

# Introduction to constitutionalism: the legal institution of the constitution

## I. Preconditions of constitutionalism: the world order of states<sup>1</sup>

- Planet Earth is not a legal entity but divided into ca. 200 legally independent (sovereign) territorial governing entities, which are called "states" (*principle of the territorial state*).
- Each state enjoys underived and independent legal capacity to act in internal and external affairs (*sovereignty*); this includes the power to decide itself about its political and legal order.
- Most states have regulated the *basic legal order of the state* in a comprehensive document with special legal force: the Constitution (exceptions: UK, NZ, totalitarian states)

## II. What is a constitution and what is the background of the constitution as a legal institution?

- Quick introduction: A constitution is a special kind of written statutory law, which forms the basic legal order of the state and enjoys primacy over all other law in the state.
- The constitution in the legal sense is a **legal institution** (a construct of law) *developed in the modern age* in North America and Europe (especially France) for a reliable rough arrangement of the political conditions in a state
  - the most important invention of lawyers in the history of mankind
  - based on a sophisticated political-philosophical doctrine: **constitutional theory**.
- The functions of a constitution are:
  - to *stabilise* the state *by combining flexibility* (allowing for development 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*).
- A constitution in the sense of constitutional theory is always a constitution in the *normative and legal* (not just empirical or historical) and in the *formal plus material sense*
  - formal characteristics: set of norms in *written form*, originally enacted by a single normative act, with *primacy* and *specific procedures and requirements for amendments*
  - material characteristics: function as *basic legal order* of the state, *basic political-philosophical orientation* of the state (in Indonesia: Pancasila), *organisational design of the state*, self-identification as a constitution

## III. Who can have a constitution?

- a sovereign state (in the sense of public international law)
- a federated state within a federal state (e.g. Texas, Queensland, Bavaria)
- disputed for the European Union (which is not a state but very similar to a state)

## IV. Who has the power to enact a constitution?

- 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, effectively enacts the constitution
- this *can be anyone* but in a democratic state *must be the people*
- the constituent power must be distinguished from the constitution-amending power (*pouvoir constituant constitué*), which is regulated and limited by the constitution in force.

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<sup>1</sup> Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

## V. What characterises the constitution as binding law?

### 1) The legal character of the constitution

- it is 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: moderate exercise of wide discretionary power and narrow interpretation of indefinite legal concepts (such as "public order" etc.) with regard to the citizen's constitutional rights

## VI. How is a constitution interpreted?

### 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*
  - a convenient rich source of inspiration within teleological interpretation
  - helpful in particular in the field of fundamental rights and constitutional principles

## VII. Which were the most important milestones in constitutional history?

- for self-study - see special Diagram