Principles

- **Separation and Distribution of Powers** (Across all branches (Legislative, Executive and Judiciary; horizontal OR vertical) - USA)
- **Fusion of Powers** (Legislative and Executive) – delimitation blurs – for reasons of expedient and effective governance (term and structure of these powers is connected) – EUROPE (mostly)

# “Constituting” Rights





# A Typical Constitution? Content

- Preamble + Preliminaries (Foundations)
  - Rights and Obligations
- Branches of Power (Institutions)
  - incl. specialized organs (e.g. Court of Auditors, ombudsmen)
  - Subnational governance
- Armed Forces (Emergency Situations, Martial Law)
  - Miscellaneous (closing, temporary, amendment, etc.)

# Questions for Self-Check

1. How are the constitutions of states and international organizations different?
2. In terms of legal competitiveness, what is the added value of Comparative Constitutional Law for institutional capacity-building?
3. How does a constitution constitute the boundaries of the political community?
4. In terms of sovereign power, what sort of self-imposed limitations we know of?

# Questions for Self-Check

5. What is the difference between direct and indirect exercise of power (under popular sovereignty)?
6. What kinds of rights are included in constitutions (generally)?
7. How could you define the principle of fusion of powers in Europe?
8. What is the difference between the separation and the distribution of powers?

# Questions for Self-Check

9. How are prescriptive and procedural constitutions different?
10. Can the two types of constitutions overlap in a constitutional text?
11. What are the typical elements of the so-called 'preliminaries'. How are these different from preambles?
12. In which part of the constitution would you place a reference to the form of government?

# Resources

- [Elliot Bulmer: What Is a Constitution? \(IDEA Handbook\)](#)
- Mark Tushnet: *Advanced Introduction into Comparative Constitutional Law*, Elgar, 2014, 10-40.
- ***Reading Item*** 1. The Concept, Types, Functions and Content of a Constitution

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

**SZÉCHENYI** 2020

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