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The German Federal Constitutional Court from the point of view of complainants in search of their constitutional rights

I. Imagine a violation of your basic rights that you might want to bring before the Federal Constitutional Court

Imagine that you are *not* a legal expert, that you go on holiday to Germany, and that being there, you are - arbitrarily, from your point of view - arrested by the police. For the sake of simplicity, let us assume that the police release you after a few hours, but without apologising, that you decide to sue them and that all you want is to have it made clear to them that their action was illegal and infringed your rights. Suppose the administrative courts, which you ask for a statement to that effect, do not grant that request in any instance.

All of this, including your going on holiday in Germany, is extremely unlikely to happen, but if it happened, you might want to know whether and how you can take the case to the German Federal Constitutional Court.

II. Access to and subsidiarity of legal protection by the Federal Constitutional Court

Perhaps you have German friends who told you that, while you needed a lawyer to bring your case before the second-instance administrative court, no advocate is necessary in order to go to the Federal Constitutional Court – you can do it by yourself[1]. But how? Trying to find out from the website of the Federal Constitutional Court, you will be disappointed: no information there, so far, on how to invoke the Court's jurisdiction. However, this may soon improve.

Meanwhile, I suggest that you turn to the German Basic Law ("Grundgesetz", GG) and the Law on the Federal Constitutional Court ("Bundesverfassungsgerichtsgesetz", BVerfGG), both of which are available on the internet. From these you will learn that any person can turn to the Federal Constitutional Court with the complaint that one of his basic rights has been violated by public authority[2], but that where other legal remedies are available, these have to be exhausted beforehand[3]. What that means in practice depends on the rules of procedure of the five branches of the German judiciary. There are matters for which two stages of appeal are available and must, consequently, be gone through to make a constitutional complaint admissible. In many areas, however, only one stage of appeal is available, and there are even matters where the court of first instance's judgment will not be reviewed by any other ordinary court, so that the unsuccessful party may turn directly from the first-instance

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[1] There is a statutory requirement to be represented by a lawyer in the oral hearings, Art. 22 I 1 BVerfGG. Oral hearings, however, rarely take place (see part V. below); for the normal case of proceedings without oral hearings, no legal counsel is required by law. If you feel that you need a counsel but lack the means to appoint one, you can apply for legal aid, including the assignment of legal counsel (analogous application of Art. 114 ff. of the Code of Civil Procedure). This will, however, only be granted if indispensable, and only if your complaint has a chance of success.

[2] Art. 93 I no. 4a GG; Art. 90 I BVerfGG.

[3] Art. 90 II 1 BVerfGG; on that requirement see also M. Singer, The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints, in: The International Comparative Law Quarterly, vol. 31, 1982, pp. 331-356 (345 ff.). Against individual acts of the executive (allegedly) infringing basic rights, a legal remedy is *always* available since it is guaranteed by the constitution. As to legislative acts, there are no legal remedies by which they can *directly* be challenged as unconstitutional. Accordingly, there are no legal remedies to be exhausted under Art. 90 II 1 BVerfGG. However, constitutional complaints directed against a statute are held admissible only if the complainant can claim that his basic rights are *presently* and *directly* infringed by the statute; if this is not the case, he will have to wait for an application of the statute to him by an act of the executive or the judiciary and then exhaust remedies against that act of application before bringing the matter before the Federal Constitutional Court. If a ordinary court shares the view that the statute applied is unconstitutional, it must refer the question of constitutionality of the statute to the Federal Constitutional Court, Art. 100 I GG. For details and references on constitutional complaints against acts of the legislature cf. *W. Heun*, Access to the German Federal Constitutional Court, in: R. Rogowski/T. Gawron, Constitutional Courts in

ordinary court to the Federal Constitutional Court. This is the case, for instance, when an action concerning the right of asylum has been dismissed as obviously unfounded. Since German legislation has tended to cut down stages of appeal in recent years, the Federal Constitutional Court is confronted with rising numbers of complaints directed against lower-court judgments.

If a case is of general importance or if prior recourse to other courts would entail a serious and unavoidable disadvantage to the complainant, the Federal Constitutional Court *may* take on a case which has not yet gone through the regular legal procedures[4], but none of these exceptions would normally apply to a case of (allegedly) arbitrary arrest by the police – not even if the detainee were still under arrest. To an arrested person, it would of course be a serious disadvantage if he did not get released very soon, but there is no reason why an intervention by the Federal Constitutional Court should be necessary to avoid that disadvantage, since there are ordinary courts at hand, which can normally be expected to protect a detainee's rights efficiently[5]. Accordingly, the exhaustion requirement is also applied when a complainant asks for, and claims to be in need of, a temporary injunction. The Federal Constitutional Court may issue such an injunction if this is urgently needed to avert serious detriment or to ward off imminent force or for any other important reason for the common weal[6]. But speedy provisional protection can as well – and in certain respects even better[7] – be obtained by the ordinary courts. Mere urgency of a case is not a sufficient reason to assume that it is precisely a *Federal Constitutional Court* decision which is urgently needed, and therefore not a sufficient reason to depart from the "prior exhaustion" rule.

Generally, the Federal Constitutional Court tends to apply the "prior exhaustion" rule in a rather strict manner. Moreover, the court has derived from this rule, by way of induction, a broader principle according to which a constitutional complaint is admissible only if the complainant has used all available means of, and in, legal procedure to prevent the alleged

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Comparison. The U.S. Supreme Court and the German Federal Constitutional Court. New York – Oxford 2002, pp. 125-156 (129 ff.).

[4] Art. 90 II 2 BVerfGG.

[5] By way of exception, exhaustion of remedies is considered unnecessary where it would foreseeably be futile in view of a firmly established, uniform jurisprudence of the ordinary courts, see, e.g., Decisions of the Federal Constitutional Court ("Entscheidungen des Bundesverfassungsgerichts", BVerfGE) 68, 376 (380 f.); 78, 155 (160).

[6] Art. 32 I BVerfGG.

[7] For instance, quick decision-making by the Federal Constitutional Court may be hampered by the unanimity requirement for Chamber decisions, cf. part VII.

violation or to get it corrected[8]. This broader principle is called the *principle of subsidiarity of the constitutional complaint*.

This implies that it is incumbent upon the complainant not only to go through all stages of appeal that are explicitly made available by law, but also, for instance, to try remedies whose admissibility is unclear[9], to use remedies of merely indirect relevance to the act which is claimed to be unconstitutional[10], and to raise before the ordinary courts precisely those issues which he later wants to bring before the Federal Constitutional Court[11]. Anyhow: you, supposedly, did exhaust legal remedies. What else do you have to observe?

III. Substantiation requirements – with an excursus to the presiding administrative officers

Art. 93 I BVerfGG informs you that to be admissible, your complaint must be lodged and substantiated within one month after notification "of the decision". In a case like yours, the relevant decision in this context is, of course, the last-instance administrative court decision denying that your rights were violated by the arrest. As to substantiation and other formalities, the legal requirements don't seem to be very demanding: According to Art. 23 I 1 and 2 BVerfGG, any application for the institution of Federal Constitutional Court proceedings must be submitted to the court in writing; the reasons for the complaint must be stated, and evidence, where necessary, must be specified. As to the statement of reasons, a specific rule

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[8] BVerfGE 73, 322 (325); 74, 102 (113); 77, 381 (401); 81, 22 (27); 81, 97 (102); 84, 203 (208); 94, 166 (188); 95, 163 (171); 104, 65 (70); 107, 257 (267); 110, 1 (12).

[9] BVerfGE 70, 180 (186 f.).

[10] Cf., e.g., BVerfGE 22, 287 (290 ff.) and BVerfGE 24, 363 (365). In these cases, members of the religious community of Jehovah's Witnesses who regarded performing military as well as alternative civilian service as contrary to their religious duties had complained against criminal sanctions imposed upon them for desertion from alternative civilian service. Their complaints were dismissed under the principle of subsidiarity because they had failed to exhaust legal remedies against *their being drafted into alternative civilian service*, i.e. an act different from the one their constitutional complaint was directed against.

[11] If of several issues or claims relevant to a case, only a part has not been raised before the ordinary courts, the complaint will be held inadmissible only with respect to this part. Thus, if a person who was denied asylum and ordered to return to his country of origin claims that the competent authority has a) misinterpreted the constitutional notion of political persecution in Art. 16a GG and b) failed to consider his state of health which does not allow him to travel to or survive in his home country, only the first claim will be heard by the Federal Constitutional Court and the second one dismissed if the former, but not the latter one had been raised before the administrative courts. For an account of the Federal Constitutional Court's jurisprudence concerning substantiation requirements see G. Lübbe-Wolff, Substantiierung und Subsidiarität der Verfassungsbeschwerde. Die Zulässigkeitsrechtsprechung des Bundesverfassungsgerichts, in: EuGRZ 2004, 669 (676 ff.).

concerning constitutional complaints requires that you specify (in the sense of: identify) the right which you allege to have been violated, and the violating act[12].

If you rely on that information to be exhaustive, you might get a letter from the presiding administrative officer of the competent panel soon after having dispatched your complaint. There are two "presiding administrative officers" – in practice: the director and the vice-director of the court's administration –, each of them assisted by several registrars. Their function, according to the Internal Rules of the court, is to support the presidents of the two panels. In accordance with the Internal Rules, the president of the court has delegated to them the management of the court's registers. There is one register, the register of proceedings (Verfahrensregister), for filings to be handed over to the judges for judicial treatment, and another register, the so-called General Register (Allgemeines Register) for filings to be treated as administrative matters. If you ask the court for permission to inspect historical files, this request and the answer to it will be kept in the General Register. This is also where the congratulatory or insulting (more often insulting) letters go which the court receives as a response to controversial judgments. According to the Internal Rules, however, even constitutional complaints may end up there, i.e. they may never come before the eyes of a judge: A constitutional complaint may (not: must) be entered in the General Register if its being accepted for decision is out of the question because it is *obviously* inadmissible or ill-founded[13]. In such a case, the complainant will receive a letter from the presiding administrative officer informing him that and why his complaint is presumed to be without prospects of success, and drawing his attention to an attached leaflet concerning the conditions of admissibility of constitutional complaints. From this leaflet, he can also learn that he has the right to insist on getting a judicial decision. If in response to that letter, the complainant asks for a judicial decision, his complaint will be transferred to the register of proceedings and go the normal way to a judicial decision[14].

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[12] Art. 92 BVerfGG: "The reasons for the complaint shall specify the right which is claimed to have been violated and the act or omission of the organ or authority by which the complainant claims to be harmed." In the German version, the word which has been translated by "specify" in the English edition of the Law on the Federal Constitutional Court is "bezeichnen"; the closest English equivalent to the verb "bezeichnen" in this context is "to name" (in the sense of: to identify). This makes it clear that, literally, very little is being asked.

[13] Art. 60 II a of the Internal Rules of the Federal Constitutional Court ("Geschäftsordnung des Bundesverfassungsgerichts", GOBVerfG). Also, constitutional complaints for which the competence of one or the other panel cannot be immediately ascertained will temporarily be kept in the General Register, see Art. 60 II b GOBVerfG. Of the files entered in the General Register as a constitutional complaint according to Art. 60 II a GOBVerfG, some may not have been meant as such. The character of filings is sometimes doubtful; in such cases, the presiding administrative officer will rather take the risk of treating a non-complaint as a complaint than vice versa.

[14] Art. 61 II GOBVerfG (together with the counsel's letter, every complainant receives a leaflet explaining this).

There is a discussion on whether the Internal Rules of the court are a sufficient basis for this procedure[15]. As to the practical effects, one might see a weak point in the somewhat reserved, indirect way just described in which complainants are given access to information concerning their right to insist on getting a judicial decision. Yet, as a mechanism of sorting out obviously hopeless cases, and *only* obviously hopeless ones, the procedure seems to work well, due to high juridical competence of the presiding administrative officers and their assistant registrars and a sensitive, cautious exercise of their discretion. The filtering effect of preliminary administrative examination and premonition substantially reduces the workload of the court in its judicial function, and as far as I can see, it does so without collateral damage to warranted constitutional complaints. In 2003, 4,298 complaints were first entered in the General Register. 1,786 were, upon explicit or implicit request of a judicial decision by the complainant, transferred to the register of proceedings. 2,630 definitely ended up in the General Register[16]. Among the transferred complaints which I have seen, I do not recall a single one to which the criteria for preliminary registration in the General Register had been wrongly applied.

Now why is there a good chance for you to receive a letter from the presiding administrative officer if, in drawing up your constitutional complaint, you have taken the substantiation requirements in Art. 23 I and 92 BVerfGG to be exhaustive? Because in that, you were mistaken. The Federal Constitutional Court has given an extensive interpretation to these requirements – an interpretation so extensive that the substantiation requirements established by the court's jurisprudence can hardly be anticipated from the relevant legal text[17]. The complainant must not only name the decision which allegedly violates his rights, and give the facts of the case in such a way as to show the possibility of the alleged violation[18]; beyond that, the contents of the contested administrative and/or judicial decisions in dispute must be brought to the Federal Constitutional Court's knowledge in such a way as to give the court a sufficient basis for its judgment, i.e. the complainant must either add a copy of these decisions to his complaint or give a sufficiently detailed account of their contents, including a detailed

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[15] Cf. *Heun* (note 3), 134 f., with further references.
[16] Annual statistics of the Federal Constitutional Court, 2002, p. 45, and 2003, p. 50. If the sum of the two latter numbers is not equal to the first, this is because the set of complaints filed in 2003 and the set of complaints either transferred to the register of proceedings or being conclusively dealt with in the General Register in 2003 are in fact incongruent. The quota of transferred filings has gone up during the last decade; in 1992, it was only 20 %, cf. Annual statistics 2002, p. 45.
[17] For the literal meaning of the legal text, cf. supra note 12.
[18] BVerfGE 17, 252 (258); 47, 182 (186); 52, 303 (327 f.).

rendering of the reasons[19]. Mainly by chamber decisions, this requirement has been extended to other types of documents upon the contents of which the case may depend. Also, it has been held that, to be admissible, the reasons of a constitutional complaint must also show that the complainant has complied with the requirement of exhausting regular legal remedies, or even – following the extension from the exhaustion requirement to the principle of subsidiarity, that he has complied with the broader principle of subsidiarity. Depending on how extensively the principle of subsidiarity is interpreted, this may entail substantiation requirements concerning the motions and arguments by which the complainant has sought to defend his case before the ordinary courts. Some chamber decisions have even held that the substantiation requirement includes an onus to adduce jurisprudential arguments buttressing the complainant's claim[20].

As far as the substantiation requirements just mentioned are firmly established by panel decisions, failure to comply with them may result in a presiding administrative officer's getting in touch with you. And by the time the presiding administrative officer informs you, it may be too late for amendment.

IV. Time-limits

What makes the extensive substantiation requirements a significant hurdle is that they must be fulfilled *within the time-limits* for constitutional complaints established by Art. 93 BVerfGG. Normally, the time-limit is one month after service or informal notification of the decision in question[21]. If the complaint is directed against a law or some sovereign act against which regular legal action is not admissible, the complaint may be lodged only within one year from the day the law entered into force or the act was notified to the complainant[22].

In case you failed to send with your complaint a copy of the decisions against which it is directed, or to give the necessary detailed account of the reasons, the presiding administrative officer of the competent panel might thereupon inform you about the relevant substantiation requirement, including the time-limit to be observed. Since your complaint, like most complaints, probably reached the court near the end rather than near the beginning of the relevant period, it will usually be too late to amend it in response to what you have learned

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[19] BVerfGE 88, 40 (45); 93, 266 (288).
[20] For a more detailed account of the points last mentioned cf. Lübbe-Wolff (supra, note 11), pp. 678 ff.
[21] Art. 93 I 1 BVerfGG.

from the presiding administrative officer. Let us therefore suppose that you had taken pains to furnish the court with all the information needed to form a view on your case, and that, in the absence of other manifest deficiencies, your complaint goes directly to the register of proceedings. In that case, the court will send you an acknowledgement of receipt and inform you about the reference number assigned to your complaint. After that, some time will probably elapse before you hear from the court again.

V. How long will you have to wait for a decision?

Most likely, you will get a decision within the next twelve months. Of the constitutional complaints filed from 1994 to 2004, 67.4 % were decided upon within one year, 20.2 % within two years, 4.6 % within three years, 3.1 % within four years or more, and 4.7 % were still pending by the end of 2004.

VI. Why there probably won't be oral hearings in your case. On the division of labour and competences between the Federal Constitutional Court and other courts

It is most unlikely that you will have to travel to Karlsruhe for oral hearings. In constitutional complaint cases, the court may dispense with oral hearings if it does not expect them to be helpful, unless constitutional organs which have the right to join the proceedings want them[23]. In the vast majority of cases, there is no need for such hearings. This is due to the special function of the Federal Constitutional Court.

Although the court has powers to take evidence during oral hearings, or to charge one of its members with taking it, or to delegate this task to some other court[24], it is not – neither with respect to fact-finding nor in any other respect – supposed to work as just another instance on top of those which the complainant must have gone through before lodging a constitutional complaint. The court is confined to judging whether or not your constitutional rights have been violated. At first sight, this does not seem to imply much of a restriction, since under the

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[22] Art. 93 III BVerfGG.
[23] See Art. 94 V BVerfGG: "The constitutional organs named in paragraphs 1, 2 and 4 above may join the proceedings. The Federal Constitutional Court may dispense with oral hearings if they are not expected to advance the proceedings any further and if the constitutional organs which are entitled to make a statement and have joined the proceedings waive an oral hearing."
[24] See Art. 26 BVerfGG.

German constitution as interpreted by the Federal Constitutional Court, German citizens as well as citizens of states other than Germany have ample constitutional rights which, in sum, amount to – or at least come close to – a constitutional right to be treated legally[25]. Thus, for practical purposes, there does not seem to be any difference between controlling the constitutionality of an act and controlling its legality. A functional differentiation with respect to guaranteeing individual rights between the Federal Constitutional Court and other courts can therefore only be established by way of a differentiating answer to the question of *quis judicabit*, and this is how the Federal Constitutional Court has distinguished its own function from that of the ordinary courts: According to continuous Federal Constitutional Court jurisprudence, it is for the ordinary courts to ascertain the facts of a case and to interpret and apply the relevant law ranking below the constitution[26]. As long as the courts keep within the limits of defensibility in performing that task, i.e. as long as their judgment is not *arbitrary* and does not show a *fundamental misconception of the relevance of basic rights to the interpretation and application of statutory law*, the Federal Constitutional Court will not interfere[27].

Therefore, if you claim, for instance, that the administrative court's decision of your case rests on a mistaken assessment of the credibility of a witness who testified that the police arrested you because you turned violent when asked to show your passport, the Federal Constitutional Court will certainly not hear the witness, but point out to you that it is not within its competence to replace the administrative court's assessment of credibility by its own. Even if the administrative court had shown absolute unawareness of fundamental rights in evaluating the testimony – say if it had believed the witness more than you on the ground that he was German and you were not – this would not be a reason for the Federal Constitutional Court to take over and hear the witness itself. In such a case, the administrative court judgement, if it rested on that discriminatory assessment, would be reversed for violating Art. 3 III 1 GG[28], and the case referred back to a competent administrative court[29].

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[25] For a recent confirmation see decision of October 26, 2004 – 2 BvR 1038/01 – www.bverfg.de, paragraph no. 77.
[26] See, e.g., BVerfGE 18, 85 (92); 95, 96 (128); 99, 145 (160); 104, 92 (119); 106, 28 (45).
[27] BVerfGE 18, 85 (92 f.); 95, 322 (330); 96, 375 (398); 100, 214 (222).
[28] Art. 3 III 1 GG: „No one may be disadvantaged or favoured because of his sex, parentage, race, language, homeland and origin .....".
[29] See Art. 95 II BVerfGG: „If a complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence of Article 90 II above it shall refer the matter back to a competent court." In practice, the matter is in most – but not all – cases referred back to the court whose decision was overturned, i.e. the Federal Constitutional Court normally expects that the court which has made the annulled decision will be able to make an unbiassed new decision on the basis of the grounds on which the Federal Constitutional Court has set aside the first one.

Oral hearings only take place in cases which are decided by the panels (not in chamber cases[30]), and even then by far not in every case. For the reasons just explained, even the panels do not hold oral hearings in every constitutional complaint case. If they do, the main purpose of the hearing is usually to discuss the questions of constitutional law which the case raises and to collect – also from experts and representatives of interest groups – teleologically relevant information.

VII. Will you get a panel or a chamber decision? A chamber decision with or without a statement of reasons? Ways of coping with the court's workload.

Having been entered in the register of proceedings, your file will be sent to the reporting judge as determined by the schedule of responsibilities. He or she will decide whether to bring the case before the panel or before the chamber (or before one of the chambers) in which he is sitting.

In the course of time, the Law on the Federal Constitutional Court has been changed several times, each time with a view to make it possible for the court to cope with the growing number of applications. From 481 in 1951, the number of filings has by and by, with intermediate variations in speed and direction, gone up to a maximum of 5,911 in 1995. From 1998 to 2002, the numbers fell below 5000, but have since risen again to 5,589 in 2004. Constitutional complaints make up by far the greatest part of the filings (in 2004: 5,434 of 5,589, that is, 97.2 %). When the Federal Constitutional Court took up work in September 1951, two panels were the only adjudicating bodies[31]. Today, additional smaller bodies operate alongside the panels: the so-called chambers. An appropriate number of chambers are appointed by the panels for the duration of each business year[32]. In recent years, each of the two panels has appointed three chambers. The panels consisting of eight judges and the chambers of three[33], one judge has to sit in two chambers when there are three of them. The chambers were first – under a different name – institutionalised in 1956 as a means for the court to cope with the growing number of constitutional complaints. Initially, they were

[30] See Art. 93d I BVerfGG. On the allocation of competences among panels and chambers see infra, VII.
[31] Originally, twelve judges were sitting in each panel; later, the number was reduced to eight. This reduction took effect from 1963 on.
[32] Art. 15a I BVerfGG.
[33] Art. 2 II and Art. 15a I 2 BVerfGG.

confined to rejecting constitutional complaints under certain conditions, so that cases had to be passed to the panel if the complaint was to be successful.

During the following two decades, chamber competences were broadened by successive changes in the Law on the Federal Constitutional Court. Also, a requirement that constitutional complaints be accepted by the court was introduced[34]. Complaints are to be accepted if (and, according to the court's interpretation of the relevant article, *only if*) they have fundamental constitutional significance[35], or their acceptance is indicated in order to enforce the complainant's constitutional rights[36]. In other words: complaints are to be accepted if, and only if, the complaint is of special importance either to the legal system or to the complainant. This was meant to relieve the court from juridical examination of petty cases, but does not seem to work well in that function: The court holds that inadmissible or unfounded complaints do not fulfil the acceptance criteria[37]. This has, in practice, been a way to reintroduce broader juridical examination into the application of these criteria instead of using them to avoid such examination; they rather rarely come to be deployed in this latter function.

Since 1986, chambers are competent to *either* refuse to accept a complaint, i.e. make a final decision to the effect that the case is not accepted, *or* accept and allow the complaint, provided it is clearly justified and the relevant constitutional issue has already been decided upon by a panel[38]. Generally, the competence of the chambers is restricted to decisions which

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[34] Art. 93a I BVerfGG.

[35] Art. 93a IIa BVerfGG; this is held to be the case if it poses a question of constitutional law to which the answer is not obvious and which either has not yet been answered on the basis of existing panel jurisprudence or with respect to which new need of clarification has arisen due to changes in the circumstances, BVerfGE 90, 22 (24); 96, 245 (248).

[36] Cf. Art. 93a IIb BVerfGG: „if this is indicated in order to enforce the rights referred to in Article 90 I above; this can also be the case if the complainant would suffer an especially grave disadvantage as a result of refusal to decide on the complaint.".

[37] Cf. a panel nonacceptance decision (almost without reasons) and a dissenting vote of Justice *Hirsch* on this point (concerning an earlier version of Art. 93a BVerfGG in which, however, the criteria for nonacceptance by a panel were very similar to those which are today applicable for panels and chambers alike), in: Neue Juristische Wochenschrift 1978, 936 f.

[38] Art. 93c I 1 BVerfGG. The wording here runs as follows: "if the constitutional issue .... has already been decided upon by the Federal Constitutional Court"; obviously, this implies that only a previous *panel* decision can trigger off a chamber competence for cases which can be the decided on the basis of interpretations developed in that decision, since a previous chamber decision would itself not have been justified under this rule. One further prerequisite for chamber decisions mentioned in Art. 93c I 1 BVerfGG relates to one of the conditions for acceptance of a complaint; on these see above, text with notes 35 and 36.

can be made on the basis of previous panel jurisprudence[39]. How much room for jurisprudential creativity this leaves to the chambers depends on how abstract you allow the principles of panel jurisprudence to which a chamber decision must be reducible to be. From a sociological point of view, the practical answer to this question is likely to be determined by the quantitative capacities of the panels under their usual conditions of operation.

Chamber decisions, whether positive or negative, can only be made unanimously. Failing consensus among the three judges sitting in each chamber, the case can therefore only be decided by the panel, i.e. the reporting judge who could not get his chamber colleagues to subscribe to the proposed decision must take it there. However, such transferrals of cases from the chamber to the panel are not frequent. Since the capacity of the panels is limited, there is even a certain degree of factual necessity to come to terms in the chambers. In practice, about ninety-nine percent of the constitutional complaints are decided upon by the chambers. So from a statistical point of view, the chance that you will get a panel decision is very low.

Should your complaint fail to be accepted, the resulting decision may be very short. In 1993, the Law on the Federal Constitutional Court was changed to the effect that the refusal to accept a constitutional complaint does not require reasons[40]. This has turned out to be not only a very effective, but also a very efficient instrument of exoneration. Of course it does not spare the court a detailed examination of the case. Every decision of the court – be it a panel or a chamber decision, and be it delivered with or without reasons – is based on a close examination of the complaint. The chambers usually do not sit and deliberate, but decide on the basis of the file which is circulated by the reporting judge with an internal report, mostly prepared by one of his law clerks[41], and the proposed decision. What the licence to omit reasons for nonacceptance decisions relieves the court from is not careful juridical

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[39] For decisions allowing the complaint, this follows from the passage in Art. 93c I 1 BVerfGG quoted above in note 38. For decisions refusing to accept the complaint, it follows from rule stating that complaints must be accepted if they have fundamental constitutional significance, cf. note 35.

[40] Art. 93d I 2 BVerfGG.

[41] The court's staff appointment scheme allows for an average of 3.8 law clerks per judge. For the Second Panel, of which I am member, the clerk positions are distributed evenly among the judges; the cutback which is necessary due to the missing fifth part of one position being effected by leaving positions unoccupied for a few months from time to on the occasion of changes. Most law clerks are judges seconded, upon individual demand, from other courts for a period of two our three years; some also come from public prosecutor's offices or other authorities or from universities. On the role of the law clerks see *J. Wieland*, The Role of the Legal Assistants at the German Federal Constitutional Court, in: Rogowski/Gawron (note 3), 197-207; O. Massing, The Legal Assistants at the German Federal Constitutional Court – A "Black Box" of Research? A Comment, ibid., 209-216.

examination but additional time investment for the formulation of unanimously agreed reasons. This implies a considerable saving of time. The chambers are deliberately composed in such a way as to avoid political monocultures, and even among judges whose political worldview is similar, specific juridical convictions or stylistic taste often differ. The need for conciliatory meetings or repeated circulating of files therefore substantially decreases where agreement must only be reached on the decision itself, not on the wording of reasons. The extent to which the chambers make use of the possibility to facilitate their work by deciding without giving reasons differs from chamber to chamber. The chambers of the First Panel tend to be more generous with respect to giving reasons than those of the Second (see fig. 1)[42].

Fig. 1

	Nonacceptance decisions without reasons	
	Chambers of the First Panel	Chambers of the Second Panel
2000	64 %	70 %
2001	64 %	66 %
2002	67 %	72 %
2003	67 %	77 %
2004	68 %	81 %

Another instrument must be mentioned which is meant to allow the court to defend itself against abusive complaints: according to § 34 II BVerfGG, the court may levy an abuse fee of up to 2600 euros. To avoid a general deterrent effect, the court has, on the whole, been rather cautious in applying this instrument – the First Panel even more so than the Second. However, there have been ups and downs. From the late seventies to the middle of the eighties, the total number of abuse fees was almost regularly above one hundred every year (in 1980 and 1981 even 330 and 194, respectively). In recent years, the number of abuse fees imposed has been much lower (2002: 26; 2003: 16; 2004: 17). Most of the time – almost continuously since 1971, and continuously since 1990 – the Second Panel has imposed more abuse fees than the First. In 2004, the Second Panel levied ten abuse fees, summing up to a total of 4.400 euros, and the First Panel six, amounting to a total of 2.970 euros.

[42] For the schedule of responsibilities, see the court's website: www.bverfg.de.

VIII. What are your prospects of success? Statistics.

According to a legend in which many German lawyers believe, the success rate of constitutional complaints has continuously been about 2.5 % over the years. I have even heard people say that there must be objective justice to the court's jurisprudence since there is no other plausible explanation for the amazing spontaneous stability of the success rate than the assumption that 2.5 % is indeed the stable rate of unconstitutional acts of state among those which are the subject of complaint, and that the Federal Constitutional Court does so well as to identify them reliably every year. Well, I am afraid that we shall have to look for some other proof of our excellence. The stability legend is based on an erroneous interpretation of a figure which usually appears on the first page of the court's annual statistics. This figure represents the success rate of *all* constitutional complaints decided from 1951 to the end of the year last documented, and of course it is relatively stable because fluctuations from one year to the next will not significantly change an average calculated over more than fifty years. The court's annual statistical reports do not indicate success rates for the several years. For the years from 1974 on, however, these can be calculated from other data contained in the reports (fig. 2).

Fig. 2

	Constitutional complaint proceedings brought to a close (from register of proceedings)	Successful complaints	
		Absolute	Percent (from register of proceedings)
1974	1,619	13	0.80
1975	1,594	19	1.19
1976	1,987	30	1.51
1977	2,429	24	0.99
1978	2,575	21	0.82
1979	2,757	27	0.98
1980	3,086	86	2.79
1981	2,991	62	2.07
1982	3,294	39	1.18
1983	3,493	89	2.55
1984	3,582	22	0.61
1985	2,942	23	0.78

1986	3,044	46	1.51
1987	2,905	87	2.99
1988	3,258	84	2.58
1989	3,511	87	2.48
1990	3,995	635	15.89
1991	3,761	246	6.54
1992	4,026	210	5.22
1993	5,211	270	5.18
1994	5,107	161	3.15
1995	4,936	139	2.82
1996	5,097	109	2.14
1997	4,882	45	0.92
1998	4,870	99	2.03
1999	5,036	103	2.05
2000	5,072	76	1.50
2001	4,665	89	1.91
2002	4,549	100	2.20
2003	4,578	81	1.77
2004	5,468	117	2.14

Striking peaks in the numbers of successful complaints in certain years like for instance in 1980, 1981, 1983 and 1990 ff. are due to important decisions concerning the constitutionality or unconstitutionality of statutes, or the right to asylum of certain minorities from certain countries, which determined follow-up decisions in a greater number of other pending cases.

That the court's decisions, like decisions everywhere, are not determined by legal rules alone but also by the institutional setting, is well illustrated by the abrupt rise of the number of successful complaints from 1986 on. By law of December 1985, the chambers were empowered to allow constitutional complaints, whereas before, they only had the power to reject them, so that every allowing decision had to be made by a panel. The new chamber competence obviously broadened the court's overall capacities for allowing decisions. Figure 3 shows that this resulted not only in an overall increase in the number of successful

complaints but also in a general redistribution of labour, with the number of allowing panel decisions going down while the total number of allowing decisions went up.

Fig. 3

	Successful complaints decided by panels	Successful complaints decided by chambers
1974	13	
1975	19	
1976	30	
1977	24	
1978	21	
1979	27	
1980	86	
1981	62	
1982	39	
1983	89	
1984	22	
1985	23	
1986	7	39
1987	23	64
1988	12	65
1989	15	66
1990[43]	13	615
1991	17	227
1992	15	185
1993	10	268
1994	11	145
1995	23	116
1996	9	100

[43] For the years from 1990 to 1994, the sums of successful constitutional complaints resulting from an addition of the numbers in the left and right columns is not exactly equal to the sum indicated in the middle column of fig. 2. This is because the numbers in fig. 3 had to be calculated on the basis of more specified data from the annual reports than those in fig. 2. The underlying incoherence in the report data can be traced back to a problem of attribution which I desist from explaining here because the explanation does not help to make sure what precisely the correct sum for 1990-94 is.

1997	14	31
1998	31	68
1999	21	82
2000	11	65
2001	4	85
2002	19	81
2003	16	65
2004	20	97

Of the two panels, the first is often considered the more liberal, pro-civil-rights-oriented, and the second the more conservative, pro-authority-oriented one. If that were generally true, one should expect the success rates of constitutional complaints to be generally higher in the First panel, including chambers, than in the Second. However, figure 4 shows that "liberality" in terms of success rates cannot be generally attributed to either one or the other panel and its chambers. Where the prospects for success are better has changed from time to time, but not erratically: once one of the panels has established itself as the more „liberal" one, it usually holds that position for a number of years.

Fig. 4

	Successful complaints		Panel with the Greater number of successful complaints
	First Panel (including chambers)	Second Panel (including chambers)	
1974	9	4	1
1975	6	13	2
1976	6	24	2
1977	10	14	2
1978	16	5	1
1979	18	9	1
1980	76	10	1
1981	49	13	1
1982	27	12	1

1983	75	14	1
1984	18	4	1
1985	16	7	1
1986	22	24	2
1987	46	41	1
1988	27	50	2
1989	40	41	2
1990[44]	42	586	2
1991	61	183	2
1992	66	134	2
1993	67	202	2
1994	56	100	2
1995	63	76	2
1996	42	67	2
1997	23	22	1
1998	56	43	1
1999	73	30	1
2000	49	27	1
2001	60	29	1
2002	69	31	1
2003	51	30	1
2004	79	38	1

Statistically, chances of success are significantly better for complainants represented by legal counsel than for those who try on their own. In recent years, about half of the complaints have been filed with the support of a lawyer (2000: 55 %; 2001: 48 %; 2002: 52 %; 2003: 52 %; 2004: 55 %). As shown by figure 5, complaints filed without such support are distinctly underrepresented among the successful ones. In part, this is certainly due to the fact that complaints brought in by lawyers have passed a filter while the others have not. Among the complaints filed without counsel, a significant portion is so obviously unfounded that a serious lawyer – in many cases, particularly in those of notoriously litigious persons, even *any*

[44] Cf. note 43.

lawyer – would dissuade from bringing them to court and would refuse to do the job himself. This explains why the success rates cannot be identical for complaints brought in with and without legal counsel, but it probably does not account for all of the difference. Another reason may be that the hurdles of admissibility are difficult to surmount for non-experts since part of them is not apparent from the relevant statutory rules (cf. parts II. and III.). However, this difficulty often makes for failures in cases of complaints filed by lawyers, as well.

Fig. 5

	Successful complaints		
	Total	Without counsel (absolute)	Without counsel (percent of successful complaints)
1999	103	15	14.56
2000	76	10	13.16
2001	89	14	15.73
2002	100	10	10.00
2003	81	9	11.11
2004	117	16	13.68

Note that the rates of successful complaints displayed above in figure 2 relate to the number of complaints in the *register of proceedings*. With respect to questions concerning the work (and workload) of the justices of the Federal Constitutional Court, the interesting statistical data are generally those relating to the register of proceedings. From the point of view of the citizen, however, it is rather the statistics including data from the *General Register* which count[45]. As I have explained above, many constitutional complaints never get into the register of proceedings but end up in the *General Register* because the complainant, having received information concerning the prospects of his complaint from the presiding administrative officer, does not insist on a judicial decision (III.). In 2004, for instance, this was the fate of 2,888 complaints. If you add these to the 5,478 from the register of proceedings that were brought to a close that year, the total number of complaints processed in 2004 adds up to 8,366, and the success rate goes down from 2.14 % (fig. 2) to 1.4 % (fig. 6). Accordingly, the

[45] The picture resulting from these may be a little too somber because, for the reason mentioned in note 13, the statistical number of complaints in the General Register may be slightly inflated.

success rates of complaints filed by citizens not represented by a lawyer come down to 0.2 % if calculated with reference to complaints from both registers (fig. 7).

Fig. 6

	Complaints brought to a close (register of proceedings plus General Register)	Successful complaints	
		Total	Percent
1999	9,405	103	1.1
2000	7,789	76	1.,0
2001	8,463	89	1.,1
2002	8,197	100	1.,2
2003	7,208	81	1.,1
2004	8,366	117	1.,4

Fig. 7

	Success rate of complaints filed without support of legal counsel relative to complaints in	
	Register of proceedings (R.o.p.)	R.o.p. and General Register
1999	0.3 %	0.2 %
2000	0.2 %	0.1 %
2001	0.3 %	0.2 %
2002	0.2 %	0.1 %
2003	0.2 %	0.1 %
2004	0.3 %	0.2 %

IX. Conclusion

There are various possible explanations of, and reactions to, the low success rates appearing from the figures above. I will not dwell on that subject here except by warning against one possible conclusion: It should not be concluded that as a remedy which is open to anyone, without a statutory requirement of being represented by a lawyer, in any case of alleged

violation of basic rights, the constitutional complaint is too inefficient to be worth the costs. At a time when stages of appeal are being cut down throughout the judicial system, when staff appointment schemes throughout the judicial system have long since ceased to keep up with the ever growing number of proceedings, and when due to internationalization of the economy, the general tendency is to shift burdens to individual citizens, the constitutional complaint in its traditional form is more necessary than ever. The efficiency of our dealing with constitutional complaints is certainly improvable in certain respects, but in trying to improve it, we should aim at conserving and even reinforcing the basic characteristic of the constitutional complaint as a remedy which makes the Federal Constitutional Court accessible with as little social bias as possible and enables it to keep an eye on the overall culture of respect for basic rights. It should also be considered that the exceptional trust and esteem which the German Federal Constitutional Court enjoys among German citizens[46] is linked to the openness of access to the court.

Since constitutional complaints are not decided upon by throwing the dice, the prospects for *your* hypothetical complaint (I.) can of course not be determined on the basis of the statistical data in figure 7. If you have managed to file a complaint satisfying the procedural prerequisites, and if it is on the basis of a constitutionally relevant mistake – deviation from due process of law, arbitrariness or insufficient consideration of your basic rights in applying the relevant statutory law – that the administrative courts have failed to acknowledge the illegality of your arrest, your complaint will most likely be successful. The Federal Constitutional Court will then state that the administrative court decisions have violated your basic right to liberty or due process, reverse them, refer the case back to an administrative court[47] and order that your necessary expenses for the Federal Constitutional Court proceedings be reimbursed[48]. Should your complaint be unsuccessful, you will at least have the comfort that the proceedings are free of charge[49].

[46] See *J. Limbach*, The effects of the Jurisdiction of the German Federal Constitutional Court, European University Institute (EUI) working papers Law No. 99/5, pp. 7-22 (7, 8), with further references.
[47] Cf. note 29.
[48] Art. 34a II BVerfGG.
[49] Art. 34 I BVerfGG.