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Competencies and Functioning of the Federal Constitutional Court of Germany

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**Seminar on "Constitutional Control:
Basic Problems of Legal Proceedings, Organisation and Practice"**

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My presentation is divided into two parts. In the first part I would like to give a short overview of the system of judicial review and the role the Federal Constitutional Court plays within that system. In the second part of my presentation I am going to discuss the organisation of the Court's work, that is to say, the legal framework and other factors that are important for the management of the Court.

I. The Federal Constitutional Court: Role and Competences

1. Its Role

The Federal Constitutional Court is situated 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 constitutional law. In doing so, the court is called upon to prevent the three powers of the State from violating the constitution. Its jurisdiction is limited to the interpretation of the Federal Constitution, the so-called Basic Law. The court is therefore often called the supreme guardian of the Basic Law.

The competences of the Federal Constitutional Court are not defined in an overall clause that authorises the court to settle constitutional conflicts. Its competences are specified in detail in the Basic Law and in the Federal Constitutional Court Act. They include the supervision of legislative bodies to determine whether legislation has been enacted in conformity with the Basic Law (Art. 93), as well as the supervision of all acts of public authorities and courts in order to determine whether their measures are compatible with the Basic Law. The Federal Constitutional Court is able to declare the forfeiture of fundamental rights (Art. 18 of the Basic Law), it decides about the prohibition of unconstitutional political parties (Art. 21), about the validity of parliamentary elections (Art. 41), about the impeachment of the Federal President and judges (Art. 61) and on disputes between individual governmental bodies (Art. 93). This enumeration of competences could be continued. A number of items on the list are exclusively reserved to the Federal Constitutional Court. But some of the competences have actually never been used, for example the removal of judges or the impeachment of the president.

The Federal Constitutional Court must not make use of its competences at its own discretion. It may exercise its power only if there is a case that is brought to the court in a proper way. In the following I will describe three specific groups of cases; most of the cases that are brought to the Federal Constitutional Court belong to one of these groups.

2. Instruments of judicial review

a) The first group of cases is the request for a so-called "review of a specific statute" (Art. 100, par. 1 of the Basic Law), which arises from an ordinary lawsuit. Every German court which is convinced that a relevant federal or state law that is applicable to its case violates the Basic Law must refer the constitutional question to the Federal Constitutional Court and suspend the proceedings until a decision of the Federal Constitutional Court has been reached. The Federal Constitutional Court is the only court in Germany which is vested with the power to declare a law unconstitutional. No ordinary German court may decide on the unconstitutionality of a law; ordinary courts are those German courts not exclusively competent for constitutional matters, as is the Federal Constitutional Court,. But of course every German court has to reflect on the constitutionality of the laws applicable to cases that are brought before it, because the Basic Law says in its Art. 1, par. 3 :

> "The following fundamental rights shall bind the legislature, the executive and the judiciary as directly enforceable law."

If doubts about the constitutionality are raised but the court concludes that there is a way to interpret the statute in conformity with the Basic Law, it can do so. It is only the "negative declaration" of a court - concluding that a statute cannot be interpreted in conformity with the Basic Law - that is reserved exclusively to the Federal Constitutional Court.

The submitting court has to explain in detail why it considers the relevant legal provision to be in conflict with the constitution, why the outcome of the case depends on the validity of the law and why there is absolutely no acceptable way of interpreting the law in accordance with the constitution. The (ordinary) court has this obligation whether or not the issue of constitutional conformity has been raised by one of the parties. If the Federal Constitutional Court accepts the request for the review of a specific statute, it provides the parties with an opportunity to be heard and permits the highest Federal bodies (or State government, if a state law is challenged) to enter the case.

The procedure that involves the review of a specific statute is frequently made use of. It accounts for the second largest share of the Federal Constitutional Court's activities. From the Court's beginning in 1953 until the end of 2001, the court has found over 300 statutory provisions unconstitutional.

b) Contrary to this, the so-called "abstract review of a statute" does not have its origins in court proceedings. It starts on the request of the Federal government, a state government or one third of the members of the German Parliament, the *Bundestag*. Here the Federal Constitutional Court is asked to decide differences of opinions or doubts about the compatibility of Federal or State law with the Basic Law. The requesting party has to submit written briefs and the relevant Federal bodies or State governments are asked to participate.

While the Federal Constitutional Court can refuse to decide a case that involves the review of a specific statute on the grounds that the submitting court has not sufficiently set forth its concern about the unconstitutionality of the challenged law or because the Federal Constitutional Court finds that the decision of the case does not necessarily depend on the validity of the challenged law, there is "no easy way out" in the case of the abstract review of a statute. Here the Federal Constitutional Court has to deliver an opinion which is binding for every state body, including the legislature. Once the request is submitted, the party that started the proceedings has no longer the power to withdraw it. The court will analyse the law in question under every constitutional aspect, it is not limited to objections raised by the parties.

A good example for a proceeding that involves the abstract review of a statute are the abortion cases (BVerfGE 39, p. 1 and BVerfGE 88, p. 198). In 1974, and again in 1992, the *Bundestag* had passed abortion reform statutes. Both times, a number of members of Parliament as well as the state government of Bavaria (and in the first case, 4 more state governments) petitioned the Federal Constitutional Court to review section 218 a of the Abortion Reform Act on the ground that it violated several provisions of the Basic Law, including its clauses on human dignity and the right to life.

c) The other instrument of control the Federal Constitutional Court has, which is important for the relation to other courts and which accounts for the largest share of its workload, is the constitutional complaint: More than 4,900 constitutional complaints were lodged by individuals and legal persons in 2001. After exhausting all other available means to find relief in the ordinary courts, any person who claims that a "public authority" has violated his or her fundamental substantive or procedural rights under the Basic Law can file a constitutional complaint. Fundamental rights are rights of protection as against the state. They guarantee that individuals have an inviolable sphere of rights and all incursions by the state require justification. "Public authority" in this context means any governmental action including judicial decisions, administrative decrees and legislative acts.

In any case, the complainant has to be directly and presently affected by the act of public authority. As most legislative acts require implementation by the administration, frequently the complainant will have to wait for an administrative act addressed to him and direct a court action against that act. In some cases however it has been found that a law itself presently and directly affects the fundamental rights. As no ordinary judicial remedy is available against legislative acts, a constitutional complaint has been considered admissible in these cases.

The constitutional complaint is an extraordinary legal remedy, available to the individual for the protection of his or her fundamental rights. All remedies within the relevant branch of jurisdiction must therefore have been exhausted before an individual may bring the case before the Federal Constitutional Court. This restriction makes sense because all courts are obliged to consider constitutional values when deciding cases of ordinary law. The principle follows, as I have already mentioned, from Art. 1, par. 3 of the Basic Law. This paragraph provides that the fundamental rights set forth in the constitution shall bind the legislature, the executive and the judiciary as directly enforceable law.

Most constitutional complaints are directed against court decisions. Therefore the examination of the case - and its full review if it is admitted for decision - necessarily has to include the evaluation of the preceding court decisions. The Federal Constitutional Court is restricted to constitutional review. Usually the complainants claim the violation of fundamental rights in the findings of the regular courts, either because the courts applied a statute in an unconstitutional manner or because the law applicable to the case itself is unconstitutional. The Federal Constitutional Court, however, is only permitted to review whether the regular court has violated the complainant’s constitutional rights. As long as no fundamental right has been infringed, the Federal Constitutional Court is bound by the decisions of the regular courts.

But if the Federal Constitutional Court finds that the regular courts have applied a valid law in an unconstitutional way, it will overturn the decision. If it finds that an ordinary court wrongly interpreted the underlying law to be constitutional, it will overturn the decision and additionally declare the law unconstitutional, because it violates a specific fundamental right. If this happens the statute in question is null and void just like in the cases that involve the review of statutes and regular courts may no longer apply it. And 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 on all the other courts, too.

The impact of the constitutional complaint on the constitutional law in Germany cannot be overemphasised, although the rate of the successful complaints is very low. It is below 3 %. Most landmark cases in Germany’s constitutional history have originated from a

constitutional complaint that was lodged by ordinary citizens. Let me give you a few examples:

(1) In a 1958 case the Federal Constitutional Court held that an injunction by a civil law court against a man called Lüth violated his freedom of speech. Mr. Lüth had publicly demanded the boycott of a certain film. The Federal Constitutional Court made clear that fundamental rights are to be taken into account within the sphere of civil law and its interpretation as well.

(2) In 1987 the Federal Constitutional Court decided on a constitutional complaint of a farmer who won his case: The Daimler Benz Automobile Company planned to build a test course for new cars on his land. The Federal Constitutional Court decided that expropriation for a private purpose requires a written law, which describes the purpose of the expropriation, the preconditions and the procedure of finding out whether the preconditions are fulfilled.

(3) And in 1995 the court held that former nationals of East Germany (GDR) who had engaged in spying against the Federal Republic of Germany may after reunification only under certain circumstances be prosecuted for espionage.

3. Impact and Influence of the Federal Constitutional Court's Work

The task of the Federal Constitutional Court is to ensure that all bodies of the state obey the Basic Law. The delimitation of State power is a feature of the rule of law. The Court shows the way how to interpret and to develop the German Constitution and places great emphasis on transparency in its decisions (*e.g.,* by appointing independent experts).
The work of the Federal Constitutional Court also has a political effect. But the Court is not a political body. Its sole standard is the Basic Law. Questions of political expediency are not allowed to play any part as far as the Court is concerned. If this were otherwise, the Court would long have lost its high reputation in the eyes of the public. The Court merely determines the constitutional framework for political decision-making.

II. Functioning of the Federal Constitutional Court

1. Its composition

First of all, I would like to explain the composition of the German Federal Constitutional Court. It is composed of sixteen Justices. These sixteen Justices sit in two Panels, or Senates, with eight Justices each. This is one Justice less than in the Constitutional Court of Georgia.
The two German Senates are equal in power but exercising mutually exclusive jurisdiction. They both speak in the name of the Federal Constitutional Court as a whole. The Federal Constitutional Court meets as a "plenary" with all the sixteen Justices only in order to resolve juridical conflicts between the two Senates or to deal with administrative matters, for example the amendment of the internal rules of procedure. Important to the preservation of the Federal Constitutional Court's independence is its administrative autonomy. The Court is responsible for its own organisation and administration, and it also has financial sovereignty. The organisational, administrative and financial independence of the Court is based on the

Rules of Procedure that the Federal Constitutional Court has given itself (published in: Lechner/Zuck, BVerfGG, 4th ed., 1996, addendum), which make the judicial and administrative procedures of the Court transparent.

In each Senate there are three Chambers with three members each. The Chambers primarily determine whether a constitutional complaint is to be admitted for decision. If the complaint is admitted, the Chamber procedure is terminated, and the case is dealt with by the responsible Senate. The chamber system is of essential importance for efficiently handling the burdensome caseload.

On the other hand, the Chamber may grant a constitutional complaint if it is manifestly justified and if the legal question at issue has already been decided by a Senate. In proceedings of fundamental importance, however, it is always a Senate that decides.

2. The Justices

In order to become a Justice at the Federal Constitutional Court, one must be at least forty years of age and must have a judicial degree. The Justices are not appointed. They are elected. Contrary to the Justices of the Constitutional Court of Georgia, German Constitutional Court Justices are elected, in principle, for a term of office of 12 years. The term of office, however, does not extend beyond the retirement age of 68 years. Half of the Justices are elected by the Bundestag (the German parliament), the other half by the Bundesrat (which is the Council of Governments of the Federal States). The Justices may not continue to be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding bodies of a Federal State. It is interesting that three justices of each Senate must be recruited from the supreme Federal Courts of the German judiciary. This rule was designed to ensure the stability and continuity that experienced justices are expected to bring to the bench. Their experience in the judicial system and the fact that they are very familiar with procedural provisions serves not least the effectiveness and efficiency of the Constitutional Court procedure. The other justices usually are law professors, former politicians and sometimes lawyers.

The Federal Constitutional Court has a President who serves as the head of the Court's administration and presides over the First Senate. Prof. Dr. Papier has been President of the Federal Constitutional Court since April 2002. Beside his judicial and administrative duties, he has representative obligations. Apart from its role as constitutional court, the Federal Constitutional Court is one of the supreme constitutional bodies of Germany (beside the Federal President, the Bundesrat, the Bundestag and the Federal Government).

As a Justice, President Papier is not superior to his colleagues in the First Senate. As the presiding judge of the First Senate, he is "one among equals."

It might be of interest to you that the compositional framework that I have just outlined is only partly laid down in the German Constitution itself, in Article 94. In fact, there are very few stipulations in the Basic Law with regard to the composition of the Federal Constitutional Court. Most of them you will find in the Federal Constitutional Court Act. This seems to be different from the respective regulations in Georgia because, like any other law, the Federal Constitutional Court Act can be changed by the respective political majority without the constraints of a constitutional amendment.

3. The "Case Management"

If you take a look at the statistics of the Court, you will see, that in the last year we had almost 5,000 cases (4,831, to be precise). Most of them (*i.e.,* 4,705) were constitutional complaints.

How can the court manage such an overwhelming caseload?

Let me describe the functioning of the Federal Constitutional Court: When a file is submitted to the court, it first reaches the administration, the so-called "*Präsidialrat*", (presiding administrative officer of the Senate), a kind of case-manager. He or she decides whether a case is patently inadmissible (then it is referred to the "General Register"). If it is not patently inadmissible, it is referred to the Justice who is responsible for the subject matter according to the yearly plan for the allocation of the workload.

The Justices in the First Senate are responsible for legal review proceedings in which a legal provision is claimed to be incompatible with fundamental rights, for example the important fundamental right to free speech, to freely choose and practice an occupation or profession, the guarantee of private property (Article 14 of the Basic Law) and the general freedom to act, for example, as part of the right to the free development of one's personality (Article 2, paragraph 1 of the Basic Law).

The Second Senate is responsible for the cases concerning forfeiture of fundamental rights, the ban of an unconstitutional political party (at present, the case of the National Democratic Party, a right-wing party which is said to follow the ideas of the Nazis is pending and is closely observed by the public and the press), disputes between constitutional bodies or between the Federation and the *Bundesländer* (*i.e.,* the Federal States) and constitutional complaints concerning the right of asylum and tax law.

When the responsible Justice is identified, he or she reads the file and - if he or she does not finally deal with the case at this point in time - gives it to one of his or her Law Clerks. Most of the Justices have four Law Clerks. Then the Law Clerk writes a draft opinion on the case. I, for example, only deal with constitutional complaints that concern the right to asylum and the guarantee of protection from the courts and the guarantee to be heard in court. So I suggest if the case should be admitted for decision or not. Furthermore I can suggest that the Chamber or the Senate should rule in favour of the complainant.

The draft opinion that has been written by the law clerk is read by his or her Justice. If he or she accepts it - sometimes it is revised by the Justice - the draft opinion goes to the other Justices of the Chamber or the Senate. The Justices of the Chamber usually agree with the draft opinion, but sometimes add or change parts of the suggested justification and sign the attached decision.

The admission procedure is very important for managing the caseload of the Federal Constitutional Court, which is mainly caused by the huge number of constitutional complaints. However, it is frequently criticised that in the Chamber procedure: (1) only three, instead of eight, Justices decide without oral argument; (2) that mostly no statement of reasons is given in the Chamber decisions; and (3) that the preparatory work is done by law clerks. A proposal has been discussed for some time, according to which the responsible Senate would decide, at its discretion, whether a constitutional complaint is admitted for decision. This would mean that the Chambers would be abolished.

The reporting Justice would have to write a brief statement about the case. If the reporting Justice recommends non-admission, another Justice, the co-rapporteur, would review the case, and the members of the Senate would have, during a short period of time, the opportunity to raise objections against the non-admission.

I am doubtful about whether this procedure is better than the admission procedure as it is currently practised. It is remarkable that every year, 5,000 cases are brought before the Federal Constitutional Court although it is widely known that only a very small percentage of all constitutional complaints is admitted for decision. Nevertheless, the jurisprudence of the Federal Constitutional Court has been enjoying, in the fifty years of its existence, great confidence among the German public.

When a case is admitted for decision in a Senate, the Justices discuss the case. Just to remind you: only constitutional issues that are new or very important are decided in the Senates. After the discussion, the Justice who is responsible for the case, the rapporteur, writes the text of the decision, and then the Senate debates the contents of the decision for the second time. After that the decision is pronounced. This procedure sometimes takes a very long time, especially when fundamental or ethical questions are under consideration.

A good example for the described procedure are the abortion cases from 1974 (BVerfGE 39, pp. 1 *et seq.*) and 1992 (BVerfGE 88, pp. 198 *et seq.*), that I have already mentioned. The petitioners had argued that this section violated several provisions of the Basic Law, including its human dignity and right-to-life clauses. You can imagine that these decisions required long and careful consideration before the Justices finally decided to declare that the termination of pregnancy is to be exempt from punishment while remaining illegal. This is certainly a uniquely German approach, which seeks to achieve a reasonable balancing between the numerous competing interests in this case.

Finally, it is worth mentioning that the heavy caseload can only be managed owing to the sophisticated "infrastructure" below the judicial level. Excellently trained staff on all levels of the Court's administration, the use of state-of-the art telecommunication, word processing and information technology equipment, and, not least, the existence of an extensive library facilitate the daily work at the Court.