



Strasbourg, 2 November 2006

**CDL-JU(2006)045**  
Engl. only

CCS 2006/11

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**in co-operation with**  
**THE CONSTITUTIONAL COURT OF AZERBAIJAN**

**INTERRELATIONS BETWEEN THE  
CONSTITUTIONAL COURT AND  
ORDINARY COURTS**

**Baku, Azerbaijan, 9-10 November 2006**

**REPORT**

**The Federal Constitutional Court's relation to the German ordinary courts**

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## **I. The Federal Constitutional Court's special status**

To understand the Federal Constitutional Court's relation to the German ordinary courts, it is important to remember first of all that the Federal Constitutional Court has a special position in the constitutional order of the Federal Republic of Germany. The Federal Constitutional Court is a court of justice. However, it is not an ordinary court, and it is not only a court. Instead, it is at the same time a constitutional body which has the same rank as the other four constitutional bodies of the Federal Republic of Germany (the Federal President, the Federal Government, the *Bundestag* (the federal German parliament), and the *Bundesrat* (the council of constituent states)) (Section 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)). It is the responsibility of the Federal Constitutional Court as a constitutional body to ensure that the Basic Law, that is, the German constitution, is obeyed. The constitutional order of the Basic Law is binding on all state authority, which means that it is also binding on all constitutional bodies and all three state powers (the legislative, the executive and the judicial power) (Article 20 subsection 3 of the Basic Law (*Grundgesetz – GG*)). The Federal Constitutional Court watches over compliance with this obligation: the only standard of review in this context is the Basic Law.

## **II. The constitutional complaint that challenges a court ruling – a point of contact and a source of conflicts between the Federal Constitutional Court and the ordinary courts**

In its function as the guardian of the constitution, the Federal Constitutional Court also controls the judicial power, and hence also the ordinary courts. As a general rule, control takes place through constitutional complaint proceedings. Pursuant to Article 93 subsection 1 number 4a of the Basic Law, any person can lodge a constitutional complaint with the Federal Constitutional Court alleging that one of his fundamental rights, or rights that are equivalent to fundamental rights, has been violated by public authority. Such an alleged violation of fundamental rights can also be brought about by a specific court ruling. As a result of the constitutional complaint, the court ruling is reviewed by the Federal Constitutional Court. This means that the German law provides the possibility for any private individual to invoke the Federal Constitutional Court's jurisdiction after a litigation with the outcome of which he is not satisfied alleging that the ruling in question violates his fundamental rights. This possibility is comparable for instance with the individual application to the European Court of Human Rights provided by Article 34 of the European Convention on Human Rights. In the past few years, about 5,000 constitutional complaints per year have been brought before the Federal Constitutional Court. As a result, the review of constitutional complaints constitutes by far the largest part of the Federal Constitutional Court's work.

This situation holds potential for conflicts as regards the Federal Constitutional Court's relation to the ordinary courts. For according to its function, the Federal Constitutional Court is not part of the appeals process. In Germany, the appeals process before the ordinary courts ends at the latest with an appeal on points of law before the federal courts, such as the Federal Court of Justice (*Bundesgerichtshof*), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Finance Court (*Bundesfinanzhof*), the Federal Social Court (*Bundessozialgericht*) and the Federal Labour Court (*Bundesarbeitsgericht*). The federal courts are entrusted with the binding interpretation of non-constitutional law; the Federal Constitutional Court has no say in this. The appeals process therefore ends at the latest with the ruling of a federal court; the federal courts

are the supreme ordinary courts. Their ruling becomes final and non-appealable and can be executed. Therefore it is sometimes painful for the ordinary courts if a litigation which has gone through the entire appeals process before the ordinary courts and was concluded by a final and non-appealable ruling by a federal court is once again reviewed by the Federal Constitutional Court. In this way, the Federal Constitutional Court is situated not only outside, but also above the appeals process before the ordinary courts.

To defuse this potential for conflicts between the Federal Constitutional Court and the ordinary courts which is inherent in the constitutional complaints that challenge court rulings, the Federal Constitutional Court expressly does not exercise its control like a supreme ordinary court. Instead, the Federal Constitutional Court limits its control to the review of constitutional questions. This restraint that the Federal Constitutional Court exercises can be described by three characteristics: Firstly, the Federal Constitutional Court's control takes place subsequently; secondly, it is a control of comprehensibility, and thirdly, the Federal Constitutional Court's control is non-replacing. "Subsequently" means that the Federal Constitutional Court is not the court which is originally competent to make a ruling; it may only do so if the entire appeals process before the ordinary courts has been exhausted. "Control of comprehensibility" refers to the Federal Constitutional Court's limited standard of review: The Federal Constitutional Court only reviews whether the ordinary court's ruling is substantiated in a comprehensible manner and whether it is within the boundaries of what is constitutionally justifiable. And finally, rulings of the Federal Constitutional Court are non-replacing even if a constitutional complaint is successful. This means that the Federal Constitutional Court does not bring the litigation to a conclusion by replacing the ordinary court's ruling by its own. Instead, it only objects to the violation of the constitution and refers the case back to the ordinary court so that this court can make a new ruling which is free from errors and, above all, which is the ordinary court's own ruling.

In the following, I will try to present these three essential criteria to you in more detail:

### **1. The Federal Constitutional Court's "subsequent" control**

The strict requirements on the admissibility of a constitutional complaint ensure that the first criterion, that of "subsequent" control, is complied with. As a general rule, the constitutional complaint is only admissible if the entire appeals process before the ordinary courts has been exhausted (Section 90 subsection 2 sentence 1 of the Federal Constitutional Court Act). The complainant must therefore exhaust all possibilities of recourse to the ordinary courts before he can invoke the Federal Constitutional Court's jurisdiction. This ensures that the ordinary courts can first render decisions on all issues that are raised by the case.

The Federal Constitutional Court applies the criterion of the exhaustion of the appeals process as a barrier to admissibility in a very strict manner. This means not only that the complainant must have lodged all admissible genuine appeals, such as an appeal on questions of fact and law (*Berufung*) and an appeal on questions of law only (*Revision*). Over and above this, the complainant must have exhausted all other means available to him in proceedings before the ordinary courts to get his point of view through (principle of the subsidiarity of the constitutional complaint). This includes, for instance, that the complainant files the right motions in the proceedings before the ordinary courts and that he submits issues that are important to him already in the proceedings before the ordinary courts. It would be inadmissible, for instance, to complain, by means of a constitutional complaint, about the bias of a judge in proceedings that

have taken place before an ordinary court without having filed a motion to this court challenging the judge on grounds of bias. Another example: If a defendant in criminal proceedings regards the use of a specific means of evidence as inadmissible (for example the reading out of the written record of an intercepted telephone call), he must object to the use of this evidence immediately after the record has been read out in order to give the criminal court the opportunity of reassessing its course of action. If the accused does not raise an objection but challenges the taking of evidence for the first time in his constitutional complaint, the constitutional complaint is inadmissible even if the interception of the telephone call may in fact have been illegal. A third example: A complainant cannot assert, by means of a constitutional complaint, that a civil court heard the wrong witnesses and therefore acted arbitrarily if the complainant himself did not previously submit a motion in due form for the right witnesses to be heard.

## **2. The Federal Constitutional Court's "control of comprehensibility"**

The second criterion is that the Federal Constitutional Court's control must merely be a "control of comprehensibility". At the same time, this criterion is about the Court's limited standard of review. The Federal Constitutional Court merely reviews compliance with specific constitutional law; it does not interfere as far as questions of non-constitutional law are concerned. As concerns the rulings made by the ordinary courts that are challenged by constitutional complaints, the Federal Constitutional Court does not review whether the ordinary courts correctly applied non-constitutional law or if the Federal Constitutional Court itself would have reached the same result if it had been in the place of the ordinary court. The Federal Constitutional Court looks into the comprehensibility of the review that has been performed by the ordinary courts merely to the extent that it examines whether the ordinary courts still stay within the boundaries of the constitution as concerns their ruling and the procedure used. Consequently, the Federal Constitutional Court merely performs a control of constitutional justifiability.

The intensity of control can, however, differ widely from case to case. It depends in particular from the facts to be reviewed and from their proximity to positions that are protected by fundamental rights: If, for instance, two parties have a civil-law dispute about the interpretation of a contract, this is actually a dispute which has no direct relation to constitutional law and which is decided exclusively according to non-constitutional law. In such cases, the Federal Constitutional Court restricts itself to examining the question whether the civil courts have acted arbitrarily or whether they have misjudged the significance of the fundamental rights. A direct relation to the fundamental rights can, however, arise also in civil-law matters: If, for instance, a defaulting tenant threatens to kill himself if he is evicted, the civil court must, in its ruling, also take into account the tenant's right to life and physical integrity (Article 2 subsection 2 sentence 1 of the Basic Law) beside the civil-law rules of the law of tenancy. In such a case, the intensity of the Federal Constitutional Court's review increases.

In criminal law, particularly in the law concerning imprisonment or pre-trial detention, non-constitutional law, as a general rule, is especially close to constitutional law. The fundamental right to free development of one's personality (Article 2 subsection 1 of the Basic Law) must be taken into account in virtually every case that involves deprivation of liberty, and in these cases, the Federal Constitutional Court's standard of review is correspondingly strict. The same also applies to parts of the public law, for instance as regards questions concerning the expropriation of private property for large-scale projects such as motorways or airports. It is obvious that in such cases, the freedom of property, which is protected by a fundamental right (Article 14 of the Basic Law), has direct relevance to the ruling.

### **3. The Federal Constitutional Court's "non-replacing" rulings**

The third characteristic of the relation between the Federal Constitutional Court and the ordinary courts is the fact that the Federal Constitutional Court does not replace the ordinary court's ruling by its own if a constitutional complaint is successful. Instead, the Federal Constitutional Court merely states which provision of the Basic Law was infringed in the challenged ruling, it overturns the challenged ruling and refers the case back to the ordinary court (Section 95 subsections 1 and 2 of the Federal Constitutional Court Act). This gives the ordinary court the opportunity of reassessing the case and to make a new ruling that takes the Federal Constitutional Court's interpretation of the law into account. This, however, does not prescribe the result of the ruling in any way. The ordinary court can also in the second round uphold the result that had been objected to in the first round to the extent that it now observes the standards set by the Federal Constitutional Court.

This ensures at the same time that in the final ruling of the ordinary court also the interests of those parties to the proceedings can be taken into account appropriately who, unlike the complainant, do not participate in the constitutional complaint proceedings. Examples for those parties are the opposing party in civil proceedings, or the public prosecutor's office in criminal proceedings.

### **III. Conclusion**

The Federal Constitutional Court's relation to the German ordinary courts is characterised by the possibility of challenging court rulings by means of a constitutional complaint. This possibility potentially subjects every ruling of an ordinary court to the Federal Constitutional Court's review. In principle, this circumstance is not likely to strain this interrelation because the Federal Constitutional Court restricts itself to reviewing compliance with specific constitutional law. It therefore applies very strict admissibility criteria as regards the exhaustion of the appeals process and of subsidiarity, and, finally, it does not make a final ruling if the relief sought by the constitutional complaint is granted but refers the case back to the ordinary court. In practice, however, individual cases can give rise to conflicts between the ordinary courts and the Federal Constitutional Court. A conflict might occur if, for instance, the Federal Constitutional Court interprets the influence of the fundamental rights in other areas of law in a different manner than the ordinary court does, and it therefore makes a ruling in a case which, in the opinion of the ordinary courts, does not fall within its competence. But such disputes are essential to the nature of an independent judiciary. In such cases, the Federal Constitutional Court's authority prevails (Section 31 subsection 1 of the Federal Constitutional Court Act).