

VYTAUTAS MAGNUS UNIVERSITY
FACULTY OF LAW

**Constitution and Constitutionalism in Comparative Context:
Concepts, Principles, the Problems of Theory and Practice**
Gediminas Mesonis



EUROPE

EUROPEAN UNION

- EU Member States
- EU New Members 2004
- EU Candidates
- EFTA Member States

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Atlantic Ocean

English Channel

Bay of Biscay

Mediterranean Sea



AFRICA

MALTA

CRETE

ASIA

TURKEY

ROMANIA

BULGARIA

HUNGARY

SLOVAKIA

CZECH REPUBLIC

Austria

FRANCE

DEUTSCHLAND GERMANY

NETHERLANDS

UNITED KINGDOM

IRELAND

UKRAINE

BELARUS

LITHUANIA

LATVIA

ESTONIA

DENMARK

NORWAY

FINLAND

SWEDEN

ICELAND

RUSSIA

Moscow

St. Petersburg

Helsinki

Tampere

Oulu

Gulf of Bothnia

Sundsvall

Trondheim

Norwegian Sea

Faroe Islands

Greenland Sea

Reykjavik

Hammerfest

Greenland Sea

Black Sea

Constantinople

Bucharest

Cluj Napoca

Vienna

Bratislava

Prague

Leipzig

Hannover

Berlin

Amsterdam

Brussels

London

Dublin

Kiev

Lviv

Krakow

Warsaw

Poznan

Odessa

Norstock

Stockholm

Oslo

Bergen

Edinburgh

Aberdeen

Newcastle

Belfast

Minsk

Vilnius

Riga

Tallinn

Goteborg

Copenhagen

Geneva

Milan

Venice

Bordeaux

Nantes

Paris

Madrid

Porto

Chisinau

Chişinău

Belgrade

Sarajevo

Podgorica

Skopje

Thessaloniki

Triana

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Lviv

Krakow

Warsaw

Poznan

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VYTAUTAS MAGNUS UNIVERSITY – 90

www.vdu.lt



Mykolas Romeris / (Michail Pius von Römer) (1880-1945)



- **Rector (1933 – 1939)
of Vytautas Magnus University**
- **Professor/Scientist**
- **Judge / lawyer
the Hague International Court
of Justice (1933)**

THE THEMES OF THE LECTURES

1. Lecture: **Constitution in the system of legal norms:** the concept of term - “Constitution”
2. Lecture: **Methods of interpretation of Constitution:** “spirit of constitution”
3. Lecture: **Exclusive features of the Constitutions:** comparative context
4. Lecture: **Constitutional justice at comparative context:** duties and responsibilities
5. Lecture: **Constitutional principles:** The Separation of Powers
6. Lecture: **Human Rights:** Constitutional versus International (European) context

LEGAL SYSTEMS: PRINCIPLE DIFFERENCE

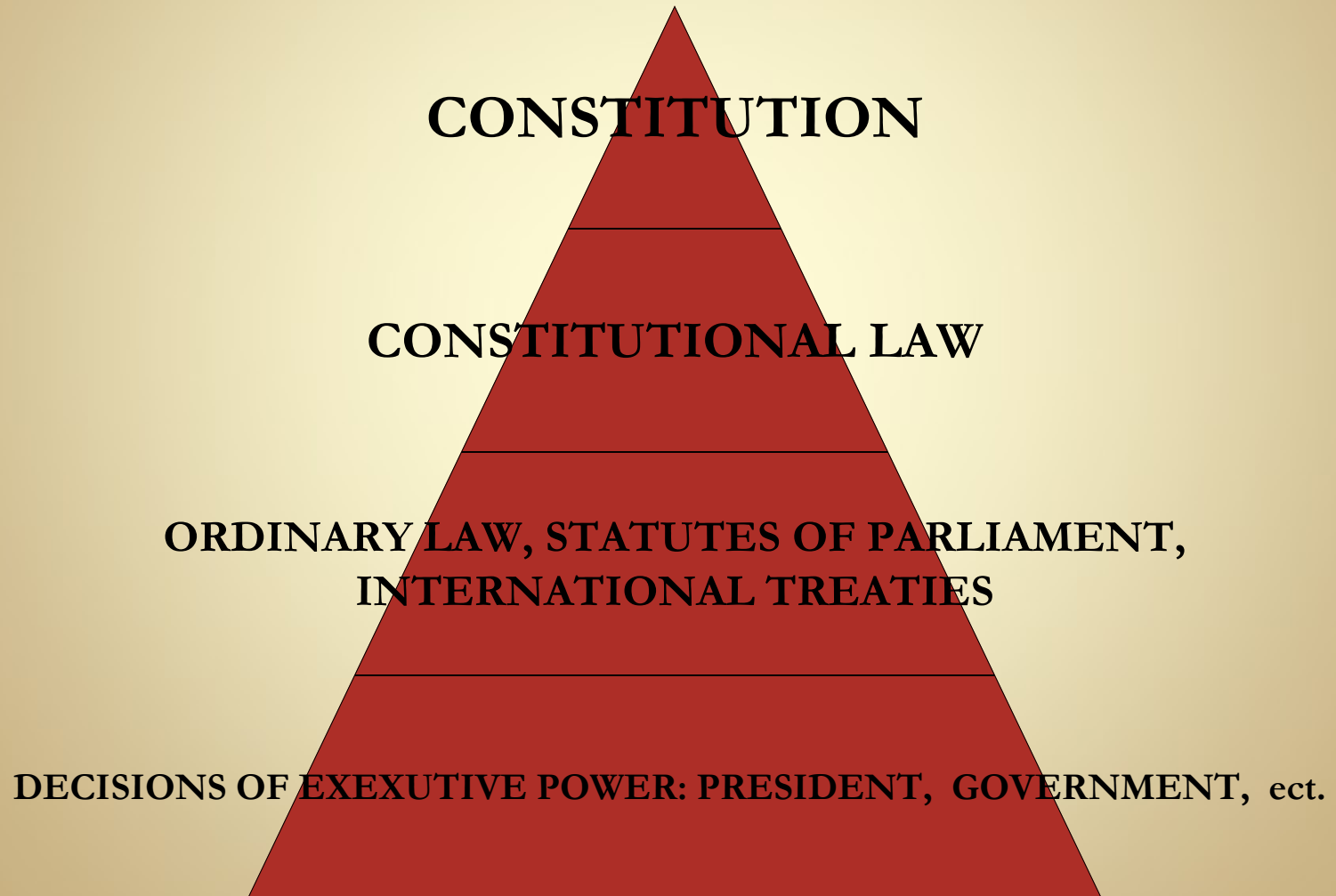
Legal systems

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graph TD; A[Legal systems] --- B[Roman - German: Law = legal norm + .....]; A --- C[Anglo - Saxon: Law = legal norm + .....]
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Roman – German:
Law = legal norm +

Anglo - Saxon:
Law = legal norm +

H. KELSEN: “grundnorm” and pyramid and legal norms



OBJECT OF CONSTITUTIONAL REGULATION

(by Oxford University book on Constitutional law)

- **Define** a way of life – the moral values, major principles, and definition of justice toward which a people aims.
- **Create and/or define** the people if community so directed.
- **Define** the political institutions, the process of collective decision making, to be instrumental in achieving the way of life – in other words, define a form of government.
- **Define** the regime, the public, and citizenship.
- **Distribute** political power.
- Structure conflict so it can be **managed**.
- **Limit** governmental power.

“CONSTITUTION” ANGLO v. AMERICAN

1. Constitution of the UK: system of written and unwritten norms.

- Acts of Parliament (written); Treaties (written); EU law (written);
- Common Law (unwritten); Conventions (unwritten); Royal Prerogative (unwritten); Works of authority (written)

The Constitution of the UK is an example of an uncodified constitution which consists of both written and unwritten sources and has no single written fundamental document.

2. Constitution of the USA: “Living Constitution”

- Text of the Constitution
- The Jurisprudence of the Supreme Court of the USA

Throughout the history of the US, courts have used a wide variety of theories of judicial interpretation to construe the Constitution of the US, including textualism, originalism, strict constructionalism, functionalism, doctrinalism, developmentalism, contextualism (historical or facial), structuralism, or even a combination of several of these schools of thought.

THE ASPECTS OF THE CLASSIFICATION OF CONSTITUTIONS

- by the character of adoption;
- by complexity of amending and changing process;
- by written / unwritten aspect of expression;
- by validity period;
- by factual implementation of constitutional norms;
- by codification;
- by plenty of public relations which are regulating;
- by state form (government form; form of state structure; type of political – legal regime (system)).

**SELECTED CONSTITUTIONS BY THE
CHARACTER OF ADOPTION**

SWEDEN (1974, 1810, 1949, 1991)		By State Parliament
FINLAND	2000	By State Parliament
DENMARK	1953	By referendum
NORWAY	1814	By Constitutional assembly
ESTONIA	1992	By referendum
LATVIA	1922	By Constitutional assembly
LITHUANIA	1992	By referendum
POLAND	1997	By referendum
CZECH REP.	1992	By State Parliament

**CONSTITUTIONS BY COMPLEXITY OF AMENDING
AND CHANGING PROCEDURE**

FINLAND	Rigid Constitution
SWEDEN	Rigid Constitution
DENMARK	Rigid Constitution
NORWAY	Rigid Constitution
ESTONIA	Rigid Constitution
LATVIA	Rigid Constitution
LITHUANIA	Rigid Constitution
POLAND	Rigid Constitution
CZECH REPUBLIC	Rigid Constitution

AN INSTITUTIONS OF CONSTITUTIONAL JUSTICE (I)

<p style="text-align: center;">LITHUANIA www.lrkt.lt</p>	<p style="text-align: center;">Constitutional Court 9 justices</p>	<p>The Government, no less than 1/5 of the members of the Parliament, and the courts shall have the right to address the Constitutional Court. No less than 1/5 of the members of the Parliament and the courts shall have the right to address the Constitutional Court concerning the conformity of acts of the President with the Constitution and the laws.</p>
<p style="text-align: center;">LATVIA www.satv.tiesa.gov.lv</p>	<p style="text-align: center;">Constitutional Court 7 justices</p>	<p>The right to submit an application: the President; the Saeima; not less than twenty members of the Saeima; the Cabinet of Ministers; the Prosecutor General; the Council of the State Control; the Dome (Council) of a municipality; the State Human Rights Bureau; a court, when reviewing an administrative, civil or criminal case; a person whose fundamental rights established by the Constitution have been violated.</p>
<p style="text-align: center;">ESTONIA www.nc.ee</p>	<p style="text-align: center;">The Supreme Court 19 justices</p>	<p>Constitutional review petitions are heard by the Constitutional Review Chamber which consists of 7 members.</p>

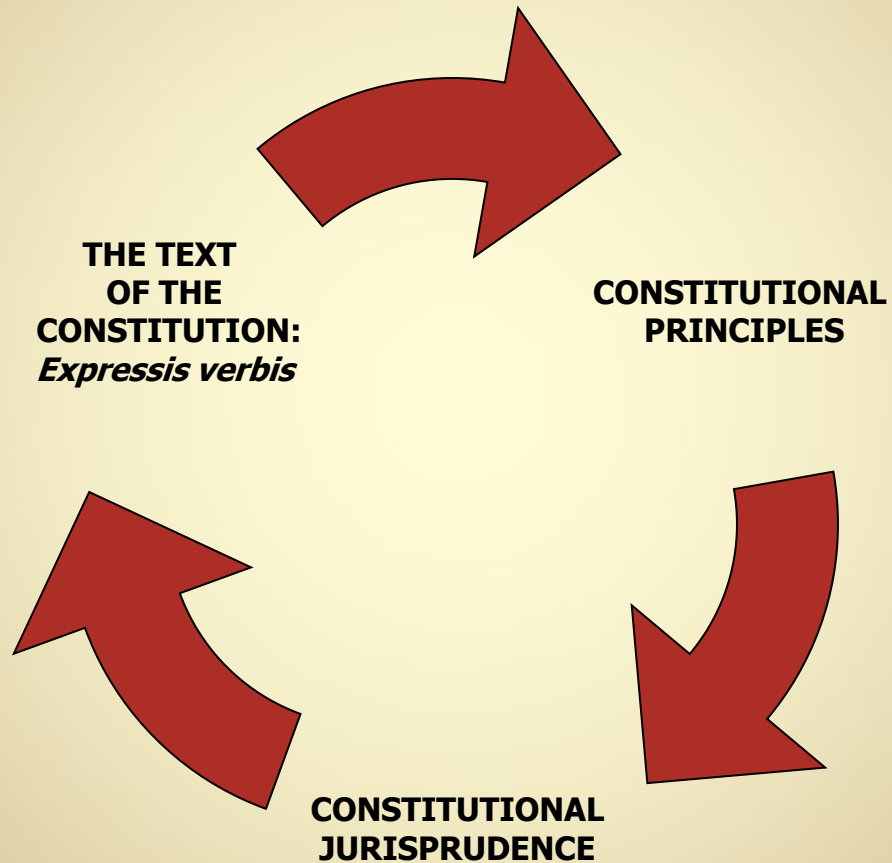
AN INSTITUTIONS OF CONSTITUTIONAL JUSTICE (II)

<p style="text-align: center;">POLAND www.trybunal.gov.pl</p>	<p style="text-align: center;">Constitutional Tribunal 15 justices</p>	<p>The President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights, the constitutive organs of units of local self-government; the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations; churches and religious organizations;</p>
<p style="text-align: center;">CZECH REPUBLIC www.concourt.cz</p>	<p style="text-align: center;">Constitutional Court 15 justices</p>	<p>The Constitutional Court shall act on an initiative: a) the President; b) a group of at least 41 Deputies or a group of at least 17 Senators; c) a Panel of the Court in connection with deciding a constitutional complaint; d) the government e) the representative body of a region; f) the Public Protector of Rights ["Ombudsman"]; g) the Interior Minister; h) the competent minister; k) the representative body of a municipality, in cases concerning petitions proposing the annulment of a legal enactment of a region within the territory of which the municipality lies.</p>
<p style="text-align: center;">SLOVAKIA www.concourt.sk</p>	<p style="text-align: center;">Constitutional Court 10 justices</p>	<p>The Constitutional Court initiates proceedings on the basis of a proposal by a) at least one-fifth of deputies of the National Council of the Slovak Republic, b) the president of the Slovak Republic, c) the Government of the Slovak Republic, d) the court, e) the general prosecutor, f) in cases listed under Article 127, anyone whose rights are to become the subject of inquiry.</p>

AN INSTITUTIONS OF CONSTITUTIONAL JUSTICE (III)

FINLAND	The Supreme Court	www.kko.fi
NORWAY	The Supreme Court	www.domstol.no
SWEDEN	The Supreme Court	www.domstol.se
DENMARK	The Supreme Court	www.domstol.dk

CONCEPT: CONSTITUTION AND CONSTITUTIONAL LAW



EXPRESSIS VERBIS
- ORIGIN OF THE LEGAL POSITIVISM

- (a) Problem of abstract contents of Constitutional norms
- (b) Problem of “competition” of Constitutional norms
- (c) Problem of “gaps” at Constitution

PROBLEMS OF THE INTERPRETATION

- (a) Official and (b) unofficial
- (a) Professional and (b) not professional
- Methods of interpretation:
 - (1) grammatical (linguistic) ,
 - (2) systematic,
 - (3) logical,
 - (4) teleological (intention),
 - (5) common principles of law,
 - (6) historical,
 - (7) Comparative
 - (8) Precedents
 - (9) doctrinal (dogmatic).
- Discretion to select the methods of interpretation?
- Vector of interpretation: (a) from ordinary law to constitution or (b) from constitution to ordinary law?

METHODS OF INTERPRETATION OF CONSTITUTION

METHOD	THE ESSENCE OF THE METHOD
GRAMMATICAL	Rules of language, grammar, content of the conception of the words and concepts of generic language become the source determining the result of the interpretation
SYSTEMIC	Constitution is perceived as an integral and systematic act. In the interpretation process the valuable balance among different norms and principles of the constitution is being ascertained.
DOCTRINAL	The interpreter uses the recommendations of scientific doctrine, invokes logical reasoning patterns as well as boundaries of legal problem recognition directions and scope it suggests.
HISTORICAL (EVOLUTIONARY)	Retrospective analysis of national and foreign countries' jurisprudence of constitutional justice institutions, scientific doctrine and their alteration is a source in deciding on recent interpretational direction, content and form.
TELEOLOGICAL (METHOD OF INTENTIONS)	The interpreter tries to cognize the will of the authors of the constitution; he understands constitutional provisions through the world-view of their creators, through the concepts, the content of which reflected contemporary world-view.
COMPARATIVE	Comparison and analysis of jurisprudence of constitutional justice institutions as well as of scientific doctrine of different countries is a source in making decision on recent interpretational direction, content and form.
PHILOSOPHICAL (VALUABLE)	The will of the interpreter to choose world-view (valuable) attitude, which determines interpretations of the constitution in the "moral" cases.

PRINCIPLES OF CONSTITUTION

- Written (*expressis verbis*) constitutional values
- Unwritten constitutional values

Principles:

democracy,

rule of law,

separation of powers,

separation state and church,

social orientation of state,

good governance,

legal expectation, ect.

Abortion: Constitutional issue?

- The draft of law: protecting the life at prenatal phase
- Two possibilities for legal abortion:
 - a) the life or health for woman is in danger
 - b) the pregnancy is a result of crime (rape)

The Principles of Integrity and Indivisibility of Human Rights while Interpreting Social Rights

The modern doctrine of human rights is based on the principles of indivisibility of human rights and of the equal importance of all human rights.

CONCEPT OF THE CONSTITUTION: THE INTERPRETATION POSSIBILITIES

- 1. The Constitution and jurisprudence, *constitutional principles* are basic sources of constitutional law. Other sources: *laws, various sub statutory legal acts, international treaties, constitutional customs* (they are very difficult to identify, if they exist at all in the state, which during two decades of independence had six constitutions and for fifty years was annexed by a foreign state), can not be identify like constitutional law.
- 2. Some constitutional principles are *expressis verbis* formulated (declared) in the text of the Constitution, others are not formulated explicitly, but they are, however, deduced logically from those formulated directly in the text of the Constitution.
- 3. As the constitutional doctrine is understood as a complex part of the constitution, it allows to “improve” the constitution through its *reinterpretation*, without radically changing the formulation of the “basic” constitutional document. Due to the constitutional doctrine, the constitutional system has potential to develop without the interference of external powers. This is the way not only to develop the constitution, but also to guarantee its consistency and stability.
- 4. The interpretation of the constitution is a process, which guarantees harmony between the stability of fundamental constitutional provisions in the continuous development of the constitutional regulation and the dynamic of the constitution, understood as its capability to correspond to the changing social and political environment.

SEPARATION OF POWERS

John Locke (1632 -1704)

- J. Locke found the origin of the legislative and executive authority in the powers man had in the state of nature. The first of these was to do whatever he thought fit for the preservation of himself and others within the limits of the Law of Nature. This was the origin of legislative power. The second power man had in the state of nature was the power to punish crimes committed against the Law of Nature. This was the origin of the executive power. J. Lock mark third power – “Federative power”. The federative power contains “ the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the Commonwealth”.
- J. Locke select the legislative like a “supreme power”. So, this tree powers was not equal in Lock’s system of separation of powers. Doctrine of popular sovereignty was so actual at that time, time of contradiction between the King and parliament. The judicial function was a part of executive function, on the J. Lock point of view.

MONTESQUIEU (1689 – 1755)

„DE L'ESPRIT DES LOIS“

- Montesquieu described division of political power between an executive, a legislature, and a judiciary. He based this model on the British constitutional system, in which he perceived a separation of powers between king, Parliament, and the courts of law.
- To prevent one branch from becoming supreme, and to induce the branches to cooperate, governance systems employing a separation of powers typically are created with a system of "checks and balances", a term which, like separation of powers itself, is generally credited to Montesquieu.

“THE FEDERALIST PAPERS”: BACKGROUND OF THE CONCEPT OF THE CHECKS AND BALANCES SYSTEM

- The **Federalist Papers** are a series of 85 articles arguing for the ratification of the United States Constitution.

The articles were written by Alexander Hamilton (who probably wrote 51 of them), James Madison (29), and John Jay (5).

- The separation of powers embodies a different philosophy, that of balancing power between different bodies so that no power can act without the co-operation of the others, and each checks the others. On this conception is creating the doctrine of the system of checks and balances.

**“SEPARATION OF POWERS” IN
THE CONSTITUTIONS**

ESTONIA	DIRECT Art.4 of the Constitution
LATVIA	CONSTRUCTIVE
LITHUANIA	CONSTRUCTIVE
FINLAND	DIRECT Art 3 of the Constitution
SWEDEN	CONSTRUCTIVE
DANMARK	DIRECT Art 62 of the Constitution
NORWAY	CONSTRUCTIVE
POLAND	DIRECT Art.10 of the Constitution
CZECH REP.	CONSTRUCTIVE

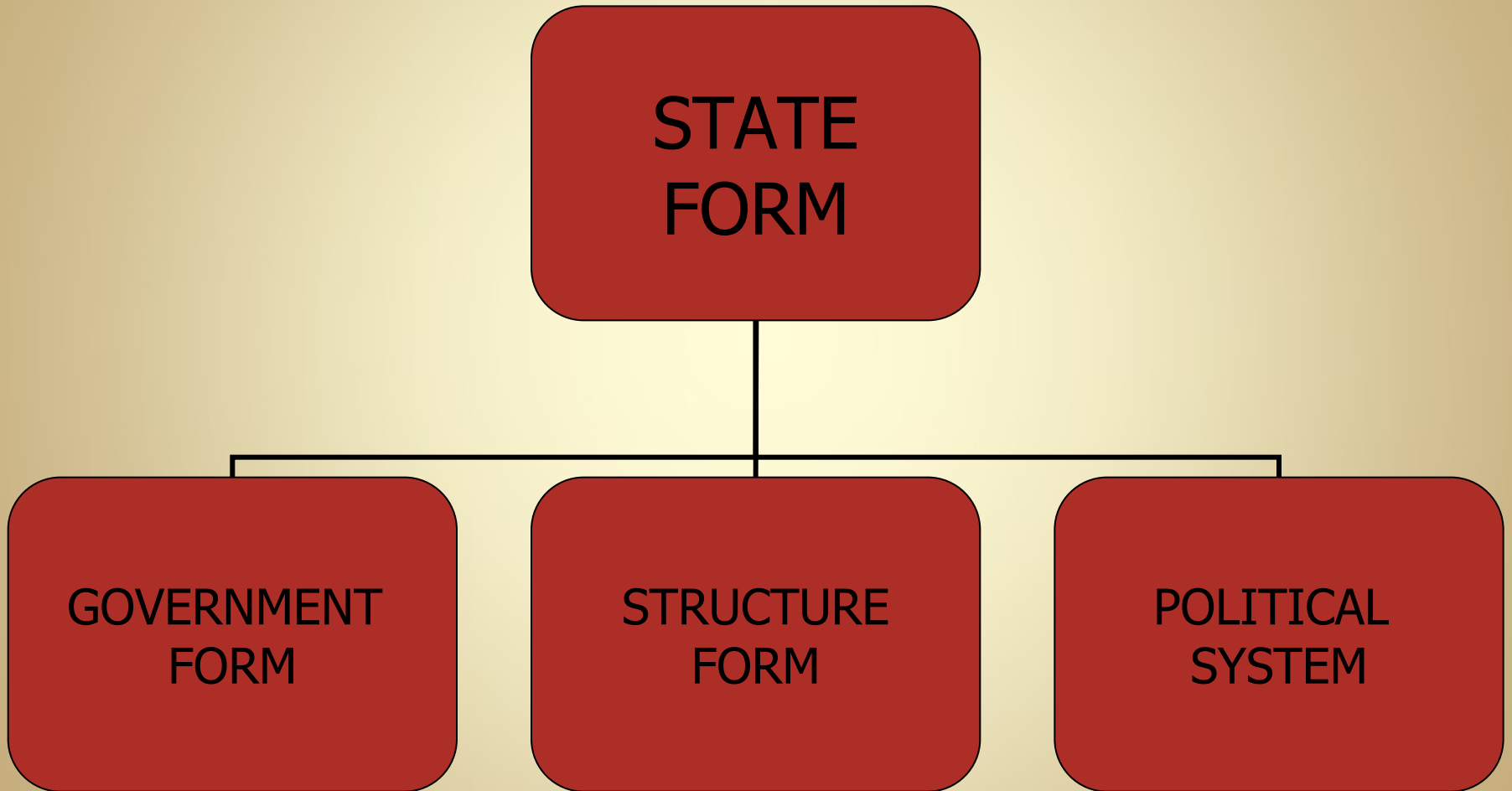
CONSTITUTIONS BY VALIDITY PERIOD

ESTONIA	Permanent Constitution
LATVIA	Permanent Constitution
LITHUANIA	Permanent Constitution
POLAND	Permanent Constitution
FINLAND	Permanent Constitution
NORWAY	Permanent Constitution
DENMARK	Permanent Constitution
SWEDEN	Permanent Constitution
H U N G A R Y	TEMPORAL Constitution

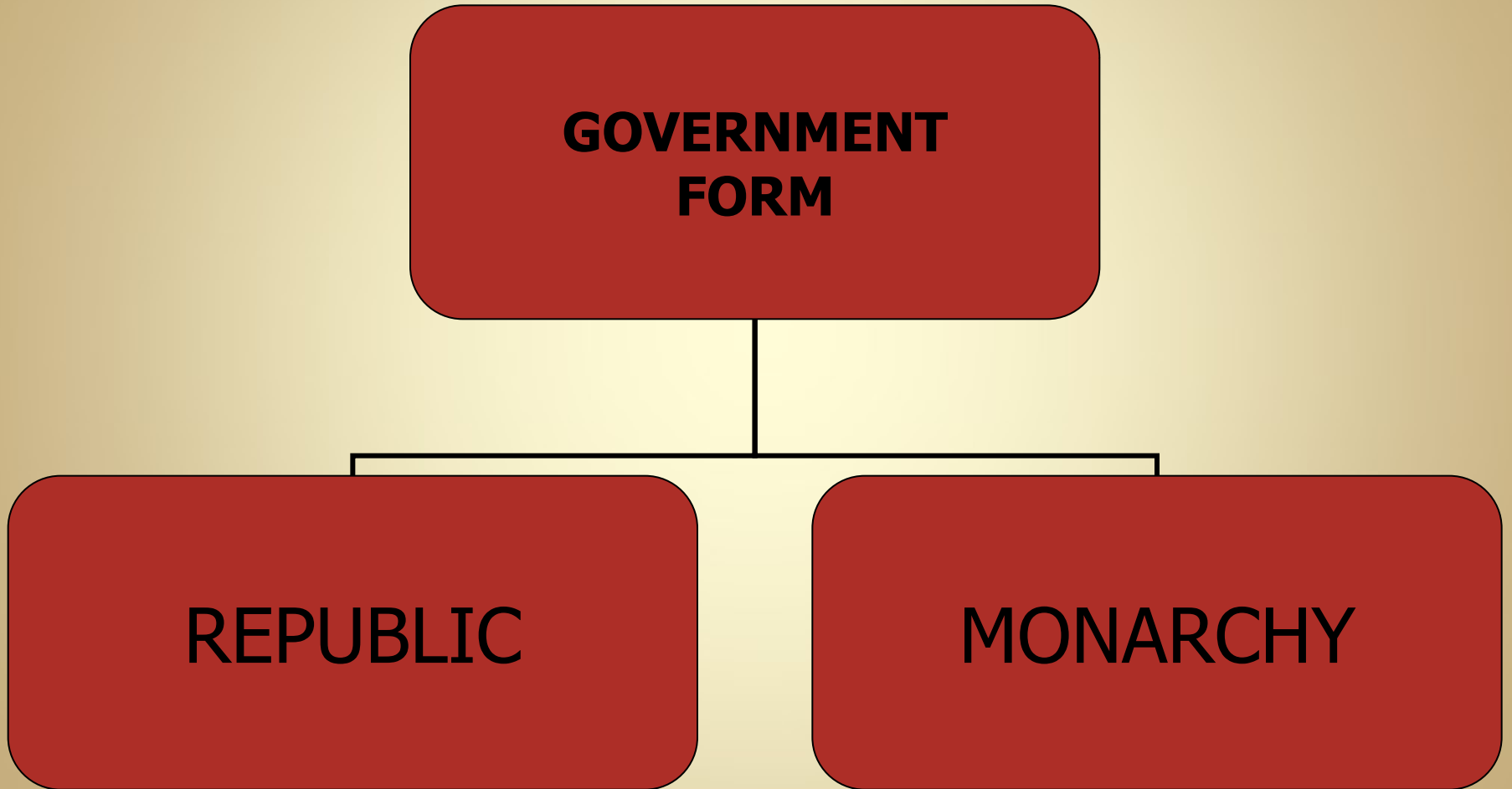
Implementation of constitutional norms: material v. formal

ESTONIA	Material Constitution
FINLAND	Material Constitution
SWEDEN	Material Constitution
DENMARK	Material Constitution
NORWAY	Material Constitution
LATVIA	Material Constitution
LITHUANIA	Material Constitution
POLAND	Material Constitution

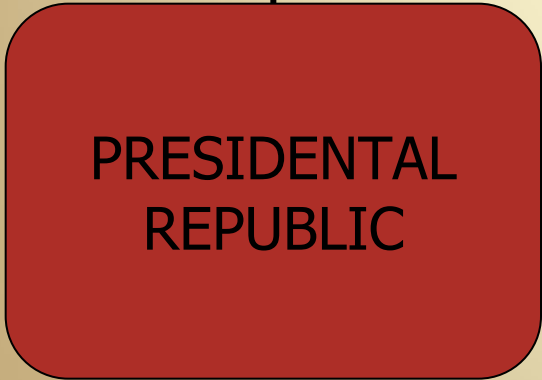
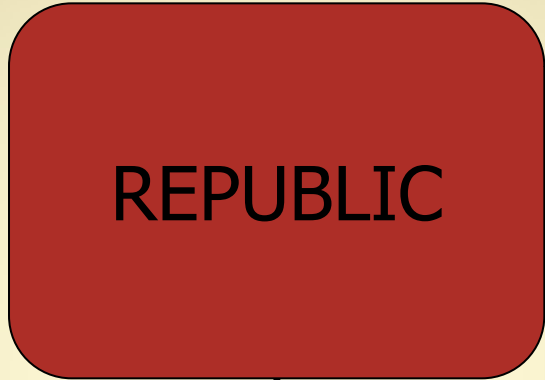
STATE FORM: SISTEMIC CONSTRUCTION



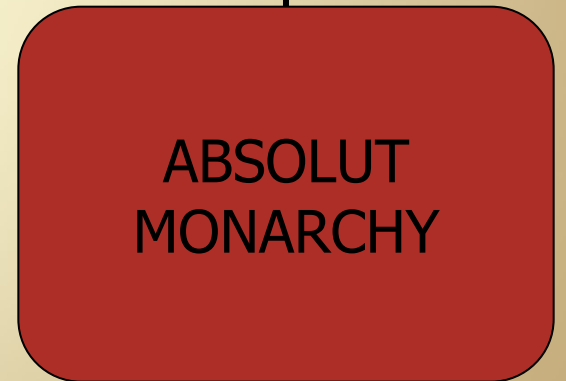
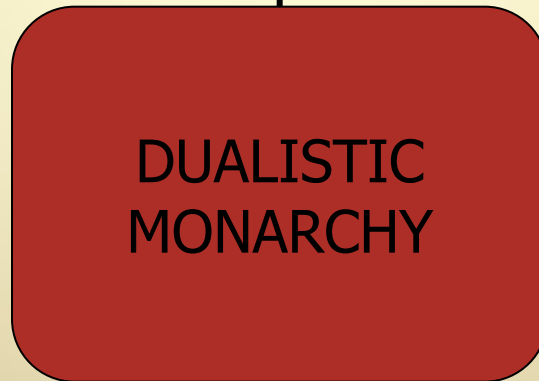
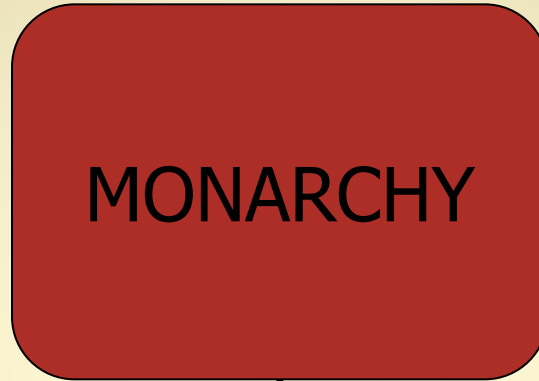
GOVERNMENT FORMS



REPUBLIC



MONARCHY



GOVERNMENT FORM: MAIN CRITERIA

PRESIDENTIAL FORM OF GOVERNMENT	PARLIAMENTARY FORM OF GOVERNMENT	MIXED FORM OF GOVERNMENT
Government is not political accountable to parliament	Government is political accountable to parliament	Government is political accountable to the President and Parliament

MAIN CRITERIA OF THE GF IN THE CONSTITUTIONS

EST	<p>The Parliament shall decide on votes of no-confidence in the Government of the Republic, the Prime Minister or individual ministers; The Government of the Republic shall resign when the Parliament expresses no-confidence in the Government or the Prime Minister.</p> <p><i>Constitution of the Republic of Estonia. Articles 65 (13), 92 (3).</i></p>
LAT	<p>The Prime Minister and other Ministers must have the confidence of the Parliament and they shall be accountable to the Parliament for their actions. If the Parliament expresses no confidence in the Prime Minister, the entire Government shall resign.</p> <p><i>Constitution of the Republic of Latvia. Article 59.</i></p>
LIT	<p>The <i>Seimas</i> (Parliament) shall supervise the activities of the Government, and may express non – confidence in the Prime Minister or individual Ministers.</p> <p><i>Constitution of the Republic of Lithuania. Article 67.</i></p>
POL	<p>The members of the Council of Ministers shall be collectively responsible to the House of Representatives (<i>Sejm</i>) for the activities of the Council of Ministers. The House of Representatives (<i>Sejm</i>) shall pass a vote of no confidence by a majority of votes of the statutory number of Deputies.</p> <p><i>Constitution of the Republic of Poland. Article 157 (1), 158 (1).</i></p>
CZ	<p>The Government is accountable to the Chamber of Deputies. The Chamber of Deputies may pass a vote of no confidence in the Government.</p> <p><i>Constitution of the Czech Republic. Articles 68 (1-3), 72.</i></p>

MAIN CRITERIA OF THE GF IN THE CONSTITUTIONS

<p>FIN</p>	<p><i>(2) The Ministers are responsible before the Parliament for their actions in office. Every Minister participating in the consideration of a matter in a Government meeting is responsible for any decision made, unless he or she has expressed an objection that has been entered in the minutes.</i></p> <p><i>Constitution of the Republic of Finland. Articles 60.</i></p>
<p>SWE</p>	<p><i>The Parliament is the foremost representative of the people.</i></p> <p><i>The Parliament enacts the laws, determines taxes and decides how public funds shall be used. The Parliament shall examine the government and administration of the country.</i></p> <p><i>The Government rules the country. It is responsible to the Parliament.</i></p> <p><i>Constitution of the Sweden (Basic principles) Article 4, 6.</i></p>
<p>DK</p>	<p><i>1) A Minister shall not remain in office after the Parliament has passed a vote of no confidence in him.</i></p> <p><i>2) Where the Parliament passes a vote of no confidence in the Prime Minister, he shall ask for the dismissal of the Ministry unless writs are to be issued for a general election. Where a vote of censure has been passed on a Ministry, or it has asked for its dismissal, it shall continue in office until a new Ministry has been appointed.</i></p> <p><i>Constitution of the Denmark. Article 15.</i></p>
<p>NOR</p>	<p><i>The members of the State Council of Ministers shall be collectively responsible to the House of Representatives for the activities of the Council of Ministers.</i></p> <p><i>Constitution of the Norway</i></p>

AUXILIARY CRITERIA IN THE SYSTEM OF CHECKS AND BALANCES

- The impeachment of executive officers
- The ways of presidential elections
- The ways of parliamentary elections
- President veto rights
- President's powers to dissolve the parliament
- President's powers to lead the executive
- President's right to call referendum
- Extraordinary powers of President
- *De facto* (constitutional conventions) content of powers

THE GOVERNMENT FORM

FINLAND	Parliamentary republic
SWEDEN	Parliamentary monarchy
DENMARK	Parliamentary monarchy
NORWAY	Parliamentary monarchy
ESTONIA	Parliamentary republic
LATVIA	Parliamentary republic
LITHUANIA	Parliamentary republic
POLAND	Parliamentary republic (?)
CZECH REPUBLIC	Parliamentary republic

Parliaments of the BSC countries: internet addresses

ESTONIA	Riigikogu (101 dep.)	www.riigikogu.ee
LATVIA	Saeima (100 dep.)	www.saeima.lv
LITHUANIA	Seimas (141 dep.)	www.lrs.lt
POLAND	Sejm (460 dep.) Senat (100 dep.)	www.sejm.gov.pl www.senat.gov.pl
FINLAND	Eduskunta (200 dep.)	www.eduskunta.fi
SWEDEN	Riksdag (349 dep.)	www.riksdagen.se
DENMARK	Folketing (179 dep.)	www.ft.dk
NORWAY	Storting (169 dep.)	www.stortinget.no

THE STATE STRUCTURE FORM AND POLITICAL SYSTEM

ESTONIA	UNITARY	DEMOCRATIC
LATVIA	UNITARY	DEMOKRATIC
LITHUANIA	UNITARY	DEMOKRATIC
POLAND	UNITARY	DEMOKRATIC
FINLAND	UNITARY	DEMOKRATIC
SWEDEN	UNITARY	DEMOKRATIC
DENMARK	UNITARY	DEMOKRATIC
NORWAY	UNITARY	DEMOKRATIC

CONCLUSIONS (I): FEATURES OF THE CONSTITUTIONS

- 1. The tradition of Constitutionalism of the Central and Eastern Europe Countries is linked with a undemocratic past.
- 2. Majority of the Central and Eastern Countries, with the exception of Latvia and Hungary, have promulgated new Constitutions.
- 3. The framers of Constitutions relied heavily on the principles of the Rule of Law and Human rights. Up to now these principles are a crucial instrument in the interpretation of Constitutions.
- 4. Republican “form of government” was selected by all Central Eastern Europe Countries.
- 5. ”Separation of powers” is entrenched in all Constitutions. In the majority of them it is principle expressed indirectly and directly expressed in the Constitution of the Republic of Poland and Estonia.
- 6. The amending process of Constitutions is complicated therefore Constitutions of Central and Eastern Europe Countries should be regarded as “rigid”. Constitutional justice is under Constitutional courts, with the exception of Estonia, where it is the prerogative of the Supreme Court.

CONCLUSIONS (II): STATE FORM and GOVERNMENT FORM

- 1. There are no examples of “**direct republic**” in Central and East European countries.
- 2. None of the countries of the European continent analyzed has chosen a presidential form of government in creation of national government form. Governments or Minister Cabinets of executive institutions in Czech Rep., Estonia, Latvia, Poland, Slovakia, Slovenia Hungary are accountable to represented institutions i.e. parliaments.
- 3. Sufficient accountability of the government to leader of the state, which would allow us to classify the existing government form as mixed (semi presidential), is not envisaged in any of the government form analyzed. Major criteria characterizing the form of rule express government form of these CEE states as parliamentary republics.
- 4. Variety of expressions of secondary criteria in Central and Eastern European government form witness only efforts of the fore mentioned states to create national models taking critical evaluation of theoretical and practical experience. States of Czech Rep., Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia and Hungary are represented republics. Parliamentary republic is the predominant government form in states of this region of Europe.

www *cases in English*

- www.lrkt.lt The Constitutional Court of the Republic of Lithuania
- www.nc.ee The Supreme Court of the Republic of Estonia*
- www.satv.tiesa.gov.lv The Constitutional Court of the Republic of Latvia

* Constitutional chamber of the Supreme Court of the Estonia Republic

HUMAN RIGHTS

Human rights are commonly understood as "inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being."[[]

Constitution and Constitutional convention

1. Constitutional Convention supplement the Constitution (?).
2. Constitutional Convention interpret the Constitution (?).
3. Constitutional Convention change constitution (?).

(Controversial because formally such convention is anti constitutional) .

CUSTOM / GEWOHNHEITSRECHT

(lat. *consuetudo* Gewohnheit) ist nicht geschriebenes Recht, das durch lange tatsächliche Übung und allgemeine Anerkennung seiner Wirksamkeit (lat. *opinio necessitatis*, Überzeugung von der Notwendigkeit oder auch *opinio iuris* Rechtsüberzeugung) entstanden ist.

William Blackstone: “Commentaries on the Laws of England”

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

1. The custom: the problem of the notion

The variety of the similar notions:

- **HABIT** – (mostly of individual nature, related to daily aspects of life);
- **TRADITION** – (dominated by the aspect of culturological nature, the motivation for the need of such mode of behavior is undefined; vagueness of requirements for the mode of behavior; the object is not always clear; absence of legal consequences);

practices while *The “difference between custom and culture is subtle, yet customs generally emphasizes*
dictionary.org/definition/english/cu/custom.html *cultures rather focus on ideas”* [http://www.websters-online-](http://www.websters-online-dictionary.org/definition/english/cu/custom.html)

- **CUSTOM** – (the motivation for the need of such mode of behavior is defined, the content of behavioral modes is clearly understood; the addressee of the rule of behavior is clear; *possibility of legal consequences (?)*);
- **LEGAL CUSTOM** - (*customs sanctioned by governmental institutions*);
- **CONSTITUTIONAL CONVENTIONS (CUSTOMS)** – (are specific customs which regulate the behavior of constitutional legal subjects).

OPINIO NECESSITATIS: CONCEPT

“*Opinio juris sive necessitatis*” (latin) is the belief that a behavior was done because it was a legal obligation. This is in contrast to a behavior being the result of different cognitive reaction, or behaviors that were habitual to the individual. This term is frequently used in legal proceedings such as a defense for a case.

Opinio necessitatis its opinion that act is necessary by rule of law.

Basic problems: (1) who is the subject of belief ? and (2) how to recognize the expression of the belief?

4. Conventionality of the Constitutional conventions: basic feature of the constitutional conventions

A Constitutional convention is an informal and uncodified procedural agreement that is followed by the institutions of a state (the subjects of the constitutional legal relations).

- Constitutional convention is a custom which has specificity typical of that custom only,
- Its formation is described by a conventional nature of behavioral precedent,
- The notion of “convention” reflects the method of the formation of behavioral precedent. Thus the behavioral precedent which has become or will become a constitutional convention should reflect a compromise i.e. an agreement (convention) between the subjects of constitutional legal relations.

Constitution and Constitutional convention

- 1. Constitutional Convention supplement the Constitution.
- 2. Constitutional Convention interpret the Constitution.
- 3. Constitutional Convention change constitution. <Controversial because formally such convention is anti-constitutional >.

6. Examples of Constitutional Conventions: Anglo-Saxon countries (I)

Great Britain

- **The Prime Minister alone advises the monarch on a dissolution of parliament;** (Since 1918)
- **The monarch will grant a dissolution if requested.** (Since 1832. The Lascelles Principles in 1951 informally outlined the principles and issues that might lead to a refusal of a dissolution.)
- **The monarch grants the Royal Assent to all legislation.** (Since the early 1700s. Previously monarchs could and did refuse or withhold the Royal Assent.)
- **That the Prime Minister should be a member of either House of Parliament** (Since the 1700s. In 1963 this was changed to That no prime minister should come from the House of Lords (Since 1963, when the last peer, the Earl of Home, became prime minister. He renounced his peerage and as Sir Alec Douglas –Home became an MP.
- **That all cabinet members must be members of the Privy Council.**
- **That the House of Lords should not reject a budget passed by the House of Commons.** (This was broken controversially in 1909 by the House of Lords, which argued that the Convention was linked to a Convention that the Commons would not introduce a Bill that "attacked" peers and their wealth. The Lords claimed that the Commons broke this Convention in Chancellor of the Exchequer David Lloyd George's budget, justifying the Lords' rejection of the budget. The Commons disputed the existence of a linked convention. The convention over the Lords' powers over budgets was replaced by the Parliament Act, 1911.

Examples of Constitutional Conventions: Anglo-Saxon countries (II)

Australia

- **All executive decisions are taken by a formal meetings of the Executive Council, ie the Governor-General-in-Council.** (Allegedly broken in the mid 1970s but followed since)
- **The Governor-General does not sack the Prime Minister.** (Broken in 1975, when the Governor-General Sir John Kerr controversially dismissed Whitlam over the stalemate mentioned below.)
- **The Senate will not withdraw supply to the government.** (Broken in 1975. The Senate argued that its breaking of convention was in response to alleged breaking of numerous conventions by then Prime Minister Gough Whitlam. Whitlam did not agree.)
- **A Loss of Supply requires either the resignation of the Prime Minister or a parliamentary dissolution.** (Broken in 1975 by Whitlam who argued that the Senate's breach of convention in blocking supply did not require a dissolution or resignation. The result was a stalemate and the intervention of the Governor-General mentioned above. Each party to the dispute blamed someone else for breaching a convention, requiring *their* own breaching of another one in response when responding to someone else's alleged breach.)

Examples of Constitutional Conventions: Anglo-Saxon countries (III)

United States of America

- Members of the U.S. Electoral College should vote for the Presidential candidate having the most votes in their state. This is enforced by law in many but not all states.
- Members of Congress should come from the Congressional district that they are elected from.
- A two term limit on Presidents was a convention until Franklin Roosevelt

Examples of Constitutional Conventions (II): Continental Europe France

- **The President has the right to initiate a referendum without parliamentary approval.** (This convention was shaped when De Gaul used the power of personal authority).
- **The president must not, but nominates the leader of parliamentary majority of the Prime Minister.**
- **There is individual political responsibility to the parliament** (Even though the Constitution provides only for collective responsibility of the Government to the Parliament, but taking of personal responsibility before the parliament and resignation of the Minister of National Defense Charles Hernu in 1985 formed a precedent that has become a convention).
- **During the period of “co-existence” the powers of the President are limited to issues of foreign policy, national defense and formation of activities of the judiciary. During such a period the President can not interfere with activities of the Government.** (related to the practice of relations between President Francia Mitterrand and Prime Minister Jacques Chirak).
- **Government replies to the questions of MPs twice a week.** (Article 48 of the Constitution provides for only one meeting in the Parliament, however the custom stems from the behavioural precedents created by President Giscard d'Estaing.)
- **MPs may vote not only for themselves, but also for their colleagues.** (Even though Article 27 of the Constitution provides that each MP votes personally, but after the introduction of the electronic voting system MPs voting for their colleagues (having received prior approval from them or the fraction) are now an acceptable practice. This is a rare “convention” where *lex non scripta* has a priority over *lex scripta*.)