§ 2 The constitution as a legal institution

I. The concept of constitution (→ in the sense of constitutional theory)

1) Empirical and *normative* concept of constitution

2) Historical and *legal* concept of constitution

3) Who can have a constitution?

- only *states and state-like territorial organisations*
  - including federated states (within a federal state) but not confederations, the UN and other intern. organisations
  - for decades DISPUTED for the European Union

4) *Formal and material* concept of constitution

- a constitution is always a constitution in the formal *and* material sense
- necessary formal characteristics:
  - set of norms originally enacted by a single, comprehensive normative act
    - no "grown" or "emerged" constitutions
  - written form
    - no constitution based on judge-made law (→ Britain has no constitution)
  - primacy (see infra, VI.)
    - must be accepted in theory and generally in practice
    - states with totalitarian (e.g. fascist, communist, islamist) regimes cannot have a constitution; their document called "constitution" is none (e.g. Soviet Union; CONTROVERSIAL for China)
  - specific procedures and requirements for amendments
- necessary material (substantial) charactereistics:
  - function as *basic legal order* of the state
  - basic political-philosophical orientation of the state
    - not necessarily free & democratic or with separation of powers (DISPUTED)
  - organisational design of the state (institutions, procedures etc.)
  - self-identification as a constiution

II. Types of constitution

- constitutions of states, federated states (within a federal state) and supranational unions (EU)
- democratic, monarchic, socialist (not communist!) and islamic (not islamist!) constitutions

III. The constitution as a legal institution of the modern age

- a *legal institution* developed in the modern age for a reliable rough arrangement of the political conditions and a basic orientation and restraint of public power
- allows for developments in the state but channels and limits them, thus achieving by a combination of ***flexibility and rigidity*** a basic ***stability*** in terms of its fundamental values and ideas
- provides the citizen with a *minimum of security and orientation* by issuing basic guidelines to the authorities that make their acting to a minimum predictable.

IV. Functions of the constitution

- to provide for a *basic legal order* of the state
- to *stabilise* the state (in line with its fundamental values and ideas) by combining flexibility and rigidity (allowing for developments and changes but channeling and limiting them)

- to *restrain public power* (by organising, aligning and limiting it), thus protecting the citizen against its illegitimate or arbitrary exercise
- to *legitimise* the exercise of public power (→ as long as it is constitutional)
- to *integrate* the citizens by the common identification with their constitution and its values (→ the phenomenon of *constitutional patriotism*)

V. The pouvoir constituant (constituent power)

- lies with the one who actually has the highest decision-making power in the state in the given moment and, thus, enacts the constitution
  - *can be anyone* (monarch, prince, military junta, dictator, party, states uniting to a federal state etc.) but according to democratic constitutional theory it *should be the people*
  - in non-democratic systems, a new constitution will often be drafted by those in power but then submitted to referendum so that it will be formally a constitution based on the constituent power of the people (→ frequent example: Thailand)
- in the case of the European Union (a non-state but state-like supranational union based on public intern. law), it cannot lie with the people but only with the member states who need to sign and ratify the constitutional treaty (as so-called "masters of the treaties)

VI. The primacy of the constitution

- the most essential characteristic of the constitution and a precondition to its functioning as a legal institution in the sense of modern constitutional theory
- first established by ***U.S. Supreme Court, Marbury v. Madison (1803)***: the constitution as the "supreme law of the land"
- for a long time disputed (even in Germany in the late 19th century) but generally recognised since the end of the Second World War
- within the legal order of the state, a higher-ranking legal norm is not possible
- *primacy in validity* (hierarchical primacy): conflicting domestic law is *void*

VII. The direct applicability of the constitution

- *all public authorities* are *directly bound* to the norms in the constitution, which are addressed to them; they are not allowed to wait for a regulation in the relevant laws
- this concerns in particular constitutional principles and fundamental rights
  - example: the citizen can invoke directly the many sub-principles of the rule of law under art. 20(3) of the German Basic Law or art. 1(3) of the Indonesian Constitution of 1945 in criminal or administrative procedures, even if provisions relating to them are missing in the relevant codes

VIII. The interpretation of ordinary law in conformity with the constitution

- among several possible interpretations of a norm only those are admissible that are compatible with the constitution; moreover, the norm must be applied in a compatible way
  - examples: narrow interpretation of indefinite legal concepts, moderate exercise of wide discretionary power
- thus, often the invalidity of the norm can be avoided but this may tempt the legislator to shift the risk of violating the constitution to the executive
- however, only possible *within the limits set by the rules of legal methodology*
  - examples: no interpretation of a norm contrary to its wording, no "re-interpreting" of non-discretionary to discretionary clauses
  - if not possible, official must not apply the norm, document his decision and give reasons

IX. Constitutional interpretation

1) The classical methods of constitutional interpretation

- the same as for the interpretation of any law and for any type of constitution

a) Grammatical (literal) interpretation

- focuses on the *wording* of the norm
- wording sets absolute *limit* to interpretation

b) Systematic interpretation

- focuses on the systematic *position* of the provision within a certain part or sub-part of the constitution
- position often indicates function and, consequently, sense of the norm

c) Historical interpretation

- focuses on the *genesis* of the norm
- important for constitutions reacting to the failures of their predecessors

d) Teleological interpretation

- focuses on the purpose (ratio legis) of the norm
- most important in practice

2) Additional specific methods for constitutional interpretation?

- a discussion within German and European constitutionalism

a) Interpretation with regard to the *unity of the constitution*

- the constitution shall be understood as a homogeneous whole and inconsistencies between individual provisions shall be resolved in its overall context
- a special kind of systematic interpretation

b) Interpretation according the principle of *practical concordance*

- colliding constitutional norms and values (e.g. the fund. rights of different citizens) shall be reconciled gently by considerate concretisation and balancing allowing all of them to unfold under reciprocal limitation as far as possible
- a further development of the approach of the unity of the constitution

c) Interpretation with *comparative approach*

- foreign constit. law and jurisprudence of states based on the same fundamental values and ideas shall be considered in the interpretation of the domestic constitution
- a *rich source of inspiration* within teleological interpretation
  - helpful notably to develop fundamental rights doctrine and interpret constit. principles
  - used in practice by almost every constitutional court but not always in a transparent way