

§ 8 Constitutional jurisdiction

I. Constitutional jurisdiction as an essential element of modern constitutionalism

1) Historical and theoretical foundations

- the need of a mechanism to *enforce the primacy of the constitution effectively*
 - even against infringements by 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, Asia and Africa since 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 Korea in 1988
 - in East Europe in the 1990s
 - in South Africa in 1994
 - in Indonesia in 2003
- the triumph of constitutional jurisdiction in modern constitutional states
 - has significantly contributed to the consolidation of a rule of law-based constitutionalism with effective primacy of the constitution in state practice

2) Basic models of constitutional jurisdiction

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

3) Constitutional jurisdiction as a motor for the development of constitutional law doctrine

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

II. Constitutional jurisdiction and separation of powers

- a needed counterweight to the power of parliament and government
- in democratic states an important precaution against the degeneration of democracy into a dictatorship of the majority
 - the majority rule does not entitle to override fundamental rights or the rule of law!

III. The German Federal Constitutional Court [Bundesverfassungsgericht]

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

1) Status

- both court and constitutional organ
 - on equal footing with and independent of all other constitutional bodies
 - own rules of procedure
 - independent budgeting
- highly respected among lawyers, politicians and in the population

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

IV. 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)**

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

V. **In particular: the constitutional complaint** [Verfassungsbeschwerde]

(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

VI. **Special problems**

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