

# § 1 Constitutional development by the constitutional courts: phenomenon, legitimacy, merits and limits

## I. What is constitutional development?

- definition: development of the constitutional order under the current constitution, within the limits set by its fundamental values and ideas, in the course of time

### 1) Constitutional stagnation and constitutional development

- not all constitutional orders develop: in states under authoritarian regimes and without open society there can be a long-lasting constitutional stagnation
  - example: Indonesia before 1998

### 2) Constitutional making and constitutional development

- the adoption of a new constitution replaces the entire basic legal order by a new one and therefore is legally not const. devel. but a *revolution*
  - for such a revolutionary step there are *no specific legal requirements or limits*

### 3) Constitutional development and constitutional change [Verfassungswandel]

- constitutional change is the (disputed) *substantial change of the contents of const. norms in the course of time*, due to a more "modern" understanding, without change of wording
  - example: wider understanding of "marriage" and "family" after the developments of modern society in the last 60 years
- problem: a change of const. law itself or of its interpretation?
- problem: re-interpretation of traditional legal terms contrary to the clear historical will of the framers of the constitution?
  - can "marriage" exclude same sex couples in the past but include them today?
  - or can the same term mean something different in an old or new constitution?
  - attempts to avoid uncertainty by textual clarifications

## II. How can constitutional law be developed?

### 1) By constitutional amendment

- limited by demanding special formal and procedural requirements

### 2) By constant constitutional practice

- if accompanied by *opinio iuris*
- does usually not create new norms but establishes and consolidates a certain understanding of the existing ones

### 3) By judicial further development of law with the support of legal science

[richterliche Rechtsfortbildung]

- by *creative interpretation of individual const. norms* leading to the "discovery" of new principles or rights as integrated parts of the existing ones
  - in particular creative interpretation of indefinite constitutional concepts
  - example: the successive revealing of numerous sub-principles of the "rule of law" (→ § 2)
- by *creative interpretation of several const. norms read together or of the constitution or parts of it as a whole* leading to the "discovery" of new principles or rights understood as implied in the constitution
  - example: the introduction of numerous new fundamental rights derived from art. 2(1) read together with art. 1(1) of the German Basic Law

- by the "*discovery*" of *unwritten general principles of law*
  - principles that must exist in a legal order based on certain fundamental ideas
  - an approach first developed in French administrative law
  - most prominent example: the "discovery" of numerous general principles concretising the rule of law and unwritten fundamental rights by the European Court of Justice
- by the constant development and consolidation of such jurisprudence in a *dialogue with legal scholars* who analyse, systematise, critically discuss and, thus, impregnate it

#### 4) **By societal change?**

- can const. norms evolve with unchanged wording? → the problem of const. change

### III. The phenomenon of judicial further development of constitutional law

#### 1) **A common praxis in modern constitutional states**

- e.g. in constitutional states under common law
- e.g. in most West European and (since the 1990s) East European constitutional states
- note also the extensive judicial further development of law of the European Court of Human Rights and the European Court of Justice

#### 2) **Selected examples (landmark decisions)**

- The decision Marbury v. Madison of the U.S. Supreme Court (1803)**
  - on the primacy of the constitution (the constitution as the "supreme law of the land")
- The Lüth decision (BVerfGE 7, 198) of the German Federal Constitutional Court of 1958**
  - fundamental rights as objective system of constitutional values guiding the interpretation and application of all law (obligation to interpret all law in the light of the f.r.)
  - fundamental rights limits may limit the freedom but must be limited themselves in their freedom-limiting effect with regard to the importance of the f.r. as const. values (doctrine of reciprocal effect [Wechselwirkungslehre])
- The decision freedom of association (71-44 DC) of the French Constitutional Council of 1971**
  - the Declaration of the Rights of Man and of the Citizen of 1789 (referred to in preamble of Const. of 1958) as part of French const. law (block of constitutionality)
  - actually ad hoc introduction of a fundamental rights catalogue into the const. law
- The Census Act decision (BVerfGE 65,1) of the German Federal Constitutional Court of 1983) (→ see link, p. 144 ff.)**
  - derivation of a fundamental right to informational self-determination (data protection right) from art. 2(1) read together with art. 1(1) of the German Basic Law
- Excursus: The extensive judicial further development of law by the European Court of Justice**
  - the decision *van Gend & Loos* (case 26/62) of 1963
    - European Community Law as independent (distinct) legal order
  - the decision *Costa/ENEL* (case 6/64) of 1964
    - primacy of European Community Law over national law
  - the decision *Fancovich* (joint cases C-6/90, 9/90) of 1991
    - judicial introduction of state liability of the member states for non-implementation of European Community directives

## IV. Legitimacy and merits of judicial further development of const. law

### 1) Why do we need it?

- the *need to concretise and develop indefinite constitutional concepts*
  - an inevitable consequence of the abstractedness of the constitution
  - example: what means "human rights", "democratic", "human dignity" or "autonomy"?
  - example: what is the structure of const. rights and principles?
- the *need to ensure operability and practical effect*
  - the consequence of the weakness of the constitution as a legal instrument
  - example: how to ensure that fundamental rights are respected in practice?
- the *need to find solutions for unforeseen new challenges* on the basis of the ideas, values and evaluations of the constitution
  - example: the need for a fundamental right of data protection - even under a constitution that is older than the first computers
  - example: the need to ensure democratic decision-making - even under the complicated conditions of the European supranational integration

### 2) The legitimacy of judicial development within the the lines and concepts of the constitution: the constitution as a living instrument

- in a fast-changing world the constitution must evolve and adapt within its lines and concepts or it will fail and loose acceptance
- the legitimacy to develop const. law in order to avoid loopholes and *maintain the functionality of the constitution* to ensure the realisation of certain fundamental values and ideas
- the legitimacy of the const. courts to perform this task by developing a conclusive and coherent const. jurisprudence

### 3) The merits of judicial development of const. law: a modern and stable constitutional order fit to face the challenges of the future

- judicial development can stabilise the constitutional order
  - the example of the USA: the same constitution since 1788
  - the example of Germany: a popular constitution unfolded by the jurisprudence of the Federal Constitutional Court
  - the example of Latvia: a re-enacted constitution of 1922 modernised by consistent further development of law by the Latvian Constitutional Court

## V. The limits of judicial further development of constitutional law

### 1) Further development of the existing, not making of new constitutional law

- const. courts as part of the judiciary not entitled to make new law but to "further develop" the existing law consistantly within its lines and concepts
- however, this theoretical limit is *often blurred in practice*

### 2) Further development of, not against the existing constitutional law

- const. courts bound to all ideas, values and evaluations of the constitution - no abrogation or neutralisation of outdated const. law by jurisprudence!
  - example: no extension of the right to marry to same sex couples if the existing norm does not only disregard it but definitely aims to prevent it
  - judicial further development of law cannot generally replace necessary constitutional amendments after profound changes of society