CONSTITUTIONAL LAW – MODULE I

1. The contents of the concept of constitution

Constitution: legal document containing the fundamental principles and rules of the social and political interactions within a community.
A constitution is needed in order to avoid tyranny and it is assumed to contain:

- A definition of public power and of the institutions rightfully entrusted with its exercise;
- A list of fundamental rights;
- The criteria for the public power and its exercise to be regarded as legitimate;
- A proclamation of the specific identity of the community;
- The specification of the procedures for issuing statutory laws and administrative acts;
- The self-definition of the constitution as the highest law within the hierarchy of norms.

2. The western constitutional tradition

Public power is always, to some extent, threatening due to its competence and effective capacity to impose on individuals certain actions and to forbid others. A way to tame public power is the "bottom-up" system in which the power ascends from the governed (vested in the individuals and comes up from them to those who are chosen to govern the political community). In the "bottom-down" system, opposite of the "bottom-up" system and typical of the autocratic form of government, the power descends and falls down from above to those who are vested with it, leaving the subjects excluded from the decisions.

Definition and limitation (or control) of Public Power

Public power is considered sufficiently defined if its rules are transparent to those who have to abide by them. The limitation of Public Power is realized through two different institutional solutions:

- The division of powers;
- Federalism.

The idea of "constitution" as the founding document of a public power that, by defining itself, also restrains its spheres and forms of intervention emerged in the Ancient Greek poleis and in the Roman Republic. Their principle was based on the principle of isonomy, according to which everyone needs to be able to have access to and understand the law.

The division of Powers as the first instrument for the limitation of Public Power

In 1653 the former Commonwealth of England, Ireland and Scotland issued a constitutional document (Instrument of Government) in which Public Power was clearly defined and limited through its division into separate powers.

- Article 1 defines what has to be understood as the "Public Power" and which institution is endowed (provided) with it. It also stated that the king and the Parliament are jointly endowed with public power but they have different competences, so that public power is internally divided.
- Article 2 clarifies the competences of the King, giving them the executive power.
- Article 5 specifies that the competence to conduct negotiations with foreign states and to sign treaties is also vested in the executive (king).
- Article 6 underlines the role of the Parliament, which is granted legislative power.

The document already qualified the principle of the division of power as an inescapable condition for the legitimacy of Public Power.
This principle was then taken up in the Declaration of the Rights of Man and Citizens in 1789.

- Article 16 asserted that any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution.

Legislative, executive and judiciary have different competences and separate organizations and the way in which they interact, or in which they balanced against one another, may be different. Thus, the forms of government express the different ways in which the distinct powers are organized in their mutual relationship within general context of the democratic form of state.

The Parliamentary system

Executive power	The executive power is indirectly legitimate by the citizenship (legislative power). The government is not elected by the citizens, but it is vested with its competences by the parliament (only elected constitutional organ).
Vote of "confidence"	The parliament has to express the vote of "confidence" to the government in order for the latter to legitimately become operational. The "confidence" can be expressed to the proposed head of government or to the government as a whole and it can explicit or implicit. In countries in which a parliamentary vote is required, the head of government (or the government as a whole) is considered to having "confidence" of the parliament if it is approved by absolute majority (more than 50% of the total votes), simple majority (more than 50% of the votes cast) or in the absence of an absolute majority for those who oppose the "motion of confidence" (less than 50% against of the votes cast). When the parliament is composed of 2 chambers, the "confidence is generally voted by the LH.
No "confidence" and dismissing of the government	The government can also be dismissed by the same parliament through the approval of a "motion of no confidence". This can happened through simple majority, absolute majority or through a "constructive vote of no confidence.
Head of Government	In some countries, the head of Government has no specific authority over their ministers nor can they dismiss or substitute them. In other countries, the head of Government is the only person who is accountable before the parliament, so they can freely choose the members of their cabinet. They are also granted with the "last word"on every decision of the cabinet.
Duration of the parliamentary term and early dismissal	The duration of the parliamentary term is fixed. Nonetheless, the parliament can be prematurely dissolved, especially when the government has been dismissed by the approval of a "motion of no confidence" and no other majority is in sight. The power to prematurely dismiss the parliament rests with the Head of State, although their power to take this decision is strongly limited. The decision to prematurely dissolve the Camber (or Chambers) is signed, in some cases, only by the Head of State, in others, together with the Head of Government.
Head of State and their role	The Head of Government doesn't have any competence to decide on which policies should be adopted (Head of Government or Government as a whole). The Head of State represents the country, without taking any relevant political decision. The Head of State can also be a Monarch but their powers are even more restricted than in the other countries that adopt the parliamentary system. If the Head of State is not a monarch, they are generally elected by the parliament with a specific procedure. The Head of State is also, at least formally, the commander in chief of the armed force.
Chambers	There might be one Chamber or two Chambers, the Lower House and the Upper House. In the second case, the Chambers have different functions. The vote of "confidence" is generally granted by the LH, while the UH has only limited legislative competences.
Electoral system	- Strict majority system: the candidate who obtains the relative majority is elected. - Generous proportional system with only a "natural" threshold. - Proportional system with a nationwide legal threshold. - Different combined methods .

The Presidential system

Head of State	The Head of State is, at the same time, the Head of the Government so they have competence on which policies should be adopted. They are also the commander in chief of the armed forces. The president freely appoints and dismisses the ministers (assist him).
Legitimation of the Head of State	The president is legitimated through the vote of the citizens. The parliament and the president have two distinct and potentially competing legitimacies. The legitimation may happen in different ways but, in most cases, the election is direct: a candidate is considered elected if they obtain the absolute majority. The US represents a remarkable exemption since the election is indirect: the citizens formally elect the members of the US Electoral College, who then elect the president and vice-president. The election of the US Electoral College happens on state-based and all the candidates are linked to one of the presidential candidates. The presidential candidate who obtains the most votes in a State, also gets al seats of this state in the US Electoral College.
No vote of "confidence"	No institution like the vote of "confidence" (or no "confidence) exists.
Limitation of power	The presidential powers are to be limited so as to avoid a possible drift towards authoritarianism. - Limitation of the presidential mandates;
The autonomy of the legislature	"Checks and balances" have to be secured by an independent judiciary and an autonomous parliament. The autonomy of the legislature should be based on the fact that the executive doesn't need to control the parliament in order to be legitimated. The executive power shouldn't intervene in the legislative activity, which has to be an exclusive competence of the parliament. Nor should it undermine the legitimacy of the parliament and have the power to prematurely dissolve the latter. No mention is made of the delegation of the legislative powers to the executive.

The semi-presidential system

Executive power	The executive power belongs to both the president and the prime minister. Their legitimacy has distinct sources: - Directly elected by the citizens (president); - Can be dismissed by the Parliament through a vote of "no confidence".
President's competences	The president decides on which policies should be adopted. As a consequences, they have broad competences. The president is granted substantial priority over the prime minister. The president has the power to appoint the latter. Since the prime minister needs to have the support of the parliament, the smoothly functioning of the executive power can only be guaranteed if the president has control over the parliament. This happens through an electoral system that facilitates the election of a parliamentary majority which coincides with the party that supports the president. The president has generally the power to appoint the prime minister and their ministers, to terminate their appointment, to preside over the meetings of the government, to declare the state of emergency, to call for referenda and to dissolve the LH. The government is generally depending on the president's decisions.
Vote of "confidence"	No vote of "confidence" by the parliament is necessary for the appointed government to gain the full powers (confidence is taken for granted). The parliament can pass a motion of "no confidence" forcing the government to resign. In this case, the president, has he power to dissolve the LH.

The parliament	The parliament is weaker than in the other forms of government as it doesn't provide a robust counterbalance to the executive (weaker than the presidential system) and it has less control and legislative powers (parliamentary system).

Federalism

Federalism divides public powers on territorial basis so that the authority of the central public power is kept under control by the recognition of significant competences to the federal subunits (states).

- Competence-dividing Federalism (USA)
  The competences of public power are either attributed to the federal institutions, or to the institutions of the federated states. Art. 1 of the US Constitutions lists only a few matters in which the federal institutions have competence (currency, international treaties, defense). The most important is the Commerce Clause, which delivered the constitutional basis for a significant extension of the federal competences in two important periods of the US history:
  - The *New Deal* period was characterized by federal investments and public spending in national infrastructure in order to trigger an economic recovery after the dramatic economic crisis during the Great Depression (1920s – 1930s). Furthermore, the federal legislation aimed at improving the social condition of the workers by introducing, for instance, minimum-wage laws, child labor law and the agricultural relief laws. Yet, this kind of federal guarantee of social rights was not directly covered by the competence constitutionally attributed to the federal government. Therefore, the federal government resorted in the Commerce Clause by arguing that the recognition of social rights would impact on the commerce between states to the extent that it would create inhomogeneous conditions.
  - The *Civil Right Movement* period the federal civil rights legislation and enforcement were mainly thought to prevent discrimination against Afro-Americans by States institutions and private entrepreneurs: also in this case federal measures were justified by arguing that discrimination would have consequences for the commerce between States.

  In the last decades, the Supreme Court has gone back to a more restrictive interpretation o the Commerce Clause, following the new trend to constitutional "originalism". Federal legislation and measures are directly implemented by federal institutions.
  The strict division of competences between the Federation and the States is reflected by the organization of the judiciary power. As a result, there are two distinct judicial systems, both with three instances:
  - The first comprises the State Courts which deal with matters of State competence.
  - The second includes the federal Courts with competence on federal matters.
  - The third only decides on matters of law.
- Competence-overlapping Federalism (Germany)
  The German federalism is characterized by the relevant number of "concurrent competences", as of the competences shared by State and federated States. They both cooperate in regulating a large number of significant matters (civil and criminal law, public welfare, many economic matters). The Federated States have the power to legislate only as long as and to the extent that the State did not exercise its legislative power by enacting a law. Furthermore, federal law takes precedence over Land law. The consequence is the centralization of competences in the hand of the State. For that reason, we can speak of a centripetal federalism, in which federal State and federated States institutions are obliged to cooperate.
  However, there are two main counterbalances:
  - The Stat can veto the legislation passed by the Lower House in 35/40% of the cases. The German State is its voting system since the representatives of the federated States have to cast their votes as a single bloc.
  - The second counterbalance is depending on the "executive federalism", meaning that the federal acts are largely implemented by the executive institutions of the federated states, while there there are only a few federal agencies.

  Unlike the US, federal and state courts are not divided on the basis of competence, but with reference to the level of the instance. All cases are first dealt before state courts of first instance, then before state courts of appeal, and finally before federal courts as the last instance.

Regionalism

Competences are divided between the central institutions and regional authorities. The difference between federalism and regionalism is that in federal states the original sovereignty rests with the states, which are assumed to have transferred part of it to the federation.
Through this process, the federation acquires autonomous sovereignty, so that the federated states are not endowed with the power of taking back unilaterally the transferred competences. In contrast in regionalist institutional structures the original sovereignty completely rests with the nation.
In *Italy*, for example, the regions are endowed with significant competences and, according to the wording of the Constitution, the central state has less possibilities of intervention than in federal Germany. The Italian central state must limit itself to the regulation of the "general principles" in concurrent matters.

3. The protection of human rights

Human rights shall be protected against any abuse by the established powers. Until the 17th century there was no specific term for "individual rights", since *jus* and *lex* were used indifferently, referring both to what is assumed yo be objectively, and not subjectively. It is not until the work of Thomas Hobbes in the middle of 17th century that the meaning of "right" (*jus*) and "law" (*lex*) were clearly distinguished.
The first anticipation of a constitutional document containing a proclamation of rights and a mechanism to guarantee their protection has been laid down in the Magna Charta Libertatum of 1215, which attribute some fundamental rights. Furthermore, the Magna Charta, required the convocation of an assembly composed by the members of higher clergy and secular aristocracy, as well as its consent as *a conditio sine qua* for the introduction of new taxes.
The Magna Charta contained an element which was quite unusual, the right of resistance, or even rebellion, against an oppressive power.
The turn came at the end of the 18th century, when rights were no longer seen as a concession made by the public power in charge, but as an essential endowment of the individuals even before they enter into society. The only essential purpose of society would consist in the safeguard of individual rights, which represents the very reason for the transition from the state of nature to social order.
It was in the Virginia Bill of Rights (1776) that the principles of a public power *ex parte civium* (on the side of the citizens) were formulated for the first time.
Coherently, we have in the document the first list of civil and political rights (right to fair trial, freedom of press, right to free elections).
Many of the rights that we find in the VBR were then taken up, specified and expanded in the French Declaration of the Rights of Man and of the Citizen (1789). In particular, it reasserted some political and civil rights as, for example, freedom of opinion and religion and the right to participate in the formation of the general will. Moreover, the sovereignty of the nation and the division of power were proclaimed.
A further step as regards the recognition of fundamental rights, happened with the Weimar Constitution, the first German republican and fully democratic constitution. With the Weimar Constitution, a third category of rights was introduced: social rights.
The constitutions promulgated in the second half of the 20th century were distinguished by the introduction of a new kind of rights: environmental rights.
The last stage in the development of the constitutional recognition of rights was introduced by some Latin American constitutions in the first decade of the 21st century, in which there was a switch from individual to collective rights.

The classification of rights

Fundamental rights are enshrined in national constitutions and attributed prima facie to citizens However, many of them (in particular civil rights and some social rights) are then also extended to non-citizens residing on the territory of the state. Human rights, instead, are endowed in principle to all human beings; they are part of international law, whereas particular importance must be attached to UN Covenants and Conventions.
Fundamental rights are divided in three categories:

- Civil rights: as those rights that are guaranteed by the non-intervention of the state in fields directly concerning the "negative freedom" of the individuals.
- Political rights: as those rights which guarantee the active participation of the citizens in the law-making processes.

- Social rights: as those rights which are secured by the positive intervention of the public power in order to guarantee to all citizens a social condition that enables them to act as full-fledged members of the social and political community.

In the last decades, some more categories have been added to the traditional catalogue, each of them implying some kind of a quality leap: the recognition of environmental rights introduces a new category of rights which we could define as "shared rights". Indeed, while the rights holder remains the individual, the way how the right is enjoyed differs from the previous categories.
The introduction of collective rights has shifted the holder of rights from the individual to the community, whereas conflicts may loom between the right to individual self-realization previous and the right of the community to exist and to maintain its identity.
So far, the holders of rights were always human beings. Recently, however, it has been claimed that some essential rights should be acknowledged to non-human animals as well because of their quality as sentient beings.
In all previous categories the rights bearers are living beings, yet, due to the development of Artificial Intelligence (AI), the question arises whether non-living entities should be granted some fundamental rights and, if so, which ones and under which conditions.

Laying down the criteria of Public Power's legitimacy

Public power needed to justify its existence by having recourse to a profoundly innovative means: namely, the consent of those who are subject to it. In this sense, the constitution became the normative guarantee of the legitimacy of public power.
In Greek Poleis and Roman Republic the fundament of public life was not the will of individuals deliberately joining in order to ground a political society, but rather a shared myth on the origin of the community or the fiction of a kinship. A similar approach can be found in the constitutional tradition influenced by the Reformation as well.
The transition from the conception demanding popular consent as a validation of the support given by the citizens to an order thought to be objectively just, to the requirement that the order should be legitimated "from the bottom up" has been gradual.
The Agreement of the People (1647), the constitutional document which, in Cromwell's England, anticipated by about 6 years the Instrument of Government mentioned above: while the Instrument of Government was largely centred on the figure of the Lord Protector, the Agreement of the People was almost entirely concentrated on the representative assembly, to which a broad authority with regard to the legitimation of public power was recognized.
The same spirit also imbued, some years earlier, the founding documents of the New England Colonies, in particular of Connecticut and Massachusetts, in which the principle of the self-organization of the community was implemented by the attribution of far-going competences to the representative assemblies. Its not surprising that the role played by the Virginia Bill of Rights has been a pivotal element for the transition from a "top-down" legitimation of public power to its "bottom-up" understanding. The same idea is taken up in the Declaration of Independence of the USA.

The Electoral Systems

The Electoral Systems those systems which allows to translate the number of votes validly cast by the citizens at the polls into a corresponding number of representatives in the parliamentary assemblies.
There are, essentially, four kinds of electoral systems:

- Plurality System: according to which the national territory is divided in as many constituencies as the number of representatives to be elected. In each constituency the candidate who is elected is the one who, in only one turn, gets a relative majority of the votes. Even if fairly simple this method as the disadvantage that the parliamentary assembly has a relatively low level of representativity of the electorate. In order to respect the principle "one man one vote", the constituencies should be structured in a way that guarantees that the number of potential voters in each of them is as homogeneous as possible.
- Majoritarian Systems: the least common of the systems, also divides the territory in constituencies which correspond to the elected candidates. However, it requires that the candidate gets a significant majority of the votes. That means that, in the first round, the candidate, in order to be elected, has to get at least the simple majority of the votes. If this does not happen, the candidates with the most votes are admitted to a second round. The candidate who gets the most votes in the second round is considered elected. With reference to the dimension of the constituencies, the same principle applies as in the plurality system. The

criterion for the admission to the second round can consist in having attained one of the two best results in the first round, or an electoral threshold can be applied.

- The Proportional Systems: is the most widespread, with roughly 80 countries in which it has been adopted. Also in this case the territory is divided into constituencies; however, each constituency elects not only one, but many members of parliament. The different parties present lists of candidates in each constituency, and as many candidates of each party will be elected depending on the proportion of votes validly cast for the same party in that constituency. This system should guarantee that also minor parties are represented in parliament. Since in general more parties are represented in parliament than in the other electoral systems, it is said that the proportional system prioritizes representativity as against governability.
  Three elements are relevant:
  - The dimension of the constituency: the larger the constituency, the bigger are the chances of minor parties to send representatives to the parliament.
  - The electoral threshold: is introduced in order to limit political splintering.
  - The mathematical formula: adopted in order to transfer the percentage of votes into a certain number of seats.
- The Mixed System: combine, in a specific way, elements of the majoritarian system with the elements of the proportional system.

The Parliamentary Assembly

The parliamentary assemblies are the constitutional organs that represent the citizens. In some countries the parliament is composed of only one chamber (unicameral parliaments), but in many other countries the parliament is bicameral (it has two Chambers or Houses, the Upper House and the Lower House).
While the functions of the Lower Houses are generally quite similar in all countries, the composition and competences of the Upper Houses vary widely.
The most significant elements of the composition of the Upper House and its relationship with the Lower House:

- In most cases the UH represents the subunits of which the nation state as a whole is composed and the representation can be more or less effective.
- Originally, the UH was the expression of aristocracy, while the LH had the task of representing the whole population. A reminder of this tradition can be found in those UHs, whose members are not elected but appointed by the head of State, mostly following a proposal of the head of government.
- With reference to the competences of the UH, Italy is probably the most significant exemption since both Houses are essentially the same.
  In some countries both Houses have equal powers with reference to the legislative function, which means that a bill, in order to become a law, has to be passed by both Houses, on the basis of a similar procedure. However, in the case of Canada, the Senate rarely vetoes a bill brought forward and already approved by the directly elected Lower House. Furthermore, the US Senate is endowed with 2 important powers:
  - Confirm the president's appointments of the highest ranks of the federal authorities and of the federal judiciary through the procedure of advice and consent;
  - Ratify international treaties.

The foundation of the identity of the political community

The problem arose at the moment when the structure and competences of public power were submitted to the scrutiny of citizens freely committed to create a body politic in order to guarantee their life conditions and fundamental rights. The constitution is interpreted here as the document founding the identity of the political community. The first document attesting so was the Mayflower Compact of 1620, in which the philosophical vision of the social contract acquires historic concreteness. Moving to the European continent, the conception of collective identity, subtly yet significantly, altered its genetic code. The American "*We the People*" mutated into the French reference to the nation as the fundament of any public power. Into the concept of the nation, merged the idea of popular participation with that of a pre-reflexive and quasi-natural belonging. The idea of a "national constitution" amalgamated the distinct and at least partially contradictory elements of a collective identity based on popular participation on the one hand, as well as of an existential and exclusive self-affirmation of a pre-political

ethnos on the other. The constitution can be regarded as the document which lays down the foundation of the identity of the political community and this identity is equated with the "nation", we are confronted with two alternatives:

- "Nation" as based on pre-reflexive belongings (non-political and non-legal factors such as history, language, heritage).
- "Nation" in a quite opposite way, as the result of a social integration that essentially depends on the shared identification of the citizens with the norms and values governing their society.

The specification of the procedures for issuing statutory law and administrative acts

It was the Constitution of the United States of 1787 that introduced for the first time specific provisions on how statutory laws and administrative acts had to be legitimately issued. Indeed, as it has been shown above, parliaments have very different compositions and, insofar as they are bicameral, the competences of the two Chambers present a great number of configurations. Furthermore, the executive power can be formally excluded from the law-making process (like in the US), it can play a significant role in it (like in most countries with parliamentary system), or it can play even a predominant role.

The Self-definition of the Constitution as the Highest Law within the Hierarchy of Norms that Govern the Community

The recognition of the dimension of the constitution as the highest law within the hierarchy of norms wasn't simple. Among the factors that have contributed:

- Firstly, the substantial difference between the cases in which the constitution emerges from a relevant historical rupture or it is part of a legal evolution characterized by substantial continuity.
- Secondly, the priority of the constitution over ordinary laws depends significantly on the establishment of a constitutional adjudication.
- Thirdly, not all documents that have been granted constitutional rank and quality contain a clear assertion of their normative superiority over the remaining parts of the legal system.

Constitutional adjudication has substantially three tasks:

- Judicial review: the Constitutional Court or Supreme Court scrutinizes ordinary laws in order to verify whether they are consistent with the constitutional provisions. In case that a law is considered in contrast with the constitutional provisions, it may be annulled (cancelled from the corpus juris), or repealed (the law is treated as inapplicable, but silently remains within the corpus juris).
- Resolve conflicts between constitutional organs.
- Constitutional Courts or Supreme Courts may have the task to protect fundamental rights following a direct petition submitted by a citizen, who reasonably claims that their fundamental rights have been violated.

Curiously, constitutional adjudication came long before the formal establishment of Constitutional Courts. Indeed, the first case of judicial review was a sentence of the US Supreme Court in 1803, namely the famous case *Marbury v. Madison*. According to its wording, the US Constitution does not explicitly attribute to the Supreme Court the power to scrutinize whether an ordinary law or an administrative act is compatible with the Constitution. Yet, in Marbury v. Madison the Supreme Court assumed precisely that power of judicial review, which was not written in the Constitution, creating a precedent that was destined to shape decisively the legal history of the centuries to come.
While judicial review was already introduced at the beginning of the 19th century, the first Constitutional Court was established much later, namely with the Austrian Constitution of 1919. However, the establishment of Constitutional Courts became a usual content of constitutions only after World War II.

4. Constitutionalism outside the wester world

In the non-Western constitutional tradition the main contents of the concept of constitution have been interpreted in a way which is quite different from their original version.

The Islamic constitutions

There are many variants of Islamic constitutions:

- Monarchic constitution;
- Republican constitution.

What is common to both of them is the fundamental role played by the religious element in shaping the identity of the political and legal community, the concept of fundamental rights and the hierarchy of norms.

The Monarchic Constitution of Saudi Arabia

The theocratic essence of the Saudi Arabian monarchy is already evident on the basis of the wording of Art. 1 of its Constitution, where it's stated that islam is the official religion and its constitution is based on God's book and the Sunnah. The religious texts are therefore at the top of the hierarchy of norms. Furthermore, public power is derived from religious revelation. Since religion is regarded as an absolute truth and is constitutionally identified with the foundation of public power, public power itself is also to be considered absolute. The subjects are thus unlimitedly submitted to the king. No division of powers or "bottom-up" legitimation is provided for. Art. 26 specifies, then, which rights are constitutionally recognized.
The catalogue of rights that follows is rather short, with no reference to political rights, only a few civil rights, and a slightly longer list of social rights.

The Republican Constitution of Iran

While the Constitution of the Saudi Arabian monarchy expresses the constitutionalization of a traditional rule, the Constitution of the Islamic Republic of Iran is the result of a revolutionary process. The Preamble clearly states from the very outset that Islam builds the ethical essence of the social and political life of the community.
Therefore, political power and its aims are completely identified with religious contents.
Despite the centrality of religion, the Iranian Constitution states that Iran is officially a presidential republic.
However, a constitutional organ is created which is set above the division of powers (absolute religious leader). All powers are subject to the supervision of the "absolute" religious Leader. This institutional figure, that is, at the same time, religious and constitutional, is defined in Art. 5.
The absolute Leader is elected by the so-called Assembly of Experts. This is a constitutional organ composed of 88 members, who are directly elected by the citizens. Furthermore, the election of each single member of the Assembly of Experts must be confirmed by the absolute Leader himself.
Considering that the Guardian Council is a kind of constitutional court made up of six experts of Islamic law and six jurists nominated by the Head of the judiciary, it becomes evident that the grip of the absolute Leader on all dimensions of power in the Islamic Republic of Iran is factually unlimited.
Due to the enormously broad powers of the absolute Leader, it can be concluded that the Constitution of Iran does not provide for any consistent division of powers or limitation of public power. Moreover, the free development of the democratic process is severely hampered by the unfettered grip that the religious leadership holds on the whole society.

One-Party Constitutions

One-party constitutions were quite common in all countries of the Soviet bloc as well as in all communist states. Meanwhile, only a few of them have survived: Cuba, Vietnam, Laos, and the People's Republic of China (the most important).

The Chinese Constitution

The leading role of the Communist Party is already highlighted in several passages of the Preamble.
Art. 2, para. 1 and 2, states then that the sovereign power is vested in the people, which exercises it through its representatives in the National Congress and in the many local Congresses.
Art. 3, para. 3, provides for a division of powers, at least in principle, but with a significant limitation.
Two elements of the article sentence should be highlighted:

- First, the division of powers is different in form and content from its usual definition in Western constitutions. While the "administrative power" can be considered identical with the executive, the Chinese Constitution makes explicit mention of the offices exercising criminal prosecution as a distinct power.
- Second, all powers are regarded as depending on the representative organs of the legislature. As a result, the independence of the powers is legally undermined in a twofold sense: it is legally undermined because one power dominates over the others and controls them, and it is factually

undermined because the dominant power (as, for example, the legislature) is elected under strict scrutiny by the Communist Party.

5. Supranational constitutionalism

The concept of constitution has recently been applied also to the legal documents and institutional phenomena which are located beyond the boundaries of the nation states.
The first example of application of the concept of constitution to legal and institutional phenomena beyond the borders of the nation states refers to forms of supranational integration, in general, and to the European Union (EU) in particular.

The Primary Law of the EU as the Definition of the Competences of EU Public Power and of Its Organisation

It must be demonstrated that public power at the level of the EU has distinct competences, institutions and procedures, so that it cannot be simply considered an extension of the intact sovereign powers of the member states.
In fact, important evidences speak for the existence of an at least partially autonomous EU public power:

- the establishment of supranational institutions endowed with considerable authority;
- the existence of decision-making processes not traceable back to intergovernmental cooperation;
- a large normative autonomy within the fields of competence;
- the broad scope of the matters the competence on which had been transferred from the sovereignty of the nation states to the EU institutions;
- the direct effect of EU Treaties and regulations on EU citizens;
- the primacy of EU law over national law.

All these elements are sufficient to demonstrate that from the signature of the Treaties of Rome up to the entry into force of the Lisbon Treaty a nucleus of public power *sui generis* was created first at the Community and then at the Union level.
Public power, however, should not only be precisely defined and organised but also adequately limited. It is exactly with regard to this issue that EU primary law is still lacking essential qualities:

- The old problem of the double nature of the Council.
- The ongoing confusion concerning the quality of legal acts. The Treaty establishing the European Community (TEC) did not distinguish legislative from non-legislative acts.
- The European Court of Justice (ECJ) still has no competence in the fields of foreign policy and common security.

The consequence is a problematic lack of balance between the powers, with a clear advantage for the executive, which also lacks adequate parliamentary control in foreign and security policies.

EU Primary Law as the Guarantee of an Adequate Protection of Fundamental Rights

Communities were not grounded on the affirmation of common rights and values, but as organisations centred on the specific goal of economic integration and development. It was the European Court of Justice (ECJ) that assumed the task of putting the question of the protection of fundamental rights on the agenda of the Community's and then of the Union's law and institutions.
To overcome the shortcomings, two solutions were implemented:

- Executive-administrative measures, promoting policies carried out by specific Union institutions with a direct impact on member states. This first solution was realized by the establishment in Vienna of the European Union Agency for Fundamental Rights in 2007.
- Judicial protection of fundamental rights. This second way to improve the protection of fundamental rights within the EU led to the drafting of a Charter of Fundamental Rights, which was solemnly proclaimed on December 7 2000 in Nice.

Following the Lisbon Treaty which entered into force in 2009, the Charter has been included into the Treaties, although not into their main text. However, Art 6, para. 1, guarantees that the Charter "*shall have the same legal value as the Treaties*".
The first problem concerns the contents of the Charter, in particular with regard to social rights, the guarantee level of which is lower than in some countries of the Union or in the most advanced international law and praxis. Also the situation as regards political rights is partially inadequate because of the lack of competences of the European Parliament (EP).

A third flaw is related to the range of application of the Charter, which the Lisbon Treaty provides for to be quite narrow.
In conclusion, the application of the Charter may to a certain extent put at stake the protection of fundamental rights in the member states with the most advanced legal and social traditions.

EU Primary Law as the Normative Guarantee of the Legitimation of Union's Public Power

Since the EU public power is partially autonomous from the member states, its legitimacy cannot be secured by the democratic processes within the member states themselves. The entry into force of the Treaty of Lisbon has finally led to the recognition of the EP as the representative organ of the citizens of the Union. Secondly, the co-decision procedure, in which the EP has the same power as the Council, is ennobled to the status of an "*ordinary legislative procedure*", obtaining in this manner a higher position than other procedures of legislative production of legal acts. Thirdly, the TEU contains provisions concerning principles and practices of what could be referred to as "*participatory democracy*".
Focusing on the competences concerning the production of legal acts, a democratic deficit is evident in all cases in which the EP is not involved in the legislative procedure, or where only consultation is required and the Council votes according to the majority principle. Above all, it is in any case questionable that, in order to come into force, decisions taken at Union level do not require an adequate involvement of the EP.
National parliamentary controls differ widely from country to country with regard both to procedures and standards, the consequence is a lack of democratic legitimacy. Finally, it should be kept in mind that almost all decisions concerning the economic governance of the EU and, therefore, also the way in which the euro crisis has been dealt with, do not require any significant involvement of the EP.

EU Primary Law as the Foundation of the Identity of the European Political Community

A further content of the constitutional tradition consists in the creation of a common identity which can arise from two different sources:

- From the will of an assembly of individuals to build a "*body politic*".
- From the reference to common roots, to a pre-political substrate consisting of a shared culture and history.

With the Constitutional Treaty of 2004, the search for a common European identity made a significant quality leap: it contained the voluntaristic claim of the Union's citizens and of the member states, as well as the pointing out of an alleged common substrate in history and culture. Both elements were then supported by symbolic features destined to reinforce among the Union's citizens a pre-reflexive and substantially proto-national feeling of belonging.
It was precisely on this 4th content (the affirmation of a collective identity) that the axe of the Lisbon Treaty fell mercilessly, cancelling most elements introduced by the Constitutional Treaty. Abandoned are the flag, anthem, motto, and Europe Day as symbols of a rising common identity. And every reference to the "*constitution*" as the founding document of a specific European polity has been removed.
Nonetheless, the TEU contains in Art. 2 a clear assertion of the values that lie at the basis of the project of the European integration:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Furthermore, Art. 7 provides for a procedure to address violations of the values proclaimed in Art. 2 by a member states. The procedure may lead to significant sanctions and even to the suspension of some rights of the member state which has been found responsible for the violations of fundamental values.

6. Global constitutionalism

Different variants of world constitutionalism have been developed in the last decades. They generally deal with the difficult application of the concept of constitution to a domain for which it has not been originally conceived either by reducing or by reformulating its content.

The Global Economic Constitution
A first strand of world constitutionalism limits the application of the concept of constitution to the legal framework that gives rules to the worldwide transactions carried out by economic agents. The reason

for this limitation is that no other field of interaction would have developed a global range as well as shared rules at a comparable level. Two distinct approaches emerge from the general theory of the global economic constitution (GEC).

1. The first identifies the constitutional quality mainly in the legal system and in the praxis of the World Trade Organization (WTO) (public international law).
2. The second in the *Lex Mercatoria* as the system of rules created by private economic agents in order to guarantee the validity of their transactions (private international law).

They rely on an understanding of contemporary law as a deeply fragmented system in which single economic legal regimes have become increasingly independent and self-referent. Furthermore, they restrict the use of the concept of world constitutionalism with regard not only to the kind of interactions that are regarded as constitutionalized but also to the contents of what is assumed to be the global constitution. As a result, the constitution is understood exclusively in its functional dimension as the legal document that:

a) Enables the production of norms by specifying the procedures which govern the issuing of valid rules (5th point of the constitution).
b) Restrains this production by clarifying in which fields no rule-making should take place;
c) Fills the gaps which may arise from disparate norm-issuing actions at the transnational level.

Besides the conceptual problems which originate from the reduction of the notion of constitution to just one element, even if we assume the point of view of the supporters of GEC, some questions remain unresolved.
Even more deep-going are the problems associated with the GEC as a spontaneous private law regime. Indeed, the authors who make the case for this interpretation of world constitutionalism face an old and almost inescapable dilemma: the necessity that private law, in order to be an effective legal regime, must be validated by public law.

The Global Constitution of Governance

The starting point of the idea of a Global Constitution of Governance (GCG) is the acknowledgement of the necessity to meet the growing request for governance of global processes by establishing executive networks composed of members of national governments and of international organizations. Although most authors who can be led back to GCG are explicitly reluctant to apply the concept of "constitution" to their understanding of global order, their interpretation of post-national governance recalls, on a broader scale, what has been labeled as "material constitution" in the theory of national constitutionalism. Beyond the legal framework of a formal basic law, the notion of "material constitution" includes also the non-formal rules and practices of interaction that characterize the social and political life of a community. Therefore, even if GCG lacks a fundamental legal document on which to be based, the assemblage of sometimes disparate rules and practices of rule-making constitutes, nonetheless, a clearly identifiable idea of global order.
Some authors see the GCG as a mixture of regulations issued by public agents (such as representatives of national governments) acting within the context of international organizations, and rules emerging from agreements taken by private actors, like those at the basis of the *Lex Mercatoria*, whereas the line that should separate the two dimensions is not always clear-cut.

The Constitution of Humankind

The word "constitution" was applied for the first time to the organization of the international community in the 1920s. The conceptual foundation of this historical turning point was twofold.

1. Their proposers claimed that a part of international law was expected to be valid not only for the parties involved vis-à-vis, but for the whole humankind.
2. They assumed that the ontological basis for the worldwide constitution is a humanity which shares common fundamental values and interests.

After World War II the legal dimension of the Constitution of HumanKind (CHK) was established in particular through the discipline of the obligations *erga omnes*, on the basis either of the UN Charter or of the theory of *jus cogens*. More concretely, supra-state international law is considered to be "constitutional" as it takes on three main features of historical constitutionalism.

1. Centrality of the individuals and of their rights: state's actions are to be regarded as justified and legitimate only insofar as they aim at the best possible realization of individual rights, both at home and abroad.
2. Increasing inclusion into international law treaties of references to values, should serve as a foundation for a well-ordered international community.

3. Establishment of a germinal division of powers within the system of international organization, whereas the focus is concentrated in particular on the creation of an ever more powerful international judicial power. A more formal approach to CHK underlines rather the function of the UN Charter at the top of the hierarchy of the legal instruments of international law.

Serious criticism has been raised against CHK. In fact, the alleged division of powers within the system of international organization is at best incomplete since the UN Security Council holds both the legislative and the executive competences.

The Democratic and Eco-social Cosmopolitan Constitution

World constitutionalism has been accused of covering up normatively, and thus of improperly dignifying, worldwide hegemonic ambitions carried out by transnational elites. By marginalizing or even annihilating the principle of popular sovereignty, transnational economic agents are allowed to act in a sphere which is less politically controlled by the involved individuals and populations than in national contexts. In fact, constitutionalism, before going global, has never been an elitist undertaking, but a bottom-up project supported by broad coalitions of stakeholders.

A 4th variant of world constitutionalism has been conceived which keeps the contents of the concept of constitution as broad as possible by recognizing the value of pluralism and diversity, as well as by putting the stakeholders at the basis of the entire proposal. The fundament is the communicative understanding of society, according to which this is constituted by different contexts of interaction. The most general and inclusive among these is the one in which human beings are involved transnationally and irrespective of their citizenships and belongings. World (cosmopolitan) constitutionalism is the political project that aims at regulating this kind of transnational interactions with principles and rules in order to make them predictable, inclusive and just.

Cosmopolitan constitutionalism is based on four pillars.

- The first is a rather thin layer of international organizations with the limited task to protect peace and fundamental human rights.
- The second pillar envisages to deepen and broaden the parliamentarization of the institutions of the international community, while the third explores bottom-up forms of non-representative and inclusive empowerment of stakeholders, aiming at the safeguard of the social and ecological conditions of life.
- The fourth pillar is constituted by the politicians, the scholars, the legal professionals, etc., who are committed to an inclusive, just and democratic world order.

Towards a New Concept of Constitution?

None of the variants of world constitutionalism matches perfectly the full range of contents of the national concept of constitution. As a result, we are confronted with two possible outcomes:

- The first is to give up the use of “constitution” for the kind of legal order that is established beyond the borders of the nation state;
- The second is to question which ones of the contents of the national concept of constitution are really essential for the notion to make its use generally justifiable and its application to the postnational context reasonable.

Some considerations may help to find a way out of the dilemma.

1. First, although fundamental rights are since more 200 years an essential content of national constitutions, meanwhile a broad catalogue of human rights has been developed in international law and has been institutionalized through many international law instruments. Apart from the Universal Declaration of Human Rights of 1948, which is a groundbreaking, but not legally binding document, 9 legally binding Covenants have been adopted by the United Nations (UN) since 1965, which cover almost the entire human rights spectrum.
2. Secondly, within the national context the constitutional identity is sometimes defined by references to religious beliefs, national traditions and history, or substantive political goals. Yet, the normative elements of the constitutions cannot but be only formal, in the sense that they are limited to the specification of the rules of interaction.
3. Thirdly, national constitutional identity always implies an element of exclusion: in fact, we are what we are also because we are not what others are. This element cannot be part of a constitutionalism which aspires to include all human beings. A cosmopolitan constitutional identity becomes conceivable if we address the protection of peace and fundamental rights, as well as of the social and ecological conditions of life, as the paramount missions of the cosmopolitan society.

4. Fourthly, if the constitution has to guarantee that social interactions are peaceful and cooperative, then it cannot be value-free. In national liberal and democratic constitutions these values are expressed through the safeguard of fundamental rights and democratic procedures of legitimation. These values should be enshrined also in world constitutionalism. This consideration leads us to conclude that the use of “constitution” is inappropriate if applied to conceptions in which little or no attention is given to the most value-related contents of the basic law of the transnational community.
5. Fifthly, the only content that cannot but be excluded from the postnational definition of constitution is the presumption of the hierarchical supremacy of the constitution within the legal system. Indeed, the jus cosmopoliticum cannot be hierarchical, but is characterized by the dialogical interaction and cooperation of supra-state principles and norms, as well as of political institutions and courts, with their national counterparts. The legal documents which are endowed with the task of shaping the cosmopolis have a constitutional quality as well (and a quality which leads us to the most advanced frontier of constitutionalism).