

# § 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 20<sup>th</sup> 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