

How to Lodge a Constitutional Complaint

I. General Remarks

Any individual who believes that one of his or her fundamental rights (cf. Art. 1 to Art. 19 of the Basic Law, *Grundgesetz* – GG) or one of the rights which are equivalent to fundamental rights (Art. 20 sec. 4, Art. 33, Art. 38, Art. 101, Art. 103 and Art. 104 of the Basic Law) has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

The Federal Constitutional Court may find an act of public authority to be unconstitutional, void a law, or reverse a court decision if it violates the Constitution and remand it to a competent court.

The Federal Constitutional Court cannot issue any other decisions on account of a constitutional complaint. It cannot, for instance, award damages or initiate criminal prosecution. Moreover, the individual citizen has, in principle, no claim to a specific action on the part of the legislature that can be pursued by means of a constitutional complaint.

If a court decision is challenged by constitutional complaint, it does not undergo complete judicial review, since review is limited to potential violations of constitutional law. The mere fact that the procedure, the finding and legal assessment of the facts of the case, the interpretation of a law or its application to the individual case may have been erroneous does not in itself imply a violation of fundamental rights.

II. Form and Content of the Constitutional Complaint

The constitutional complaint must be lodged, and substantiated in writing (§ 23 sec. 1 sentence 2 and § 92 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). The reasons stated must, at the very least, contain the following information:

1. The act of public authority (court decision, administrative act, law) against which the complaint is directed must be precisely described (if court decisions and administrative acts are challenged, their date, their file reference and the day on which they were pronounced or received should be given).
2. The fundamental right or equivalent right allegedly violated by the challenged act of public authority must be named, or at least described in terms of its legal content.
3. It must be stated in detail in what respects the fundamental rights violation is alleged. To this end, the challenged court decisions (and all letters to which reference is made), administrative acts etc. must be attached as originals, certified copies or photocopies; at the very least, it must be possible to determine their content, including the reasons, from the constitutional complaint alone.
4. Apart from the challenged decisions, other documents from the original proceedings (e.g. relevant written submissions, minutes of hearings, expert opinions) without the knowledge of which it cannot be assessed whether the challenges made in the constitutional complaint are justified must be submitted (as explained under 3. above), or their content must be described.

5. If the constitutional complaint is directed against court and/or administrative decisions, it must be possible to identify the legal remedies, applications and challenges with which the complainant has sought to avert the alleged fundamental rights violation in the proceedings before the regular courts from the reasons stated in the complaint. To this end, the applications and submissions made in the proceedings before the regular courts, must be attached (as explained under 3. above), or their content must be described.

III. Other Preconditions for Admissibility

1. Time limit

Constitutional complaints against court and administrative decisions must be lodged within one month in order to be admissible (§ 93 sec. 1 sentence 1 BVerfGG). The *complete* substantiation (see II. above) must also be submitted within this period (§ 93 sec. 1 sentence 1 BVerfGG). If information that must be provided according to the minimum requirements for substantiating the constitutional complaint (see II. above) is submitted only after the expiration of the time limit, the constitutional complaint is inadmissible. The Court cannot extend the time limit.

If complainants were unable to comply with this time limit through no fault of their own, they shall, upon application, be granted reinstatement into their former procedural position and be given an opportunity to lodge the constitutional complaint again; such application shall be made within two weeks of the disappearance of the factor hindering the complainant's action. The application shall be substantiated. If the complainant's authorised representative does not comply with the time limit, this fault is attributed to the complainant (§ 93 sec. 2 BVerfGG).

2. Exhaustion of Legal Remedies

a) General Remarks

Recourse to the Federal Constitutional Court may in principle only be had if the complainant has, first of all, exhausted all other legal remedies, and apart from that, has used all other possibilities of recourse available to him or her to correct or prevent the fundamental rights violation that is asserted. The constitutional complaint is inadmissible if and insofar as a possibility of removing the fundamental rights violation, or of achieving the same practical end without recourse to the Federal Constitutional Court, exists or has existed.

Thus, before lodging a constitutional complaint, the complainant must use any available legal remedies (e.g. appeal on points of fact and law, appeal on points of law, complaint, immediate complaint, complaint subject to a time limit, complaint against denial of leave to appeal). A constitutional complaint lodged with the constitutional court of the respective *Land* (state) is, however, not a precondition for the admissibility of a constitutional complaint lodged with the Federal Constitutional Court.

Among the possibilities of averting the alleged fundamental rights violation in proceedings before the regular courts are, for instance: the sufficient statement of all relevant facts of the case, suitable motions for admission of evidence, applications for reinstatement into the complainant's former procedural position if a time limit has not been complied with through no fault of the complainant, etc. Therefore, a constitutional complaint is inadmissible insofar as these possibilities have not been used in the proceedings before the regular courts.

b) Special Characteristics of Constitutional Complaints Challenging a Violation of the Right to a Hearing in Court

If the constitutional complaint challenges the refusal to grant the right to a hearing in court (Art. 103 sec. 1 of the Basic Law), and if no other legal remedy is available, the constitutional complaint is only admissible if the complainant has tried before to remedy the refusal with the competent regular court by lodging a complaint challenging a violation of the right to a hearing in court (see in particular § 321a of the Code of Civil Procedure, *Zivilprozessordnung* – ZPO; § 152a of the Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung* – VwGO; § 178a of the Social Courts Act, *Sozialgerichtsgesetz* – SGG; § 78a of the Labour Courts Act, *Arbeitsgerichtsgesetz* – ArbGG; § 29a of the Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction, *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG; § 133a of the Finance Courts Code, *Finanzgerichtsordnung* – FGO; §§ 33a and 356a of the Code of Criminal Procedure, *Strafprozessordnung* – StPO). In such a case, the inadmissibility of the constitutional complaint is, as a general rule, not restricted to the alleged violation of the right to a hearing in court but also covers all other objections raised.

c) Constitutional Complaints Challenging Legal Provisions

Statutes, regulations and by-laws may only in exceptional cases be directly challenged by a constitutional complaint. This is only possible if such norms affect the complainant individually, presently and directly. In this case, the complaint must be lodged within one year of the entry into force of the norm (§ 93 sec. 3 BVerfGG). As a rule, however, such legal norms have to be applied in an individual case by means of an administrative or court decision first, against which the complainant must exhaust all legal remedies before the competent courts before a complaint in this Court may be admissible. As a general rule, a constitutional complaint is not admissible until the court of last instance has issued its decision (§ 90 sec. 2 BVerfGG).

IV. Representation

The complainant may lodge the complaint him- or herself. If the complainant wishes to be represented, this may in principle only be done by an attorney or a professor of law who is eligible to hold judicial office, and who teaches at a state or state-recognised institution of higher education of a member state of the European Union, another member state of the European Economic Area, or Switzerland (§ 22 sec. 1 sentence 1 BVerfGG). The Federal Constitutional Court may permit another person to act as adviser to a party if it deems this necessary in exceptional cases (§ 22 sec. 1 sentence 4 BVerfGG). The power of attorney shall be granted in writing and must relate expressly to these proceedings before the Federal Constitutional Court (§ 22 sec. 2 BVerfGG).

V. Admission Procedure

The constitutional complaint must be admitted for decision

- a) insofar as it has general constitutional significance or
- b) if it is appropriate in order to enforce the rights referred to in § 90 sec. 1 BVerfGG; this may also be the case if the complainant would suffer a particularly severe disadvantage if the Court refused to decide on the complaint (§ 93a sentence 2 BVerfGG).

As a rule, a constitutional complaint will not have general constitutional significance if the constitutional issues raised by it have already been decided by the Federal Constitutional Court.

In order to enforce fundamental rights, it may be necessary to admit the constitutional complaint for decision if, for example, a general practice by administrative bodies or courts that violates fundamental rights is to be countered, or if a violation of the Constitution poses a particularly grave disadvantage to the complainant.

Refusal to admit the constitutional complaint for decision may be decided by a Chamber, which consists of three Justices, by unanimous vote. This decision may be rendered without giving reasons; it cannot be appealed (§ 93d sec. 1 BVerfGG).

VI. Court Fees

Proceedings before the Federal Constitutional Court are free of charge. The Court may, however, charge the complainant a fee of up to EUR 2,600 if lodging the constitutional complaint is abusive (§ 34 sec. 2 BVerfGG).

VII. Withdrawal of Applications

It is, in principle, possible to withdraw a constitutional complaint as a whole, or particular challenges as part of a constitutional complaint, or an application for a temporary injunction at any time, until the Federal Constitutional Court has decided. A fee (cf. VI. above) shall not be charged in this case.

VIII. General Register

Submissions to the Federal Constitutional Court through which the submitting party neither makes a specific application nor asserts a claim falling within the jurisdiction of the Federal Constitutional Court shall be recorded in the General Register and treated as a matter of judicial administration.

In addition, constitutional complaints whose admission for decision (§ 93a BVerfGG) is out of the question, since they are clearly inadmissible or with due regard to the jurisprudence of the Federal Constitutional Court, clearly have no prospect of success, may also be recorded in the General Register (see V. above).

Should the submitting party, on being informed of the legal situation, request a judicial decision, the complaint shall be transferred to the Register of Proceedings and dealt with accordingly (§ 61 sec. 2 of the Rules of Procedure of the Federal Constitutional Court, *Geschäftsordnung des Bundesverfassungsgerichts* – GOBVerfG).

GG = Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) in the amended version published in the Federal Law Gazette (*Bundesgesetzblatt* – BGBl), Part I, no. 100-1), most recently amended by Article I of the Law of 23 December 2014 (Federal Law Gazette I p. 2438)

BVerfGG = Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*) in the version published on 11 August 1993 (Federal Law Gazette I p. 1473), most recently amended by Article I of the Act of 29 August 2013 (Federal Law Gazette I p. 3463)

GOBVerfG = Rules of Procedure of the Federal Constitutional Court (*Geschäftsordnung des Bundesverfassungsgerichts*) of 19 November 2014 (Federal Law Gazette 2015 I p. 286)

(as at: March 2015)

