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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
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**The protection of fundamental rights  
by the Federal Constitutional Court, in particular  
by way of a constitutional complaint**

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## I. Different Ways of Ensuring the Protection of Fundamental Rights

### 1. The role of the Federal Constitutional Court as regards the protection of fundamental rights

The Constitution of the Federal Republic of Germany (i.e. the Basic Law) contains, in its first part, an extensive catalogue of fundamental rights. The fundamental rights include, for example, the guarantee of property, the occupational freedom, i.e. the right to freely choose one's occupation or profession, the freedom of expression, the freedom of the press, the freedom of creed and of conscience, the protection of marriage and the family, etc. All these fundamental rights are binding upon legislature, executive and judiciary as directly valid law (Article 1, sub-section 3 of the Basic Law). This means that all holders of public authority must directly observe the fundamental rights. For that reason, the protection of the fundamental rights is not delegated to one specific body; the protection of the fundamental rights is, in principle, the task of all state bodies within their respective spheres of activities.

The Basic Law, has, however, established a special court for constitutional disputes – the Federal Constitutional Court. The Federal Constitutional Court stands at the top of the German court system. It is not an ordinary court of appeal in proceedings of civil, criminal or administrative law. Its exclusive power is to decide on questions of Federal constitutional law. The Basic Law and the Federal Constitutional Court Act provide different types of proceeding by means of which practically all conceivable constitutional disputes can be decided. This also includes disputes that concern the protection of fundamental rights.

There are several ways in which problems that concern the protection of fundamental rights can be brought before the Federal Constitutional Court. I would like to explain the different ways with the help of an example:

A specific German Act (on the practice of craft trades) provides that a craftsman – for example a shoemaker or a car mechanic – may only work as an entrepreneur, i.e. in a self-employed capacity, if he has been awarded a master craftsman's certificate after having passed a specific, rather difficult practical and theoretical examination (the so-called *Meisterprüfung*). Many craftsmen do not succeed in passing this examination and therefore cannot practice their trade in a self-employed capacity but only as employees of a master craftsman. Some of them regard this as an unconstitutional restriction of their occupational freedom. The question whether the respective Act violates these craftsmen's fundamental rights can be submitted to the Federal Constitutional Court for decision in at least three different manners:

The first manner is by way of the so-called abstract judicial review, i.e. a proceeding that concerns the abstract review of a statute (Article 93, sub-section 1, number 2 of the Basic Law). An abstract judicial review proceeding is opened upon application of the Federal Government or of one of the governments of the 16 Federal States (*Länder*) or of a third of the members of the German Parliament (*Bundestag*). The Federal Constitutional Court, then, decides whether or not a statute – like, for example, the regulations governing the examination for the master craftsman's certificate – is compatible with the Basic Law. The decision has the force of law and is binding upon all bodies of the state.

The second manner is by way of the so-called concrete judicial review, i.e. a proceeding that concerns the review of a statute which is relevant to a specific lawsuit (Article 100, sub-

section 1 of the Basic law). If a court is convinced that a law on whose validity its decision depends is unconstitutional, it must suspend the proceedings and obtain a preliminary decision from the Federal Constitutional Court. This means that every German court has to examine whether a law that it must apply is compatible with the Constitution and also with the fundamental rights that are contained in the Constitution. However, only the Federal Constitutional Court is entitled to hold, in a decision that is generally binding, whether the statute is constitutional or not. In our example, a craftsman who did not pass the examination for a master craftsman's certificate may bring an action before an administrative court in order to obtain the permission to practice his trade in a self-employed capacity. This case will lead to a concrete judicial review proceeding, if the administrative court concludes that the statutory requirement of obtaining a master craftsman's certificate for practising a trade in a self-employed capacity violates the fundamental right of occupational freedom. The administrative court will then submit the issue to the Federal Constitutional Court for decision and the Constitutional Court will decide upon the validity of the regulation.

The third manner, finally, is by way of an individual constitutional complaint (Article 93, sub-section 1, number 4a of the Basic Law). The craftsman can institute a constitutional complaint proceeding if the action that he brought before the administrative court was unsuccessful and if the court did not submit the case to the Federal Constitutional Court for review. In this case, the person affected can directly file a constitutional complaint before the Federal Constitutional Court alleging that the statutory regulations and the decisions by public authorities and courts that prevent him from practising his trade as an entrepreneur violate his fundamental right of occupational freedom.

All three manners exist side by side, they do not exclude each other. If, for example, a proceeding that concerns the abstract control of a statute is already pending before the Federal Constitutional Court, a citizen who is affected by the statute can, at the same time, file a constitutional complaint. Moreover, the constitutional complaint complements the possibility of the concrete judicial review in an important manner, because if a court, for whatever reason, fails to obtain a decision from the Federal Constitutional Court, the citizen who is affected still has the possibility of bringing the case before the Federal Constitutional Court himself by way of a constitutional complaint. This shows that the system of protection of the fundamental rights by the Federal Constitutional Court is almost perfect.

## 2. Some statistics

In practice, the constitutional complaint is by far the most frequent type of proceeding. At present, approximately 5,000 constitutional complaints are brought before the Federal Constitutional Court every year. Of the about 134,400 proceedings that the Federal Constitutional Court dealt with until the end of 2001, i.e. in the first fifty years of its existence, about 129,300 were constitutional complaints, i.e. approximately 96.2 % of all proceedings. However, only about 3,300 constitutional complaints out of a total of approximately 129,300 were successful, this is only about 2.5 %.

The relatively small number of successful constitutional complaints gives, incidentally, no indication of the importance of this legal remedy. On the one hand, a decision repealing a sovereign act that is complained of frequently has an impact that reaches far beyond the individual case involved. If, for example, the Federal Constitutional Court overturns a court decision because it rests on an unconstitutional interpretation of a statutory provision, this means that in future all state bodies, including all courts, must base their decisions on the

interpretation of the provision which is in conformity with the constitution. On the other hand, if a constitutional complaint is rejected, the statement of the reasons for the decision to that effect often contains observations on questions of constitutional law which have a considerable impact on the activities of the legislature, the executive and the judiciary that go beyond the individual case involved.

### 3. The constitutional complaint

After having given this general introduction, I will, in the following, focus on the constitutional complaint proceeding because the constitutional complaint is the most important instrument by which the Federal Constitutional Court ensures the protection of fundamental rights. At the same time, it is the type of proceeding that is particularly characteristic of the Federal Constitutional Court's activity.

Pursuant to Article 93, sub-section 1, number 4a of the Basic Law, the Federal Constitutional Court rules on constitutional complaints, which can be filed by any person alleging that one of his fundamental rights or one of his rights contained in certain other Articles of the Basic Law has been violated by public authority. The Basic Law and the Federal Constitutional Court Act specify a number of procedural requirements for the admissibility of a constitutional complaint. I will, at first, give a summary of these requirements (II.) and I will make, then, some short remarks on the acceptance procedure, i.e. a kind of preliminary review of each constitutional complaint (III.), and on the enforcement of the decisions of the Federal Constitutional Court (IV.).

## II. Prerequisites for the Admissibility of a Constitutional Complaint

The following requirements must be fulfilled for filing an admissible constitutional complaint:

### 1. First question: Who is entitled to file a constitutional complaint?

"Any person", as the Basic Law (Article 93, sub-section 1, number 4a) says, can file a constitutional complaint. This means: Anyone is entitled to file a constitutional complaint that challenges the violation of a fundamental right to exactly the same extent that he is a holder of the respective fundamental right. In this way, the entitlement to file a constitutional complaint is the counterpart, under procedural law, of the fundamental right that is granted under substantive law.

The requirement of being entitled to file a constitutional complaint is fulfilled, without any problem, by all natural persons who are Germans. The same applies to foreigners to the extent that they are holders of the respective fundamental right. This is the case, for instance, as concerns the freedom of speech, the freedom of the press, the guarantee of property, the principle of equality before the law, or the protection of marriage and the family. If a fundamental right is expressly reserved to Germans only, like, for example, the freedom of assembly, it is possible for foreigners to invoke the fundamental right of the free development of one's personality (Article 2, sub-section 1 of the Basic Law) in order to file a constitutional complaint.

Finally, domestic legal persons, like, for instance, an association or a stock corporation, can also file constitutional complaints. Domestic legal persons can invoke fundamental rights if

those rights, by their nature, are applicable to the legal person (Article 19, sub-section 3 of the Basic Law). This is the case if the formation and the activity of the legal person is an expression of the free development of the personality of the individuals that are behind the legal person, for example the shareholders of a stock corporation.

2. The second requirement is that the complainant must claim the violation of a fundamental right by "public authority".

All powers, i.e. the legislative power, the executive power and the judicial power, fall under the concept of "public authority". This means that a law that was enacted by Parliament can be challenged by a constitutional complaint, but also an ordinance or a decision of the executive power, or a judgement of a court.

The most frequent type of constitutional complaint, however, is the constitutional complaint that challenges the judgement of a court. The reason for this is that in the case of the violation of rights, recourse to the ordinary courts (i.e. to those courts which are not exclusively competent for constitutional matters) must be taken first before a constitutional complaint can be filed. The result of this is that in most cases, constitutional complaints primarily challenge judgements issued by a court of last instance. I will come back to this in greater detail later on.

A constitutional complaint can only challenge acts of German public authority. Acts of foreign states and of the former German Democratic Republic cannot be reviewed. The same applies to regulations of the European Community and to all other acts adopted by the institutions of the Communities. A different and difficult question – which I will leave aside – is whether German regulations that are based on European law, or execute European law, can be reviewed by way of a constitutional complaint.

3. The third requirement is that the complainant must claim a violation of his fundamental rights or of one of his rights that are additionally specified.

This provision contains several points:

a) Only the violation of specific rights can be claimed. These rights are, first and foremost, the fundamental rights that are listed in Part I of the Basic Law (Articles 1 to 19). Apart from this, the violation of certain rights that are additionally mentioned in Article 93, subsection 1, number 4a of the Basic Law can also be challenged. These rights comprise: the right to resist any person seeking to abolish the constitutional order (Article 20, sub-section 4 of the Basic Law), certain civic rights (Article 33), the right to vote (Article 38), the right to one's lawful judge (Article 101), the right to a hearing in court, and certain guarantees in criminal proceedings and in the event of detention (Articles 103 and 104). All these rights that are additionally mentioned in Article 93 are equivalent to the fundamental rights in Part I of the Basic Law (*grundrechtsgleiche Rechte*).

A constitutional complaint can, however, not be based on the violation of other provisions that concern fundamental or human rights; in particular, it cannot be based on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As concerns the fundamental rights of the Basic Law, it is important to point out a special feature of the interpretation of Article 2, sub-section 1 of the Basic Law. Since its so-called

"*Elfes*" Decision (*BVerfGE* 6, 32), the Federal Constitutional Court understands the free development of one's personality that is guaranteed in this provision in the sense of a general freedom of action. This means that Article 2, sub-section 1 protects every activity of a citizen that is not already protected by a specific fundamental right. Thus, a comprehensive protection of fundamental rights is ensured and, correspondingly, far-reaching possibilities of invoking the jurisdiction of the Federal Constitutional Court, by way of a constitutional complaint.

Just to make another point clear: a constitutional complaint cannot be directly based on a violation of objective constitutional law, for instance on a violation of regulations that govern the allocation of competencies or procedural provisions. A fundamental right, however, may only be directly or indirectly restricted by a law that is constitutional in every respect. If, therefore, the violation of a fundamental right is claimed in an admissible manner, the Federal Constitutional Court also examines whether the law or other legal basis is in accord with the regulations of objective constitutional law. This means that when the violation of a fundamental right is asserted, this allegation is like a "lever" for a comprehensive review of constitutionality.

b) The complainant must, then, sufficiently substantiate the allegation that one of his fundamental rights has been violated, and he must put forward the allegation in a clear manner. The violation of a fundamental right must at least appear possible.

c) Apart from this, the complainant must demonstrate that the challenged measure affects him "personally, presently and directly."

The complainant is "personally" affected if he is addressed by a statute or other measure. If this is not the case the complainant must explain in detail to what extent he is indirectly affected. A popular action, however, i.e. an action that challenges an act of public authority that does not affect the complainant in any way, is inadmissible.

Moreover, the measure must affect the complainant "presently." This means that the challenged act of public authority must already show effects and that it must still be in force.

Finally the complainant must demonstrate that the measure affects him "directly." This prerequisite is particularly important in the case of constitutional complaints that challenge laws or other statutes. A law only affects a complainant directly if it does not require execution by the public authorities. If it requires an act of execution, the complainant must wait for this act and, if necessary, challenge this act before the competent courts. A constitutional complaint is, then, only possible against the judgement of the court of last instance.

4. This becomes clearer when we look at another requirement for the admissibility of a constitutional complaint, namely the exhaustion of all legal remedies.

If legal remedies against the claimed violation of a fundamental right exist, a constitutional complaint can not be filed until all remedies are exhausted (§ 90 sub-section 2 of the Federal Constitutional Court Act). Legal remedies are all possibilities of recourse to a court that are provided by rules of procedure, for example by the Code of Civil Procedure or by the Rules of the Administrative Courts.

The complainant must have unsuccessfully tried to remedy the violation of his fundamental right by invoking the jurisdiction of the competent courts. The complainant must also resort to all rights of appeal that are legally admissible. If he fails to do so, his constitutional complaint is inadmissible. Apart from this, the Federal Constitutional Court has established a general principle of subsidiarity. Pursuant to this principle, the complainant must also resort to all other legal possibilities that are suitable to remedy the claimed violation of a fundamental right in the individual case.

One reason for this regulation is the function of the constitutional complaint as an extraordinary and subsidiary legal remedy. It would be contrary to this function if the constitutional complaint could be filed instead of or parallel to the "normal" admissible legal remedies. Another reason for this regulation is to reduce the large number of constitutional complaints and to enable the Federal Constitutional Court to concentrate on the questions that are specifically constitutional. At the same time, this regulation emphasises the responsibility of the ordinary courts for safeguarding and enforcing the fundamental rights, because it is first and foremost the ordinary courts that are to provide legal protection against the violation of fundamental rights. Finally, the previous exhaustion of all legal remedies is also supposed to convey to the Federal Constitutional Court how the ordinary courts assess the case in fact and in law. Otherwise, the Federal Constitutional Court would easily run the risk of having to take far-ranging decisions on an incomplete basis of information.

In exceptional cases, however, the Federal Constitutional Court can decide about a constitutional complaint immediately (i.e. before all legal remedies are exhausted) if the constitutional complaint is of general relevance or if earlier recourse to other courts would entail a serious and unavoidable disadvantage for the complainant.

5. There are also time-limits to observe.

A constitutional complaint shall be filed and substantiated within one month. The time-limit commences with the service or informal notification of the complete decision that is challenged by the constitutional complaint (§ 93 sub-section 1 of the Federal Constitutional Court Act).

If the constitutional complaint challenges a law, it can be filed only within one year, from the entry into force of the law (§ 93 sub-section 3 of the Federal Constitutional Court Act). This time-limit, however, only applies to constitutional complaints that directly challenge a law. It is possible to file a constitutional complaint against an act of execution of the law even after the one-year time-limit. In the context of this constitutional complaint against the act of execution, the Federal Constitutional Court will also review the constitutionality of the law itself.

6. No special requirements exist as to form. The only requirement is that applications for the institution of proceedings must be submitted in writing.

7. The complainant may be represented at any stage of the proceedings by a lawyer or by a professor of law. He is, however, not obliged to do so. Only in oral hearings, which, however, only take place as a rare exception, the complainant has to be represented in this manner (§ 22 of the Federal Constitutional Court Act).

8. Finally the cost: In principle, constitutional complaint proceedings, like all other proceedings before the Federal Constitutional Court, are free of charge. The Court can only impose a fee of up to € 2,600 in cases in which the constitutional complaint was filed in an abusive manner (§ 34 of the Federal Constitutional Court Act).

### III. Acceptance procedure

1. If a constitutional complaint meets all these requirements, it is admissible. This however does not automatically mean that it is dealt with by the Panel.

As you probably know, the Federal Constitutional Court consists of two Panels (or Senates), each of which is composed of eight judges. Each of the two Panels (or Senates) represents the Federal Constitutional Court as a whole. In view of the large number of constitutional complaints, the Federal Constitutional Court could not work effectively if every single constitutional complaint had to be dealt with directly by a Panel of eight judges. The law, therefore, provides for a preliminary examination, a so-called acceptance procedure (§ 93a to 93d of the Federal Constitutional Court Act). Each constitutional complaint requires acceptance. And the decision whether a constitutional complaint is accepted or not is at first conferred on chambers consisting of three judges. Each panel must appoint three such chambers. The Chambers' decisions must always be unanimous.

2. A constitutional complaint shall be accepted on two reasons (§ 93a sub-section 2 of the Federal Constitutional Court Act):

- firstly: in so far as it has fundamental constitutional significance or;
- secondly: if acceptance is indicated in order to enforce the fundamental rights; this may also be the case if the complainant would suffer especially grave disadvantage as a result of refusal to decide in the complaint.

If one of these two requirements is fulfilled the constitutional complaint has to be accepted. Acceptance is always a question of law, not a political question or a discretionary decision.

3. The chamber has two possibilities of making a final decision (§ 93b and § 93c of the Federal Constitutional Court Act).

The chamber may refuse acceptance of a constitutional complaint if it is inadmissible or if it does not meet the requirements for acceptance. The chamber need not state its reasons for such a decision. In this way the Federal Constitutional Court is able to reject quickly and without excessive effort the many constitutional complaints which do not have any prospect of success.

On the other hand, the chamber may accept and immediately approve a constitutional complaint under the following conditions: firstly, acceptance of the complaint is indicated in order to enforce the fundamental rights; secondly, the constitutional issue that determines the judgement has already been decided upon by the Federal Constitutional Court; and, thirdly, the complaint is clearly justified. However, a decision which declares that a law is incompatible with the Basic Law or other Federal law is always reserved to the Panel.

4. If the Chamber does agree upon whether or not to accept a constitutional complaint for decision, the Panel shall decide on acceptance. In this case the constitutional complaint is



accepted when at least three of the eight judges agree (§ 93d sub-section 3 of the Federal Constitutional Court Act).

#### IV. Effects and Enforcement of Federal Constitutional Court Decisions

Finally, I would like to make some remarks about the effects and the enforcement of the Federal Constitutional Court's decisions.

1. The decisions of the Federal Constitutional Court, and the essential reasoning of the decisions, are binding upon the constitutional bodies of the Federation and of the Federal States (*Länder*) and upon all courts and administrative authorities (§ 31 sub-section 1 of the Federal Constitutional Court Act).

If a law is declared compatible or incompatible with the Basic Law, or if it is declared to be null and void, the decision of the Federal Constitutional Court shall have the force of law (§ 31 sub-section 2 of the Federal Constitutional Court Act). The decision shall be published in the Federal Law Gazette by the Ministry of Justice. If the Federal Constitutional Court finds that a law is only in compliance with the Basic Law if it is interpreted in a specific way, this specific interpretation is binding upon all courts or public authorities which have to apply this law.

If the Federal Constitutional Court finds that in the case of a constitutional complaint an administrative authority or a court has applied a valid law in an unconstitutional way, it will overturn their decisions.

In all these cases, no enforcement in the proper sense exists. The Federal Constitutional Court Act also does not provide any regulations on enforcement. The legal effects of the Federal Constitutional Court's decisions arise automatically. In practice, the legal effects are always complied with. The Federal Constitutional Court's authority, and the authority of the principles of the rule of law, of the lawfulness of the action of administrative authorities, and of the other Courts' commitment to law are so strong that coercion is not required in order to enforce the Federal Constitutional Court's decisions.

2. Real practical problems only arise as regards a specific type of cases. The characteristic feature of this group of cases is that the Federal Constitutional Court holds that a specific regulation is incompatible with the Constitution without declaring it to be null and void.

Let me give you an example: German labour law very often differentiates between employees ("white-collar workers") on the one hand and manual workers ("blue-collar workers") on the other hand. This differentiation also existed in the legal provisions that regulate the termination of employment contracts by the employer. The employer has to observe certain periods of notice if he wants to dismiss an employee or a manual worker. But the periods of notice were shorter for manual workers than they were for employees; the workers' legal position was therefore inferior to that of employees. The Federal Constitutional Court held that this situation was unconstitutional. The Federal Constitutional Court concluded that there must be equal treatment for workers and for employees because there is no factual reason that justifies applying different periods of notice.

The Federal Constitutional Court itself, however, could not create consistency with the Basic Law. If it had declared the regulations about the periods of notice null and void, no periods of notice would have been in force at all. This would have resulted in a deterioration of their legal position for employees and workers alike; this consequence would have been even worse than the unequal treatment of both groups. In such cases, the Federal Constitutional Court therefore only declares the respective Act unconstitutional without declaring it null and void.

It is, then, in the competence and responsibility of the Parliament, to enact a new regulation that ensures equal treatment of both groups. The Parliament has different possibilities at its disposal for doing so: it can extend the worker's period of notice, it can shorten the employees' period of notice, or it can introduce a mixture of both approaches. In such cases, the Federal Constitutional Court therefore only holds that the Parliament is obliged to create consistency with the Basic Law. Sometimes, it sets the Parliament a time-limit for doing so.

Problems may arise as regards the fulfilment of this obligation. Sometimes, the Parliament does not succeed in adopting a constitutional Act in time. This can, for example, be due to the fact that no majority for adopting such an Act can be found in Parliament, or that other problems are regarded as prior-ranking and more important. In such a case, the question of how to enforce the Federal Constitutional Court's decision would indeed arise. There is no really satisfying answer to this question. At any rate, the Basic Law and the Federal Constitutional Court Act do not provide, for example, the possibility of imposing fines or of making use of other means to put pressure on the responsible bodies of the state. The Federal Republic of Germany, however, has not as yet experienced a definitive struggle of power because the Parliament has always, ultimately, complied with the Federal Constitutional Court's legislative directives. This fact also reflects the Federal Constitutional Court's importance and eminent position in the political system of the Federal Republic of Germany.