

§ 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 - formal characteristics: set of norms originally enacted by a single normative act, written form, primacy, specific procedures and requirements for amendments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 provide for a *basic legal order* of the state
 - 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 (programmatic) 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 19th 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
- 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

V. Constitutional interpretation

1) **Classical methods of interpretation**

- the same as for the interpretation of any law:
- *grammatical (literal)* interpretation (focusing on the *wording* of the norm)
 - the wording sets the absolute limit for any legal interpretation
- *systematic* interpretation (focusing on the norm's *systematic position*)
 - position often indicates function and, consequently, sense of the norm
- *historical* interpretation (focusing on the *genesis* of the norm)
 - important for constitutions aiming to react to the failures of their predecessors
- *teleological* interpretation (focusing on the *purpose* [ratio legis] of the norm)
 - most important in practice

2) **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
 - a constitutional court may deviate from the interpretation of similar clauses by the constitutional courts in other countries, but needs to explain the reasons for it

VI. Milestones in German constitutional history

- see [Diagram 2](#)