

# § 12 Constitutional review as an essential element of modern constitutionalism

## I. Historical and theoretical foundations

- constitutional review of laws as a *necessary instrument to enforce the primacy of the constitution* - even against infringements by the legislator
- how it all began: the landmark decision Marbury v. Madison of the U.S. Supreme Court of 1803 - the Constitution as the "supreme law of the land"
- the long way to the development and acceptance of the constitutional review of laws in modern constitutional states
  - in the USA since 1803
  - in Austria in the 1920s
  - in Germany and Italy after the Second World War
  - in France in 1958 (but until 2008 only preventive const. review)
  - in Spain and Portugal in the 1970s
  - in Korea in 1988
  - in East Europe in the 1990s
  - in South Africa in 1994
  - in Indonesia in 2003
- the triumph of the constitutional review of laws in modern constitutional states
  - in Europe it *helped to consolidate free and democratic constitutionalism*

## II. Basic models of constitutional jurisdiction

- 1) **The U.S. model: Constitutional review by the ordinary courts**
  - const. review in concrete cases, as exercise of an inherent part of judicial power
    - usually by all ordinary courts (→ diffuse constitutional jurisdiction)
  - common in particular in common law countries and some Latin American countries
- 2) **The Austrian model: Const. review by a specialised Constitutional Court**
  - abstract and often also concrete constitutional review by a specialised court with usually comprehensive constitutional jurisdiction
    - only by this one Constitutional Court (→ concentrated constitutional jurisdiction)
    - a concept originally developed by HANS Kelsen
  - nowadays the prevailing model; common in particular in Europe
- 3) **The French model: Constitutional review by a Constitutional Council**
  - constitutional review (mainly preventive review) by a specialised institution with limited constitutional jurisdiction
  - common in African and Arab states, Cambodia
  - in practice, French Conseil constitutionnel has approximated to a constitutional court

## III. Constitutional review as a motor for the development of constitutional law doctrine

- constitutional law develops much faster in states with const. review
- constitutional jurisprudence serves as point of reference and inspiration for scientific legal research but also takes up new developments in the scholarly discussion
- in particular important for the development of rule of law and fundamental rights doctrine

#### IV. Constitutional review and separation of powers

- in a free and democratic constitutional state, majority rule does not entitle to override fundamental rights or the rule of law; thus, const. review can thwart the legislator...

#### V. Not always the good guys: Spectacular failures and scandals of constitutional courts

- the arrest of the Chief Justice of the Indonesian Constitutional Court for corruption in 2013
- the controversial role of the Constitutional Court of Thailand in Thailand's political conflicts
- the illiberal abuse of constitutional courts in Europe: the examples of Hungary, Poland and Turkey
- the attempt of a coup d'Etat by the Constitutional Court of Moldova in June 2019
  - politicised decisions attempting to obstruct election of new government by the Parliament
  - rejected by Parliament, President, the public and foreign partners (EU, Russia, USA etc.)
  - heavily criticised in an opinion of the Venice Commission
  - finally resignation of all constitutional judges and election of new judges

### § 13 Constitutional review in Germany

#### I. The German Bundesverfassungsgericht [Federal Constitutional Court]

- see for the details the Federal Constitutional Court Act (FCCA)

##### 1) Status

- court and constitutional organ
  - no administrative supervision, own Rules of Procedure, independent budgeting

##### 2) Structure and organisation

- two *Senates* with each 8 constitutional judges
  - each Senate has several *Chambers* with each 3 judges which decide about admissibility of judicial referrals and admission of const. complaints
- *Plenary* decides if Senate wants to deviate from previous jurisprudence of the other
- *President* and Vice-President
- judges elected (half by Bundestag, half by the Bundesrat) for a 12 years term
- each constitutional judge assisted by 4 highly qualified *scientific assistants*
  - but still a too high workload - for all of them...

##### 3) Role of a model and source of inspiration for the development of constitutional jurisdiction in Europe and the world

- because of its rich, consistent, often elaborate and sophisticated jurisprudence already since the 1950s
- jurisprudence often referred to by other constitutional courts
  - however, very controversial in matters of European integration
- jurisprudence a popular object of the legal research of foreign scholars
  - however, few decisions officially translated into English

## II. Types of proceedings before the Bundesverfassungsgericht

### 1) Disputes between constitutional organs (art. 93(1) no. 1 BL)

- about the constitutional rights and duties of federal constitutional organs or parts of them (or of other parties vested with such rights)
- capacity to sue/be sued: constitutional organ, parts of constitutional organs, other parties

### 2) Abstract constitutional review (art. 93(1) no. 2 BL)

- review of the compatibility of federal and Land law with the BL without special reason (and of Land law with other federal law)
- on application of Federal Government, Land government or ¼ of the members of the German Bundestag
- since 1994 also review of compliance of federal law in certain areas with the requirement of federal necessity in the national interest (art. 72(2) BL) on application of the Bundesrat [Federal Council] or a Land government or parliament (art. 93(1) no. 2a BL)

### 3) Concrete constitutional review (art. 100(1) BL)

- review of the constitutionality of federal or Land statutory law, which a court considers unconstitutional, if the court's decision in the given case depends on its validity (or of the compatibility of Land statutory law with federal statutory law, if the court considers it incompatible)
- judicial referral can be filed by every court but must be thoroughly reasoned

### 4) Federative disputes between Federation and Länder (art. 93(1) no. 3 BL)

- about the rights and duties of the Federation and the Länder emanating from their constitutional federal relationship

### 5) Others (selection)

- constitutional complaints of communes and counties against laws violating their right to self-government (art. 93(1) no. 4b BL)
- electoral complaints (art. 41(2) BL)
- proceedings for the prohibition of political parties (art. 21(2) BL)

## III. In particular: the constitutional complaint (art. 93(1) no. 4a BL)

- review of all kinds of German acts of public power for possible violations of fundamental rights under the Basic Law
- can be filed by anyone but only after all legal remedies have been exhausted
- directly against a law only if the law affects the citizen directly (e.g. in criminal law)
  - otherwise incidental const. review of the relevant provisions
- review of court decisions limited to *specific* violations of fundamental rights
  - Bundesverfassungsgericht no "super appellate body"
- ca. 5.000 - 6.000 complaints per year; therefore filtering of irrelevant complaints in a (non-discretionary) acceptance procedure before a Chamber of 3 judges
- in most Länder also constitutional complaint before Land constitutional court against violations of fundamental rights under the Land constitution

## IV. Special problems

- how to cope with the high workload caused by the high number of constitutional complaints?
- the Bundesverfassungsgericht and the ordinary and specialised jurisdictions
- the risk of a "clash of courts": the Bundesverfassungsgericht and the European Court of Justice