

# § 2 Basics of constitutionalism

## I. Concept and types of constitution

- a constitution in the sense of constitutional theory is always a constitution
  - in the *normative* (not empirical) sense
  - in the *legal* (not just historical) sense and
  - in the *formal and material* sense
    - formal characteristics: set of norms originally enacted by a single normative act, written form, primacy, specific procedures and requirements for amendments
    - material characteristics: function as *basic legal order* of the state, basic political-philosophical orientation of the state, organisational design of the state, self-identification as a constitution
- 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

## II. The constitution as a legal institution

- 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
- functions of the constitution:
  - to *stabilise* the state *by* combining *flexibility* (allowing for developments and changes) and *rigidity* (channeling and limiting them)
  - to *legitimise* but also *restrain* the *exercise of public power* (and, thus, to protect the citizen)
  - to *integrate* the citizens by the common identification with their constitution and its values (→ the phenomenon of *constitutional patriotism*)

## III. The pouvoir constituant (constituent power)

- lies with the one who in the given moment actually has the highest decision-making power in the state and, thus, enacts the constitution
  - this *can be anyone* but in a democratic state it *must be the people*

## IV. The constitution as binding law

### 1) The legal character of the constitution

- not a political (programmatically) document but legally binding

### 2) The direct applicability of the constitution

- *all public authorities* are *directly bound* to the constitutional norms 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

### 3) The primacy of the constitution

- 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 19<sup>th</sup> century) but generally recognised since the end of the Second World War
- cannot be accepted by totalitarian regimes (therefore → no communist, fascist or islamist constitutions)
- primacy in validity: any conflicting national or sub-national law is void
- primacy, of course, also over moral and religious norms
  - no custom, tradition or religious dogma can call into question a constitutional norm!

#### 4) **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; furthermore, the norm must be applied in a compatible way
- examples: narrow interpretation of indefinite legal concepts, moderate exercise of wide discretionary power

### V. **Constitutional interpretation**

#### 1) **Classical methods of interpretation**

- *literal* interpretation (focusing on the wording of the norm)
- *historical* interpretation (focusing on the genesis of the norm)
  - important for constitutions aiming to react to the failures of their predecessors
- *systematic* interpretation (focusing on the norm's systematic position)
- *teleological* interpretation (focusing on the purpose of the norm)
  - most important in practice

#### 2) **Discussed additional specific methods for constitutional interpretation**

- interpretation with regard to the *unity of the constitution*
  - understanding the constitution as a homogeneous whole
- interpretation leading to *practical concordance*
  - colliding values and norms shall be reconciled gently by considerate concretisation and balancing allowing all of them to unfold under reciprocal limitation as far as possible
- interpretation with *comparative approach*
  - just a convenient rich source of inspiration within teleological interpretation
  - helpful in particular in the field of fundamental rights and constitutional principles

### VI. **Milestones in constitutional history**

- see **Diagram 1**