Constitutions and Rights

1. **Constitutions**

DEF: *constitutions are written documents with all the basic rules outlining the structure of a political system.*

Constitutions are important documents because the specify the rules of government.

Almost all countries in the world have constitutions, as they serve to create and define power.

Constitutions are different from statutes: statutes are general laws passed by legislatures, while constitutions specify the basic structure and framework of government.

Constitutions also almost always have some specification of individual rights for citizens.

Political scientists study the written documents as well as what is practiced. Many states might have constitutions that say one thing, but political behaviour can be very different.

The U.S. Constitution differs from other states in that it is fairly brief and considerably less detailed than others.

1. **The Highest Law of the Land**

Constitutions are the highest law in the land and no other laws can contravene them.

As such, constitutions are very difficult to change and usually require more than a simple majority.

* 1. **the General Nature of Constitutional Law**

Because a constitution cannot cover every problem, courts have to interpret the meaning of the constitution.

Judicial review is a power that is relatively new and began with the American courts. It gives power to rule on the constitutionality of legislation.

DEF: *judicial review is the ability of courts to decide is laws are constitutionals and it is not present in all countries.*

Courts are never consistent and how they read the constitution depends on how activist they are (not necessary a liberal practice)

DEF: *judicial activism is willingness of a judge to override legislatures by declaring statutes unconstitutional*.

The opposite philosophy is Judicial restraint.

DEF: *judges’ unwillingness to overturn statutes passed by legislatures.*

* 1. **Constitutions and Constitutional Government**

Constitutions are deeply affected by how they are interpreted by various people in society.

Political culture a lot in the interpretation of constitutions, and some states with the same constitutions could interpret them differently.

DEF: *political culture is the psychology of the nation regarding politics.*

Ex. Swedes are obedient, Italians not so much and even though they have similar constitutional orders, those written rules function differently.

Constitutionalism *refers to the degree to which power is limited in society.*

Constitutionalism has its roots in the Magna Carta, which limited the rights of the monarch in relation to the nobility.

In a constitutionally governed nation, laws and institutions limit the ability of the state to trample the rights of citizens, but this varies, as evidenced by the U.S. actions against Japanese Americans during WWII.

Totalitarian and authoritarian states never have constitutionalism (even if they have a constitution) because there are no limits on the power of government.

* 1. **The Purpose of a Constitution**

Constitutions serve three general purposes:

1. A STATEMENT OF NATIONAL IDEALS

They indicate the values, ideals and goals of those who draft the document.

The Preamble to the U.S. Constitution is an eloquent and precise statement of the values and ideals that matter in the U.S. creed, justice, domestic tranquillity, common defence, general welfare etc.

1. FORMALIZES THE STRUCTURE OF THE GOVERNMENT

Constitutions also define who has power, how much power they have, the uses of that power and the limits on that power.

1. ENSTABLISHES THE LEGITIMACY OF THE GOVERNMENT

Constitutions give a government legitimacy which is both practical and symbolic. Most constitutions were written after regime changes and seek to justify the new order's right to rule.

Constituent assemblies are formed after a change of regime to write a new constitution.

1. **Can Constitutions Ensure Rights?**
   1. **Civil Liberties and Civil Rights**

The Holocaust, the Rape of Nanking, the famine induced by Mao, the terrors of Stalin, all contributed to a desire to see some sort of articulation of basic rights for everyone that governments could not arbitrarily take away.

This culminated in the adoption of the United Nations' Universal Declaration of Human Rights. The Declaration includes political economic and cultural rights.

The Declaration is an important statement, but it is hard to enforce and few states have tried to do so.

* 1. **Minority Groups and Civil Liberties**

No state is truly homogenous, most have citizen from several backgrounds.

As such, there are always conflicts that arise in states where the majority seeks to infringe on the basic rights of a minority.

The Declaration says that minorities have a right to preserve their cultures, but there is often pressure by the majority to make the minority conform (ex. speak their language).

It is unclear whether the Declaration should be enforced in these cases. This is illustrated by the U.S. debate on multiculturalism.

1. **The Adaptability of the U.S Constitution**

Constitutions are not static documents: they can change and evolve over time.

The U.S. Constitution does not mention political parties, but they have evolved in the U.S. political system.

Because constitutions cannot foresee every problem that might arise, they must be flexible to adapt over time. The changing nature of Constitutions is illustrated by the Right to Bear Arms and freedom of expression.

* 1. **the Right to Bear Arms**

2008 Heller case ruling by the Supreme Court stated the right to bear arms was an individual right.

The Framers of the Constitution saw the right to bear arms as a militia right to prevent the concentration of power. The Supreme Court modified the language of the Constitutional provision.

The Heller case raised a bunch of new questions surrounding the right to bear arms.

Are there any restrictions on gun ownership?

Can states and cities still impose reasonable restrictions?

1. **Freedom of Expression in the Unites States**

Free speech is critical in democratic societies.

In the U.S it is protected by the First Amendment to the Constitution, which says that “Congress shall make no law abridging the freedom of speech”. Freedom of speech is an American problem, as many states regularly have all sorts of restrictions on speech.

Hate speech is just one example of this, as illustrated by the British Columbia case.

The Supreme Court has said that Congress can limit speech when there is a clear and present danger (this has been modified some by later Courts).

Nonetheless, First Amendment controversies are never-ending.

The Pentagon Papers case is a good example of government trying to engage in prior restraint or restricting speech before the fact.

* 1. **Free Speech and Sedition**

Even though the Constitution protects free expression, the 20th century has seen numerous attempts to limit speech.

Sedition, criticizing the government with the intent of fostering discontent and rebellion, is one of these tricky areas of speech.

DEF: *incitement to public disorder or to overthrow the state*

TWENTIETH CENTURY SEDITION ACTS:

Congress has indeed limited speech in response to what has been perceived as real and meaningful threats to U.S. national security.

1. The Espionage Act produced the “clear and present danger” doctrine by the Supreme Court.
2. The 1940 Smith Act made it illegal to advocate the violent overthrow of the government, distribute literature suggesting such actions, or belong to organizations, regardless of how poorly organized, that advocated such actions. Such actions were primarily directed at the Communist Party of the United States.
3. The McCarthy Red Scare saw a host of the most stringent and draconian anti-speech legislation passed by Congress.

These acts also violated other aspects of the Constitution, including the Fifth Amendment's protections against self-incrimination.

* 1. **Rights for Terrorists?**

The War on Terror has further complicated the U.S. discussion surrounding rights and liberties as applied to terror suspects. The Bush administration created a new category called unlawful combatants.

This was a limbo state between criminal and political prisoner that gave people in this category the rights of neither.

The Court ruled that the category had violated habeas corpus rights of those imprisoned, but it did not release the prisoners. What it did is pushing the administration to identify if someone is a criminal suspect or a prisoner of war. In the former, they get a trial, in the latter, they get treated under the Geneva Conventions.

DEF: *“habeas corpus” – detainee may protest innocence before a judge.*

Context is extremely important when thinking about rights because once rights are taken away, they are hard to get back.

National security threats will often lead to a reduction of rights in society.