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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**CONSTITUTIONAL JURISDICTION
IN THE FEDERAL REPUBLIC OF GERMANY**

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and Constitutional Courts of Federated Entities"
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I. The Constitutional order

1. The Federal Republic of Germany is a federal state. It consists of the Federation as the central state and its 16 member states (the so-called "*Länder*"). Berlin, the member state I come from, is not only a city but also one of the sixteen member states of the Federal Republic of Germany. This special status of being a city and a state is called "city state".
2. The federation and each of its 16 member states have their own constitution which regulates the organisation of the state and the relationship between the state and its citizen. That means that there are seventeen different constitutions in the Federal Republic of Germany: the federal constitution, called "basic law" (*Grundgesetz*), and the constitutions of the sixteen member states.

These seventeen constitutions consist of the same basic principles but differ in many details. They have in common the basic principle that the federation as well as the 16 member states are republic, democratic and social states governed by the rule of law. The federation and each member state have a parliament, a government, which is head of the executive, their own courts and constitutional courts. In the Federal Republic of Germany there are, therefore, a federal constitutional court (the so-called *Bundesverfassungsgericht*) and 15 state constitutional courts. Only one member state (Schleswig-Holstein) does not have its own constitutional court.

3. The state power in the Federal Republic of Germany is divided between the federation and the member states. I am going to explain this system briefly:
 - a. The legislative power lies predominantly with the central state. As a consequence, most laws in the Federal Republic of Germany are federal laws which are binding in the whole country. Among them are, with a few unimportant exceptions, the whole of civil law, criminal law and procedural law. Only in some public law areas the member states have the power to legislate. I will name a few examples:
the law of schools, the law of academic institutions, the local law, parts of planning law and the police and regulatory law.
 - b. Unlike the legislative powers most of the administrative powers lie within the member states: Most of the federal laws and all the laws of the member states are implemented by the authorities of the member states. I will give you two examples for this: The tax laws are federal laws but the taxes are collected by revenue authorities of the member states. The so collected taxes are then distributed between the Federal State and the member states according to a method of distribution set out in the Basic Law. There are only a few areas of law where federal authorities implement federal laws. I will name three examples: The customs administration is a federal administration; the currency is supervised by the German Federal Bank, also a federal authority. Finally, the freedom of competition is guarded by the Federal Cartel Office.
 - c. Turning to the jurisdiction, the picture is similar to the administration. I will have to explain this:

Among the Western World the Federal Republic of Germany is the country with

the most extensive jurisdiction. There are five main branches of the judiciary in the Federal Republic of Germany:

- . the so-called "ordinary jurisdiction", which has jurisdiction over civil and criminal matters;
- . the jurisdiction of labour courts which has jurisdiction over legal disputes between employers and employees and between staff committees and employers;
- . the jurisdiction of administrative courts which has jurisdiction over disputes between citizen and the public administration;
- . the jurisdiction for social security litigation which is responsible for disputes between citizen and social insurance institutions, such as the social pension insurance or the health insurance;
- . the jurisdiction for financial legislation being responsible for disputes in tax matters.

All these jurisdictions have a court of first instance and a court of appeal, which are courts of the member states. In the jurisdiction for financial legislation there is - as the only exception - only one instance.

Above these instances there is as court of last resort a federal court: the Federal Supreme Court of Justice for civil and criminal jurisdiction, the Federal Labour Court, the Supreme Federal Administrative Tribunal, the Supreme Social Insurance Tribunal and the Federal Fiscal Court.

As I have mentioned before, most of the laws in the Federal Republic of Germany are federal laws. Therefore, the courts apply federal law in most of their cases. The five federal courts of last resort that I have just named, have the function to judge upon points of law which are of general importance to the federal law. They also have the task to supervise that the courts of the member states apply the federal law in accordance with their rulings.

II. The Federal Constitutional Court

Besides and above those five jurisdictions there is the constitutional jurisdiction, which is exercised by the Federal Constitutional Court and the constitutional courts of the member states. I am now going to explain to you the function and the status of the constitutional jurisdiction within the constitutional order of the Federation and the member states. I start with the Federal Constitutional Court.

1. Outline of the jurisdictions

The jurisdictions of the Federal Constitutional Court are set out in the Basic Law and the Federal Constitutional Court Act. They can be divided into three groups: The Federal Constitutional Court has jurisdiction over

- Firstly, disputes between constitutional organs of the Federation over the interpretation of the Basic Law;
- Secondly, the compliance of decrees and state laws with the state constitution.
- Thirdly, constitutional complaints by individual citizen of violation of their basic constitutional rights by acts of the state.

The basic question in all three groups is whether the Basic Law has been violated. Therefore, the Federal Constitutional Court is called "guardian of the constitution" and the constitutional jurisdiction is characterised as the jurisdiction responsible for safeguarding that within the Federation and the individual member states the constitution is observed by the parliament, the government, the executive and the courts. The constitutional courts are not entitled to take action on the ground that the Basic Law has been violated unless they have been called upon by someone entitled to bring the matter before the constitutional court. The Basic Law and the Federal Constitutional Court Act determine who is entitled to bring the matter before the Federal Constitutional Court.

I am now going to set out briefly the three groups of jurisdiction of the Federal Constitutional Court:

2. Court proceedings between constitutional organs

As I have mentioned before, the Federal Constitutional Court has jurisdiction over disputes between constitutional organs of the Federation over their legal rights and obligations as set out in the Basic Law.

That may sound very abstract but is of immense practical importance in reality. Court proceedings between constitutional organs are in many cases of great political importance and have an impact that should not be underestimated. I will name a few examples: In the past court proceedings between constitutional organs were concerned with the question

- whether the Federal Government is under an obligation to submit certain files to an investigating committee of the "*Bundestag*";
- whether the Federal Government is entitled to sign an international treat without the statutory power of the "*Bundestag*";
- whether the Federal Government was entitled to order missiles to be stationed in the Federal Republic of Germany without the consent of the "*Bundestag*" through a formal act of parliament;
- whether political parties are entitled to receive money from the federal budget;
- whether the "*Bundestag*" can pass a resolution according to which the past of every member of Parliament may be scrutinized with regard to a possible participation in the National Security Service of the former GDR;
- whether the Federal Government is entitled to order German soldiers to participate in

UN peace-keeping missions in Bosnia.

These questions and many others, the Federal Constitutional Court had to decide within its jurisdiction over "disputes between constitutional organs".

The plaintiff in most of these cases was the opposition party or the individual member of Parliament. This is to show you that this kind of court proceedings serves as an opportunity for the opposition to challenge the actions of the government or the majority in Parliament as regards their compliance with the Basic Law. It is in this respect that it becomes clear that the Federal Republic of Germany is a state governed by the rule of law. The intention of the majority in Parliament and the intention of the government which is elected by that majority in Parliament only prevails if it is in accordance with the Basic Law. The constitution prevails over the intention of the majority in Parliament. The Federal Constitutional Court is there to safeguard this.

Two conditions are necessary for the Federal Constitutional Court to fulfil its role as "guardian of the constitution":

- firstly, the judges of the Federal Constitutional Court have to be independent and
- secondly, the judgements of the Federal Constitutional Court have to be strictly binding upon all organs of the Federation and its member states.

I will comment on this briefly:

The Federal Constitutional Court consists of two chambers each of which has eight judges. These judges are appointed by Parliament (that is to say partly by the "Bundestag" and partly by the "*Bundesrat*", the Federal Council, representing the German member states). A 2/3 majority of votes is necessary.

Therefore, the different parliamentary parties are forced to agree on the appointment of judges. As a consequence, all the main political parties are represented in the Federal Constitutional Court. The judges are appointed for 12 years and cannot be dismissed.

The judges of the Federal Constitutional Court are in fact independent. Any government, any political party or any other institution that undertook to influence the court or put pressure on its judges would pay a terrible price at the next election. The independence of the judges of the Federal Constitutional Court is "sacred" to the people. In this context the press serves as a guardian.

The rulings of the Federal Constitutional Court are respected by everybody and in particular by the government and the Parliament, even if they do not agree with them. I have been asked several times by judges from constitutional courts from Russia how the judgements of the Federal Constitutional Court are enforced. The answer is very simple: There is no need to enforce these judgements. They are followed and respected without enforcement. A government or a parliament that ignored a judgement of the Federal Constitutional Court would be violating the constitution and challenge considerably the constitutional order in the Federal Republic of Germany. It would cause a state crisis. The strict respect for the judgements of the Constitutional Court is one of the basic foundations of the constitutional order of the Federal Republic of Germany.

3. Court proceedings between constitutional organs

I am now going to talk about the second group of jurisdiction of the Federal Constitutional Court, i.e. the judicial review of the constitutionality of laws. Here, the Federal Constitutional Court has to decide on the compliance of state laws with the Basic Law. Let me make the following remarks:

The Parliament is bound by the constitution and in particular by the basic rights even if it is acting as a legislator. A law that does not comply with the constitution is void. The Federal Constitutional Court declares the law void and publishes its decision in the Federal Law Gazette.

The binding force of the Basic Law upon the legislator is one of the main features of the constitutional state of the Federal Republic of Germany. Although it is stated in the Basic Law that all state power lies with the people and although the parliament is elected directly by the people, there is something more powerful than the will of the people and the intention of the parliament, that is the Basic Law with its basic rights. This is to show that in the centre of the constitutional order of the Federal Republic of Germany is the individual and not the state or the people. To safeguard and to protect the freedom of the individual is the main aim of the constitutional state of the Federal Republic of Germany. This is a reaction to the time of Hitler's dictatorship when the centre of all action were the people, the state and the race and not the individual human being. As you are all aware of, this led to the loss of life and freedom of millions of people. According to the Basic Law the state, i.e. the Federal Republic of Germany, is there to serve the individual and not the individual to serve the state.

Let me return to the judicial review of the constitutionality of laws: The Federal Constitutional Court has jurisdiction over the compliance of state laws with the basic rights of the Basic Law. It declares a law void if it is in violation of basic rights. This jurisdiction encompasses federal laws as well as laws of the member states. Laws of the member states, therefore, have to be in compliance with the Basic Law, too. I mention this fact because it is here where the constitutional courts of the member states also have a part to play, that is, they have jurisdiction over the compliance of the laws of the member states with the constitutions of the member states.

The Federal Constitutional Court only rules on the compliance of state laws with the Basic Law if the matter is brought before it. The following institutions are entitled to bring a dispute before the Federal Constitutional Court:

- firstly, any court. Any court that in a case pending before it deems a law incompatible with the Basic Law may and has to lay that law before the Federal Constitutional Court;
- secondly, the Federal Government, any government of a member state and one third of the members of the "Bundestag" have a right to bring a law before the Federal Constitutional Court. No government of a member state has to tolerate a federal law that is violating the constitution but is entitled to bring the matter before the Federal Constitutional Court. The minority in Parliament is also entitled to bring a matter before the Constitutional Court if the majority is about to pass an Act that is in violation of the Basic Law, as long as the minority constitutes one third of the members of Parliament. This is another very important weapon of opposition parties;

- Thirdly, any citizen alleging that a law is directly violating his basic rights is entitled to bring the matter before the Federal Constitutional Court. Luckily, this case is a rather theoretical one: If the Parliament passed an Act that prohibited all citizen of the Federal Republic of Germany to travel abroad and for this purpose ordered to build a wall around the country, then every citizen would be entitled to bring that law before the Federal Constitutional Court for violation of his basic right to leave the country at any time. If the alleged violation of a basic right is not caused directly by law but is based on an administrative act that implements the law, i.e. the authorities refuse to issue a passport necessary to travel abroad, the citizen will have to challenge the administrative act in the general courts, first. By doing so he will have to claim that the administrative act is based on a law that violates the constitution. If the court shares that opinion, i.e. if it regards the law unconstitutional, it refers the case to the Federal Constitutional Court; otherwise, it will dismiss the case. The citizen can appeal against that decision. Only if the appeal is unsuccessful or, as we call it, the citizen has taken recourse to all possible legal remedies, he can, as a last resort, bring the case before the Federal Constitutional Court. The Constitutional Court then considers whether the law on which the administrative act is based and, accordingly, the judgement of the general court violate the Basic Law.

4. The Constitutional Complaint

I am now turning to the third main area of jurisdiction of the Federal Constitutional Court, the constitutional complaint. With this action the individual citizen can claim the violation of his basic rights before the Federal Constitutional Court. I have already outlined the main characteristics of this action. Therefore, I will refer to it only briefly:

The constitutional complaint is applicable when a citizen alleges the infringement of his basic rights by an act of the state. Acts of the state encompass state laws, administrative acts and rulings of the courts. Before the citizen can bring a case before the Federal Constitutional Court, he will have to challenge the act of the state through the general legal remedies available to him. In particular, he will have to challenge an administrative act that is of direct concern to him before the general courts first, that is the administrative courts, before he is allowed to appeal to the Federal Constitutional Court. We call this the "principle of subsidiarity". Only if recourse has been taken to all possible legal remedies, the citizen may bring the case before the Federal Constitutional Court. If the Federal Constitutional Court decides that an infringement of basic rights has taken place, it repeals the Act, the administrative action or the judgement of the court. It may refer the case back to the court that was dealing with it before, thereby giving detailed instructions on how to abide by the basic rights.

III.

I am now at the end of my general outline of the tasks and functions of the Federal Constitutional Court. I will now turn briefly to the constitutional jurisdiction of the member states of the Federal Republic of Germany.

1. As mentioned at the beginning of this paper, the Federal Republic of Germany has fifteen "*Länder*"-constitutional courts. They have the function to supervise that the Parliament, the government, the executive and the courts of the member states abide by the state constitutions. The *Länder*-constitutional courts are the guardians of the

constitutions of the member states.

2. The tasks and powers of the *Länder*-constitutional courts are set out in the respective state constitutions and the respective constitutional court acts of the member states. As a consequence, the jurisdictions of the individual state constitutional courts differ in certain aspects.

a) Court proceedings between constitutional organs

All constitutional courts have jurisdiction over the already mentioned first group of proceedings, i.e. disputes between constitutional organs. They decide on disputes between constitutional state organs, in particular between the government and the parliament of a member state. This court action is similar to the one before the Federal Constitutional Court only that the Federal Constitutional Court decides on disputes between federal constitutional organs while the constitutional courts of the member states decide on disputes between state constitutional organs. The Federal Constitutional Court judges a case according to the Basic Law while the *Länder*-constitutional courts decide a case on the basis of the constitutions of the member states.

b) Judicial review of state laws

All *Länder*-constitutional courts have jurisdiction over the judicial review of the constitutionality of laws. They decide on the compliance of (*Länder*) state laws with the (Land) constitution. They have no jurisdiction over federal laws which remain the sole jurisdiction of the Federal Constitutional Court. Neither are they entitled to judge on whether a (Land) state law violates the (federal) Basic Law. These, again, are exclusive powers of the Federal Constitutional Court. Therefore, the (*Länder*) constitutional courts are only entitled to judge on the compliance of a (Land) state law with the (Land) constitution. In practice, this particular kind of court action is not used very often. Therefore, the judicial review of state laws is of minor importance.

c) Constitutional complaint

Let me now turn to the third and last group in which the (*Länder*) constitutional courts have jurisdiction, that is the (Land) constitutional complaint. There are significant differences between the individual (*Länder*) constitutional courts:

As I have already mentioned with regard to the Federal Constitutional Court, the constitutional complaint is a court action with which the citizen can claim the violation of their basic rights as contained in the Basic Law before the Federal Constitutional Court. This definition applies to the (Land) constitutional complaint accordingly. The (Land) constitutional complaint is only applicable where the (Land) constitution contains a list of basic rights. If the constitution of the member state does not contain basic rights, a constitutional complaint to a (Land) constitutional court is not possible. The constitutions of several member states do not contain basic rights. These member states did not consider it necessary to include basic rights in their constitutions as the list of basic rights contained in the Basic Law of the Federation is far reaching and strictly binding on the organs of the member states. This is why there are no (Land) constitutional complaints in several member states of the Federal Republic of Germany, such as in the *Länder* Baden-Württemberg, Niedersachsen, Nordrhein-Westfalen,

Hamburg or Bremen.

In those member states which have included basic rights in their constitutions, the constitutional complaint does exist. Its features differ from country to country. I do not want to go into detail as we are going hear a separate lecture on questions of the constitutional jurisdiction of the member states. Let me just make a few remarks:

Subject of the constitutional complaint before the constitutional court of a member state can only be an act of an organ of that particular state, such as a (land) state law, an administrative act of an authority of that member state or the judgement of a court of that member state. A (Land) constitutional court is not entitled to decide on the compliance of federal laws, administrative acts of federal authorities or judgements of federal courts with the constitution. The reason for this is quite simple: the organs of the Federation are not bound by the constitutions of the member states but only by the Basic Law. Therefore, it is impossible for organs of the Federation to violate the constitutions or the basic rights of the member states. Therefore, acts of federal organs cannot be subject to the jurisdiction of (*Länder*) constitutional courts.

The (*Länder*) constitutional courts can only judge a constitutional complaint against the (*Länder*) constitutions, in particular the basic rights of those constitutions. They are not entitled to judge the matter on the basis of the Basic Law. This basic principle leads to a lot of very difficult questions of definition which are outside the scope of this paper, as I only intended to give you a general outline of the constitutional jurisdiction in the Federal Republic of Germany. In general it can be said that the constitutional complaint to the (*Länder*) constitutional courts is of less importance than the constitutional complaint to the Federal Constitutional Court.

The constitutional complaint to the (*Länder*) constitutional courts is also governed by the principle of subsidiarity. Therefore, the citizen have to take recourse to all possible legal remedies, first before they can bring the matter before the constitutional court of the member state.

Finally, let me comment briefly on the organization of the (*Länder*) constitutional courts which again differs from country to country. The majority of (Landes) constitutional courts consist of seven to nine judges, most of which are elected by the parliaments of the respective member states. Of these seven to nine judges one part is chosen from among the judges of the general courts and the other part from the profession of lawyers and University professors. In some of the (Landes) constitutional courts a small number of the judges appointed are lay judges. In other member states the Presidents of the civil law Court of Appeal or the administrative law Court of Appeal automatically become members of the constitutional court.

IV. Final remarks

I now come to the end of my outline of the constitutional jurisdiction in the Federal Republic of Germany. There are, of course, other jurisdictions I have not mentioned, such as the proceedings against the President of the Federal Republic of Germany or the Minister of a member state for violation of the Basic Law, which are of no practical importance. These jurisdictions do not touch general points of law and have no practical implication. But do bear in mind that there are more jurisdictions than the ones I have discussed above.

Please allow me one final remark:

The constitutional jurisdiction of the Federation and the member states is well-developed and works very well in practice. This constitutional jurisdiction is a reaction and an answer to the dictatorship of Hitler in the years from 1933 to 1945. Hitler came to power not by means of a revolution but by using the legal means of the democratic system of that time. Immediately thereafter he started to violate the constitution, to abrogate it by undemocratic laws and finally, to repeal it. This enabled him to start his dictatorship. At the time there was no constitutional jurisdiction in place to stop him. Therefore, the democratic reconstruction of Germany that began soon after the war had finished was accompanied as far as the western part of Germany is concerned by the establishment of constitutional courts. In Bavaria for instance which is one of the German member states, a (Landes) constitutional Court was established as early as in 1947.

The constitutional courts have contributed to the fact that the public life in the Federal Republic of Germany is governed by the rule of the Basic Law and the constitution of the member states. The citizens of Germany do not have to be afraid of their state. The Federal Constitutional Court and the (*Länder*) constitutional courts are there to protect them. Therefore, the constitutional jurisdiction is a necessary component of the constitutional state that we have built in the Federal Republic of Germany following the terrifying experiences of Hitler's dictatorship.