

The Constitution: The Supreme Legal Act of the State

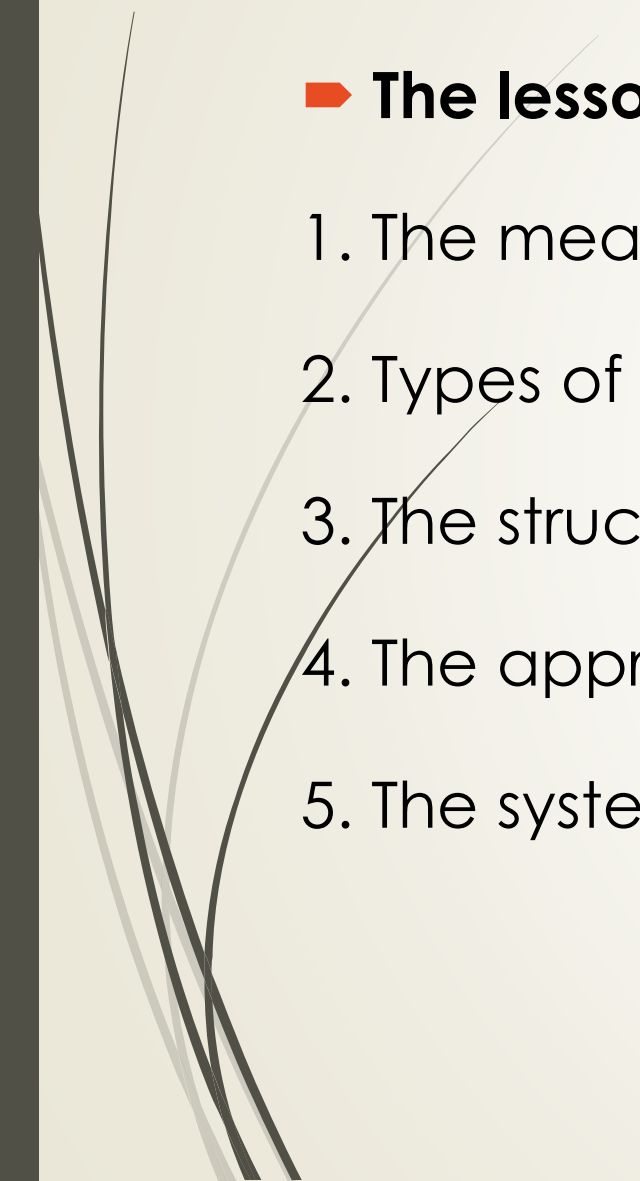
Lesson 9

Dr. Heliona Miço



The content

➤ **The lesson will treat the following topics:**

1. The meaning and the importance of the Constitution
 2. Types of constitutions
 3. The structure of the constitution
 4. The approval & the amendments of the constitution
 5. The system of the sources of law
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The meaning & the importance of the Constitution

➤ Various definitions of Constitution

1. It expresses the relationship between the state, the legal system, & the citizens.
2. It is a contract concluded between the citizens & the authorities.
3. It includes the entire system of government in the country, and the rules that create & regulate the governance activity.

What does the Constitution guarantee?

- It guarantees **the freedoms & fundamental rights of citizens** and a beneficial governance for society.
- It defines **the basic principles on which all government institutions will function**, such as:
 - The principle of division of powers
 - The state sovereignty & people's sovereignty
 - The right of the people to organize in political parties
 - The symbols of the state

What does the Constitution contain?

- It contains a **special chapter on the fundamental rights** and freedoms of citizens.
- It contains **the organs** that exercise the legislative, the executive and the judicial power, their structure and their roles.
- The Constitution **affirms the position** of the Assembly, the President of the Republic, the Council of Ministers, the Prime Minister, the main principles of the functioning of the judiciary; determines the organization and degree of autonomy of local government, etc.

Constitution as the fundamental law

The Constitution has a special status.

- It is the supreme law in a country.
- It means that all other laws have to comply with the constitution.
- The laws must be adopted based on and for the implementation of the constitution.

Why is the supremacy of the constitution necessary?

Its supremacy creates stable state structures.

It keeps the constitution out of the ordinary policy developments.

Article 4 of the Albanian Constitution

Article 4

3. The provisions of the Constitution are directly applicable, except when the Constitution provides otherwise.

- ▶ The judge may addresses to the constitution when dealing with human rights violations in the same way he addresses to civil, criminal, labor codes etc.

The concept of the constitution according to the legal science

Two concepts: FORMAL AND MATERIAL CONCEPTS

- According to the **formal concept**, the constitution is a written and codified act, with the highest legal power, approved by the highest state body, according to the special procedure (which is distinguished from other laws).
- The written form of the constitution is the predominant form throughout the world.
- **Codification is about systematizing constitutional norms in order to make them easily applicable.**

The concept of the constitution according to the legal science

The material concept

- According to the **material concept**, the constitution is presented as a set of basic norms or rules that regulate the foundations of the social, state and legal order of a country.
- According to this concept, it does not matter if the constitution is written and codified.
- What matters is **the content**.



The types of constitutions

Depending on **the form, the procedure and the body** that approves the constitution, they are divided into:

- 1. Written and unwritten constitutions
- 2. Rigid and flexible constitutions
- 3. Real and fictitious constitutions.

1. Written and unwritten constitutions

- The classification of constitutions under this division is based on the form of the constitution.
- An example of the country with unwritten constitution is **the Great Britain**.
- There is no constitution in the formal concept but there is a constitution in the material concept and a well-developed constitutional right.
- Written and codified constitutions prevail in the world today.

2. Rigid and flexible constitutions

- The influencing factors for a constitution to be rigid or flexible are:
 1. the body/the organ that adopts the constitution
 2. the procedure for adopting and amending the constitution
 3. the majority of votes that needed to adopt or amend it.

2. Rigid and flexible constitutions

- Constitutions that are adopted or amended by a **special constitutional body** such as the Assembly or the Constitutional Assembly are called rigid constitutions.
- The constitutions which are adopted by the **usual representative body** (Parliament) through **special procedures**, differ from other laws.
- If a constitution is adopted in accordance with ordinary legal procedures, it is called a flexible constitution.
- For a number of theorists, it should be approved by the highest legislative body, but **the stages of the procedure and the majority of votes** should be different from the usual laws.

Real and fictitious constitutions

- **Real constitutions** are considered to represent the real state of society.
- **Fictitious constitutions** are those that are not implemented in practice, that hide the real situation and serve the ruling forces.
- For example, the constitutions of communist states affirm fundamental human rights and freedoms as the constitutions of democratic countries do, but these rights are not applicable in practice because of the general limitations that exist.

Fictitious constitutions (The case of Albania)

- The content of the Article 46 of the present constitution (the right to organize) is not the same as the content of the Article 53 of the Constitution of 1976, although both articles sanction **the right of the people to organize.**
- The constitution of 1976 could not imagine the creation of opposition parties nor the creation of religious entities whose organization was condemned as being fascist or terrorist ones.

The structure of the constitution

- Most constitutions consist of two main parts: **the preamble** and **the normative part**.

The preamble

- The preamble is at the beginning of the constitution and is separated from the normative part.
- There are also cases in which it is intertwined with the second part in the form of basic principles.



The characteristics of the preamble

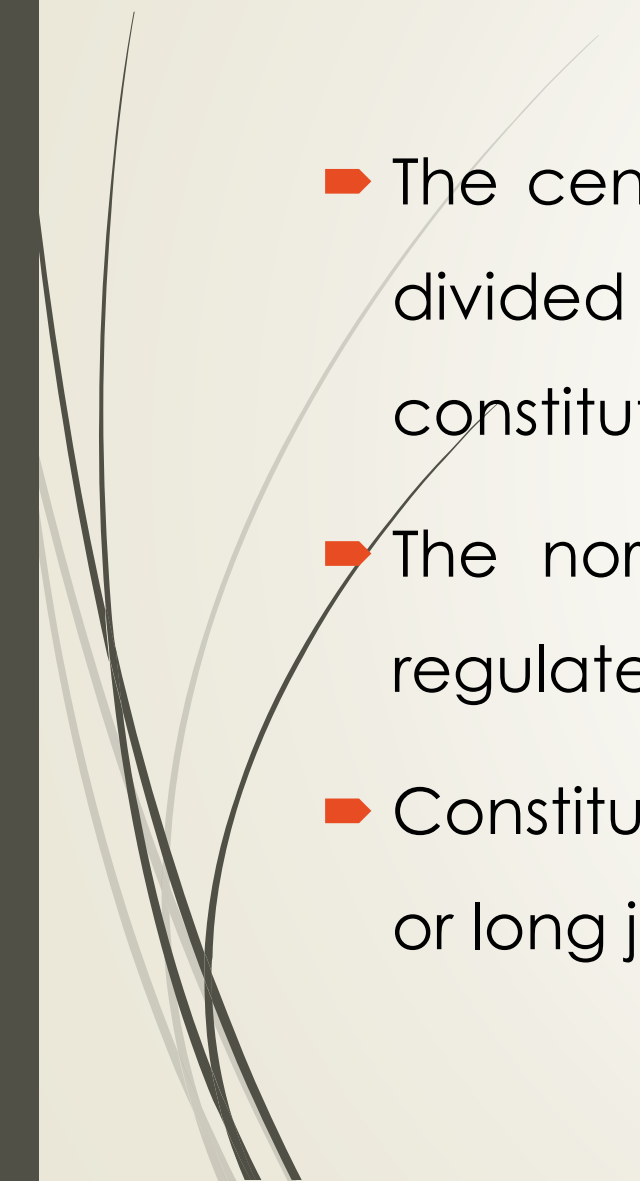
The preamble is:

- brief and concise,
- expresses the conceptual basis and the purposes for which the constitution was adopted,
- may contain details of the time and circumstances of its adoption.

The preamble to the Albanian Constitution of 1998 has a declarative character but affirms some of the principles, values and purposes of the state and law.

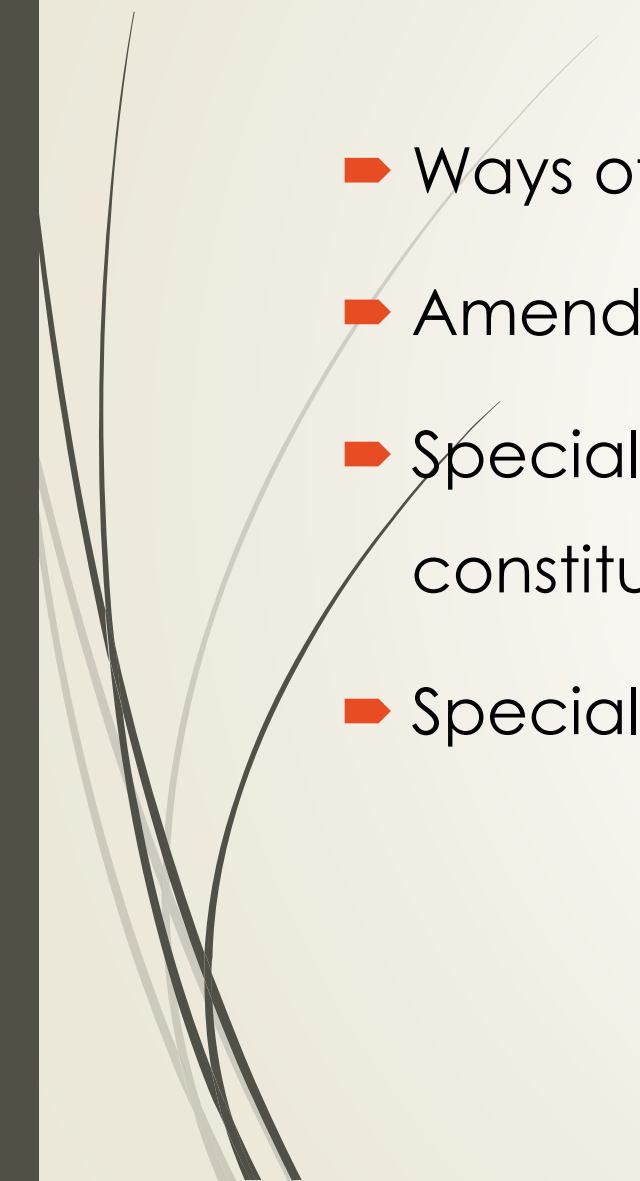


The normative part

- The central part of the constitution is **the normative part** that is divided into articles and expresses the content of the constitution.
 - The normative part is divided into **parts** and **headings** that regulate different areas.
 - Constitutions can be short like Thailand's constitution (30 articles) or long just as India's 1949 constitution with 395 articles.
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The approval and the amendments of the constitution

- Ways of adopting the constitutions
 - Amending the constitutions
 - Special conditions and remedies set for amending the constitution
 - Special constitutional amending procedures
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Ways of adopting the constitutions

- The character and properties of the constitution depend **on the body** that adopts it and on **the procedure** followed for its adoption or amendment.
- The constitutional theory underlines that the constitutions must be an expression of the will of the sovereign people.
- Relying on people's sovereignty, **three bodies** and several forms of constitutional approval have been recognized.

Ways of adopting the constitutions

1. Approval by the **special body**. The assembly or constitutional assembly that is elected by the people to carry out this activity.
2. Approval by the **ordinary legislative representative body** elected by the people's vote.
3. Direct adoption by **popular referendum**.
4. **A combined approval** when we have a combination of these forms.

Ways of adopting the constitutions

1. Approval by the **special body**. This form has been introduced since the adoption of the first written constitutions (that of the US, France). The special quality of the body that adopts the constitution ensures its supremacy in relation to other legal acts.
2. Approval by the **ordinary legislative representative body**. The second form is done by the ordinary representative body, but with a different procedure from ordinary laws and by a qualified majority.



Ways of adopting the constitutions

3. The third form is that of direct adoption by **referendum**.

4. Combined approval

There are also combined forms, as in the case of the Spanish Constitution of 1978 or the Albanian Constitution of 1998.

The referendum may be **mandatory** or **optional**.

Amending the constitutions

➤ The current constitutional theory has accepted the idea of amending the constitution.

a. The US Constitution has accepted the changes but it has provided for a very cautious and complicated procedure for their adoption.

b. A number of constitutions expressly prohibit only the amendment of certain provisions which they consider important for the constitutional order.

c. Some constitutions prohibit their amendment only for a certain period of time (French constitution 1791).

➤ Life is changing and the amendments should be a function of sustainability.

Example of Amendment of US Constitution

- Article V of the Constitution **provides two ways to propose amendments to the document**. Amendments may be proposed either by the Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress in response to applications from two-thirds of the state legislatures.
- Each state in the United States has **a legislature** as part of its form of civil government. Most of the fundamental details of the legislature are specified in the state constitution.
- With the exception of Nebraska, all state legislatures are bicameral bodies, composed of a lower house (Assembly, General Assembly, State Assembly, House of Delegates, or House of Representatives) and an upper house (Senate).

Special conditions for amending the Albanian constitution

- The Albanian Constitution has not provided for a provision to impose a ban on review for certain articles.
- However, there are absolute limitations despite not being directly expressed.
- The principles that constitute the basis of this state, the basis of governance, or the fundamental human rights and freedoms lie at the heart of the legal order (**Article 15**).

Special constitutional amending procedures

- The constitutions provide for enhanced procedures for their amendments.

They are expressed:

- in the **steps followed for the adoption of an amendment**,
- under the conditions set out **to initiate the amendment**, (the constitutional amendment initiative is not the same as the legislative initiative);
- in **the quorum necessary to consider a draft amendment** which is not the same as the amendment of the general law;
- with **the approval of the amendment by popular referendum**, which is not the case for the general law.

Special constitutional amending procedures in Albanian Constitution

➤ Article 177

1. Initiative for revision of the Constitution may be undertaken by not less **than one-fifth** of the members of the Assembly.

3. The draft law is approved by not less than **two-thirds of all members of the Assembly. (93 deputies)**

4. The Assembly may decide, with two-thirds of all its members that the draft constitutional amendments be voted in a referendum.

➤ 6. The President of the Republic does not have the right to return for review the law approved by the Assembly for revision of the Constitution.

7. The law approved by referendum is declared by the President of the Republic and enters into force on the date provided for in this law.



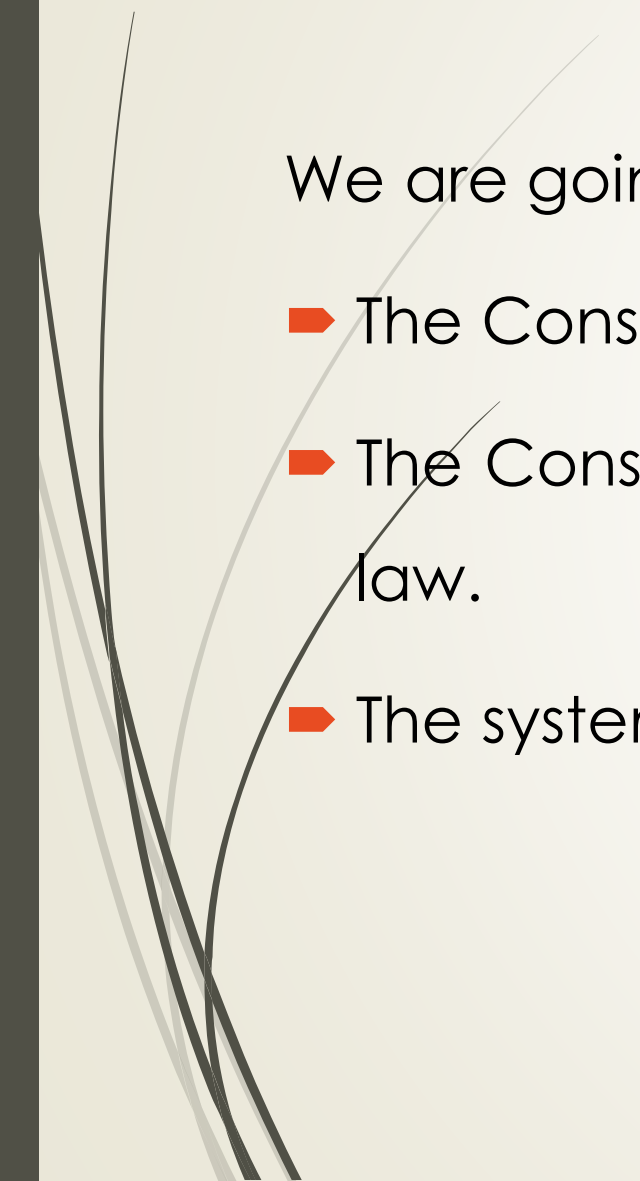
The system of the sources of law

- The basic aspects of the system of the sources of law are built into the Constitution.
- The sources of law are the seat of power (as a constitution, treaty, custom, or statute) that provides the authority for legislation and judicial decisions.
- Otherwise, the seat of power from which the law derives its validity.



The system of the sources of law

We are going to treat:

- The Constitution as a set of norms for the production of norms.
 - The Constitutional criteria for forming the system of the sources of law.
 - The system of the sources of law in the Constitution of Albania.
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The Constitution as a set of norms for the production of norms

- The regulation of the sources of law has evolved considerably. From the second half of last century, **it is the constitution** and not the law **that operates in the system of the sources of law**.
- The constitution is the source of law while the law is the norm derives as a production of law.
- Laws are **derivative**, **conditional** and **secondary sources** in relation to the constitution, which is the central pillar of the legal order.

The Constitution as a set of norms for the production of norms (concrete cases)

- Many of the sources of law are directly defined in the constitution.
- The law is presented in all its forms **as a general law, as an enforced law, an organic law.**
- The separation of powers between the organs that adopt the legal norms is placed under the supervision of the constitutional judge.

The system of the sources of law in Albanian Constitution

➤ **Article 116**

1. Normative acts that are effective in the entire territory of the Republic of Albania are:
 - a) the Constitution;
 - b) ratified international agreements;
 - c) the laws;
 - ç) normative acts of the Council of Ministers.
2. Acts that are issued by the bodies of local government are effective only within the territorial jurisdiction exercised by these bodies.
3. Normative acts of ministers and steering bodies of other central institutions of the state are effective in the entire territory of the Republic of Albania within the sphere of their jurisdiction.

The categories of the sources of law

- There are three categories:

International
sources of
law

Domestic
sources of
general
power

Domestic
sources with
local power

International sources

There is a variety of international resources.

- They can be **written** as treaties, conventions, protocols, agreements.
- They can also be **unwritten** as customary international law.

It consists of rules that derive from international practice and from the general principles of law.

- Written international sources include international court decisions as well as international doctrine.

Domestic sources of general power

1. At the forefront of these sources is **the Constitution**, and the laws for amendment of the constitution.

➤ *The European Convention on Human Rights* is placed at the same level, because it is an act that is called directly by the Albanian Constitution.

2. Further down the hierarchy of laws there are the **international agreements** ratified by the parliament.

3. **The laws** are in the third level of the hierarchy.

There are two types of laws: **enforced laws and general laws.**

The enforced laws and general laws

The enforced laws include:

- All the laws provided for in Article 81/2 of the **Constitution that require a qualified majority of 3/5 for their adoption** (laws on the organization and functioning of the institutions provided for in the constitution, electoral law, codes, etc.)
- **Laws delegating state powers to international bodies** (Article 123/2), **laws on the deployment of foreign military forces in the territory of the Republic of Albania, or the deployment of Albanian military forces abroad** (art 12/3)
- **Decisions of the Constitutional Court declaring the laws as unconstitutional**
- **The referendum for the abrogation of a law**
- General laws require a simple majority that must be no less than one plus a fourth of the members of the assembly. (art 78/1)

Domestic sources of general power

4. The **normative acts of the Council of Ministers** take the fourth place.

- A. The **normative acts** adopted by the government in **emergency conditions** on the basis of the **article 101 of the Constitution** that have the same value and importance of the law. These acts must be ratified by the Assembly within 45 days.
- The usual acts issued by the Council of Ministers are **decisions** and **instructions** (Article 100/5). (The constitution calls them normative acts or laws in the material meaning.)
- The **normative acts of ministers (orders and instructions)** and governing bodies of central institutions. We may mention the Central Election Commission, the Supreme State Audit, the National Security Council, etc.



Domestic sources with local power

Local legal acts include:

- **orders and decisions** issued by the regional council (Article 110/4)
- organization and functioning **regulations** issued by the commune, municipality and regions councils (art 113/1)
- **Orders and decisions** issued by local government bodies (art 113/2)

The characteristics of local legal acts

The main features are:

1. They apply to a particular territory.
2. They have **the force of law on that particular territory.**
3. They must comply fully with the laws.
4. Although the powers of the local authorities are connected to the central ones, **the local acts must be built upon the law.**

Most of the acts of the local authorities are issued based on the law and not on the acts of the government.