

§ 5 Constitutional jurisdiction

I. Constitutional jurisdiction as an essential element of modern constitutionalism

- the mechanism to *enforce the primacy of the constitution effectively*
 - even against infringements of the legislature
- the landmark decision Marbury v. Madison of the U.S. Supreme Court of 1803
 - the Constitution as the "supreme law of the land" and the right of the courts to review the constitutionality of laws
- the establishment of constitutional courts in Europe in the 20th century
 - in Austria after the First World War (first specialised const. court)
 - in Italy and Germany after the Second World War
 - in France in 1958 (constitutional council)
 - in Spain and Portugal in the 1970s
 - in East Europe in the 1990s
- constitutional jurisdiction as a motor for the development of constitutional law doctrine
- constitutional jurisdiction as important factor for the consolidation of free and democratic constitutionalism in Europe

II. Types of constitutional jurisdiction in Europe

- the prevailing Austrian model: a *specialised Constitutional Court*
 - a concept originally developed by HANS KELSEN
 - most prominent example: the German Federal Constitutional Court
- the French model: a Constitutional Council
 - a specialised institution with limited constitutional jurisdiction
 - in practice, French Conseil constitutionnel has approximated to a constitutional court
- the U.S. model: constitutional review by the ordinary courts
 - e.g. in Ireland, Scandinavia
- the Estonian hybrid model: a constitutional chamber within the Supreme Court

III. The German Federal Constitutional Court [Bundesverfassungsgericht]

- *status*: court and constitutional organ (no supervision, own Rules of Procedure, independent budgeting)
- *composition*: two *Senates* with each 8 constitutional judges; President, Vice-President
 - each Senate has several *Chambers* with each 3 judges (decide about admission of const. complaints)
 - judges elected (half by Bundestag [parliament], half by Bundesrat [Federal Council]) for a 12 years term
 - each constitutional judge assisted by 4 highly qualified *scientific assistants*
- *importance*: a model and source of inspiration for the development of const. jurisdiction in Europe and the world because of its rich, consistent, often elaborate and sophisticated jurisprudence already since the 1950s
- *types of proceedings* (cf. art. 93 BL):
 - disputes between constitutional organs
 - abstract constitutional review of laws
 - concrete constitutional review of laws (on judicial referral by a court)
 - federative disputes between Federation and Länder
 - constitutional complaint
 - others (electoral complaint, prohibition of parties etc.)

- most important proceedings: the individual constitutional complaint (art. 93(1) no. 4a BL)
 - review of all kinds of German acts of public power for possible violations of fund. rights
 - can be filed by anyone but only after all legal remedies have been exhausted
 - review of court decisions limited to *specific* violations of fundamental rights (Federal Constitutional Court no "super appellate body")
 - ca. 5.000 - 6.000 complaints per year; therefore filtering of irrelevant complaints in an acceptance procedure before a Chamber of 3 judges
 - high number of decisions on any aspects of fundamental rights has led to a particularly highly developed German fundamental rights doctrine

IV. Constitutionalism in danger: the attempts of authoritarian and oligarchical regimes to neutralise or abuse the constitutional court

- by cutting its competences, introducing obstructive procedural rules or replacing constitutional judges by government buddies
- the illiberal abuse of const. 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