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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**THE CONSTITUTIONAL COMPLAINT –  
AVOIDING EXCESSIVE CASE- LOAD**

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## The constitutional complaint - avoiding excessive case-load

If the legal system of a country provides for the possibility of an individual constitutional complaint, the task is to master the narrow passage between Scylla and Charibdis: On one hand there is the promise to the people that anybody can seek the protection of his/her constitutional rights by submitting his/her case to the highest court. Setting the standards to accept a case too high might result in undermining the whole concept. On the other hand it is necessary to limit the caseload of the constitutional court in order to guarantee its functioning and to ensure that a decision of relevant cases can be reached in appropriate time. I will try to give you a short overview of the way the German law tries to meet both requirements. Please note, however, that to every rule I'm going to describe to you there are exceptions, which I will leave out for the sake of the overview. Maybe we can go into some of them during the discussion.

The regulations which influence the case-load of the Constitutional Court can roughly be divided into three groups:

- admissability requirements
- procedural provisions
- organizational structures

### A. ADMISSABILITY REQUIREMENTS

#### I.

Under Art. 90 Par.1 of the Federal Constitutional Court Act (BVerfGG) any person who claims that one of his/her basic rights or procedural rights set forth in the constitution has been violated by an act of public authority can launch a constitutional complaint. This sentence contains several exemptions :

- The complainant must be **entitled** to the basic right. Certain basic rights (e.g. the right to assemble Art. 8 Basic Law) are granted to "all Germans", while others (e.g. the freedom of expression, Art.5 Basic Law) are given to "everybody". Therefore a foreigner can't claim a violation of those basic rights granted to Germans only. Domestic legal persons can claim the basic rights only "to the extent that the nature of suchs rights permits" (Art 19 Par 3 Basic Law), which might sometimes be difficult to assess.
- Only **acts of public authority** can be challenged with the constitutional complaint, because the basic rights are primarily directed against the state and do not directly apply to relations between private parties. Under German law, act of public authority can be a court decision, an administrative act or a legislative act. However, a court decision in a civil action is an act of public authority and the complainant may argue that the civil court has misinterpreted his/her basic rights and its influence on common law in it's decision. Actually, most of the constitutional complaints are directed against court decisions. To require an **act** means that mere opinions by officials or inner-administrative regulations can't be targeted by a constitutional complaint.
- The complainant **him/herself** has to be the victim of the alleged violation, there is no constitutional complaint for somebody else's right.

- The complainant has to be **directly and presently** affected. This provision is mainly important for constitutional complaints which are directed against a legislative act. Whenever such act requires implementation by the administration, the complainant won't be directly affected. He/she will have to wait and bring a case against the implementing act in a lower court. Also, if the administrative act has been reversed, the complainant is no longer and therefore not presently affected.

## II.

Art.90 Par.2 BVerfGG requires the exhaustion of remedies before a case can be submitted to the Constitutional Court. This means :

- The complainant has to seek juridical relief at the regular lower court first, if the legal system provides such possibility. As all courts have to apply the Basic Law, it is likely that the violation of a basic right - if it happened - will be noticed by one of the courts while the case moves through the system. As the legal system in Germany very often grants three consecutive instances, usually at least two, there is a good chance for the plaintiff that any unconstitutional infringement on his/her rights will sooner or later be deleted. If, however, the courts don't share the complainants point of view in a complicated legal matter, this requirement ensures that the Constitutional Court can already notice the legal opinion of the courts having jurisdiction laid out in the decisions.

If the complainant has failed to file an appeal in due form and time, he/she will still be preempted from raising a constitutional complaint, notwithstanding the fact that he/she can't make up for it. The criteria is not if the complainant can still find relief at a lower court but if he/she could have.

- The second meaning of "exhausting all remedies" has been developed by the Constitutional Court and implies that the complainant must have brought all the relevant facts to the attention of the lower court and raised the substantial issues. The appropriate court must have had a chance to evaluate the case thoroughly. Obviously, in a legal system where the representation by lawyers is not mandatory at all courts, one can't make too high demands with respect to legal arguments if a person has represented him/herself, but even a layperson can lay out all the facts and point out, why the courts should decide in his/her favour.

## III.

For lodging a complaint against a court decision or administrative act the law sets a time-limit of one month. If the constitutionality of a law is challenged, the time-limit is one year after the law gets into effect. Before expiration of this time-limit, the complainant has not only to lodge the complaint but also to substantiate it. He/she must submit the decision itself and lay out all the relevant facts and reasons. His or her brief has to explain in which respect a basic right has been violated and point out the causal connection between the act of public authority and the alleged violation. If for example a complainant claims the violation of his right to a hearing before a court, it is not sufficient for him to describe that the court has decided before he could take a stand on the case. He would also have to explain in some detail, what he would have said or written if he had been granted the hearing to enable the Constitutional Court to determine if the

court decision is really a result of the denial of the proper hearing. Ideally, the Constitutional Court should be able to evaluate the complaint without having to undertake any additional inquiries after the month has expired. This is specially important because the Constitutional Court does normally not request the transmittal of files from another court or agency prior to his first decision of acceptance (see below), but will base this solely on the information distributed by the complainant.

### *Procedural Provisions*

Before the Constitutional Court decides on a constitutional complaint, a special acceptance procedure takes place. Acceptance of a constitutional case is required and shall be granted

- if the case has a fundamental constitutional significance or
- if acceptance is indicated to enforce the basic rights, especially if the complainant suffers especially grave disadvantages as a result of refusal to decide the case.

After more than 90 volumes of published decisions by the Constitutional Court, obviously many questions of fundamental relevance to the meaning of the constitution have already been decided. Of course new regulations and laws and therefore new questions about their compatibility with the Constitution keep coming up, but this is nevertheless not a way for many cases to reach the Constitutional Court. More important is the second provision.

However, if a case has no prospective to be successful, it's acceptance can't be necessary to enforce the basic rights of anybody. Therefore a preliminary screening of each case takes place and those where obviously no violation of constitutional rights has taken place are denied acceptance at this stage. As mentioned before, most constitutional complaints are directed against court decisions. Because the Constitutional Court is not an additional regular court, it limits it's scrutiny to the question whether a basic right guaranteed in the constitution has been violated. The distinction between conformity with the constitution and conformity with the law in general is not always easy to make. Is the right to a fair hearing violated whenever a court disregards a provision of the code of procedure designed to ensure the observance of the right? Most of the laws and regulations can be traced back to one or the other provision in the constitution. To preserve the role of the Constitutional Court as an extraordinary court, it is important to leave the interpretation of the so-called "simple law" to the lower courts. The violation of a constitutional right requires more than a simple misreading of a provision in the law. The rough guideline which has emerged over the years sounds as follows: decisions on the procedure, the ascertainment and evaluation of the facts, the interpretation and application of the provisions of "simple law" are entrusted to the other courts and not subject to the control of the Constitutional Court. The latter only intervenes if the deficiencies of the decision result from a **fundamental error** of the court below concerning the **significance and the reach of a basic right**.

Lately the criteria 'suffers especially grave disadvantages as a result of refusal to decide the case' has gained importance. This is one of the reactions of the Constitutional Court to ward off a rising load of cases with minimal importance and to prevent itself from being seen as an additional court of appeals. The dividing line between 'especially grave disadvantages' and the plain realization that justice doesn't always win has a lot, but not everything to do with financial interest. A regular civil action involving a few hundred DM will normally not be accepted by the

Constitutional Court on the grounds that even if a thorough examination of the court proceedings might succeed in finding a mistake, this is not worth the required amount of time and work, when by the same token the Constitutional Court lacks the time and resources for important cases. Let me point out though that this is not identical with setting a strict minimum value requirement. The decision whether a retired worker gets 5 DM more or less a month from his or her pension fund may also not involve a big amount of money. But a case like this may very well concern a matter of principal importance, e.g. if the question is raised whether childraising contributes to the years countable towards eligibility for a pension.

The acceptance requirements in combination with two more procedural provisions are the main tool to reduce the work-load of the Court in accordance with the general idea of the constitutional complaint. The two other provisions are Art. 93 b BVerfGG (The chamber <three judges instead of eight> may refuse or accept the constitutional complaint) and Art. 93 d BVerfGG (The refusal does not require reasons). The chamber's decision shall be adopted by unanimous consent (Art. 93 d BVerfGG). The composition of the chamber should not remain unchanged for more than three years (Art. 15a BVerfGG) to respond to the danger that a chamber develops its own standards.

Each case is assigned to a "reporting judge", who prepares a written memo dealing with the admissibility requirements and proposing acceptance or refusal. This memo is circled in the chamber and if the two other members sign their consent with a refusal, the panel will never have to deal with the case. The fact that no reasons are required greatly simplifies this procedure, because it is much easier to consent on the reasons set out in an internal memo than to a text which is sent to the complainant and may even be published.

Art. 93 c BVerfGG also provides for a positive decision of the chamber in cases where the constitutional issue has already been decided by the panel, the acceptance of the case is necessary to enforce the basic rights of the complainant and the complaint is clearly justified. Again, the requirement of an unanimous decision ensures that this procedure is used only in truly clear cases. No oral proceedings are necessary for the chamber's decisions (Art. 93 d Par. 1 BVerfGG).

To give you an example of the work done through the chambers: From January through April 1997 1612 constitutional complaints have been lodged at the Constitutional Court. During the same time, 1441 have been denied acceptance through a chamber decision, whereas 7 have been granted a positive decision through a chamber and 5 have been decided by whole panels. Incidentally, more than 95 % of all constitutional complaints are not accepted.

Usually no fee is charged for the lodging of a constitutional complaint. For abusive complaints however the possibility of charging one exists (Art. 34 BVerfGG), but this provision is rarely used.

### *Organizational structures*

The secretariat of the court performs a first examination and sorts out those complaints, which are manifestly inadmissible, e.g. for missing the time-limit. Although they can't exert the judicial power and decide to dismiss the case, they can prepare the decision very well. Also they can write to the complainants and point out the deficiencies of their briefs, ask to submit the relevant documents or to withdraw the manifestly inadmissible complaints. In Germany, the secretariat also collects those "complaints" which are just general declarations of dissatisfaction without

targeting a specific decision or the letters from "regular clients", who are already known to the court as writing out of a slight mental disorder.

At the beginning of the business year, the panel decides on the principles according to which the incoming complaints are distributed among the judges in the capacity of rapporteurs. This means that the rapporteur shall prepare the proceedings for those cases he/she is assigned to by submitting a written legal vote containing the case history and his/her preliminary legal opinion to the other members of the chamber or panel. The first panel of the court has for example distributed along the lines of the basic right which is allegedly violated. So one judge prepares all the cases where freedom of religion is the main issue, the next one all the cases where free choice of occupation or profession is at stake etc. This ensures that the constitutional judges can work efficiently, because they gain experience in their field.

In addition to the secretarial staff, the Rules of Procedure of the Constitutional Court state that each judge shall have a number of research or legal assistants, which they select themselves. The assistant are usually judges of lower courts, some of the come from universities. They prepare the written votes for the constitutional judges, conduct the legal research, talk to the parties involved in the case etc. At the time being, each constitutional judge has three assistants, who for the most part have worked in legal fields relating to the main field of "their" constitutional judge before coming to Karlsruhe.