

JUDICIAL INDEPENDENCE IN GERMANY

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REZUME

The presentation will briefly outline the way by which Germany has attempted to safeguard judicial independence. Article 97 of Germany's Basic Law, or Constitution, specifically refers to and guarantees judges' independence without, however, granting an individual right. Rather, judicial independence is seen as a basic constitutional principle, which ensures the realisation of the rule of law.

In Germany, judicial independence does not only encompass a judge's professional, but also his/her personal independence, because the latter is seen as an indispensable prerequisite of the former. There-

fore, both concepts of independence are explicitly referred to in the German constitution.

Following an explanation of how these concepts are interpreted in Germany, the limits nevertheless imposed on judges' freedom of conduct will be outlined. These limits range from areas of their work in which judges cannot rely on the constitutional guarantee of independence to consequences for individual judges in cases of professional misconduct.

Lastly, some of the criticism levelled at the German system will be discussed, with reference to solutions found in other EU member states.

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Key words:

COURT, PRINCIPLE, PROFESSIONAL

1. Professional and personal independence (Article 97 Basic Law)

The principle of the independence of judges in Germany is rooted in Article 97 of the German Basic Law (Grundgesetz) of which the first paragraph refers to the *professional independence* of judges, the second to their *personal independence*.

Interpreted very generously, *professional independence* means that a judge is responsible to nothing but the law when administering justice. Neither the legislative¹ nor the executive,² nor even higher-rank-

ing members within the judiciary³ can tell a judge how to decide a case.

Indeed it goes further, for it applies to the whole handling of a case to ensure the judge's coming to a judgment wholly free from outside influence. Thus, according to the practice of the Constitutional Court, the highest instance in Germany, all the procedural decisions taken by a judge before and after judgement, such as when to hear a case, or which witnesses to hear, are a matter of professional independence.⁴

Judges are free to determine the order in which

1 BVerfGE 12, 67, at 71 (Decision by the Constitutional Court of 17 January 1961; Case Reference: 2 BvL 25/60); BVerfGE 38, 1, at 21 (Decision by the Constitutional Court of 27 June 1974; Case References: 2 BvR 429/72, 641/72, 700/72, 813/72, 9/73, 24/73, 25/73, 47/73, 215/73).

2 BVerfGE 3, 213, at 224 (Decision by the Constitutional Court of 17 December 1953, Case Reference: 1 BvR 335/51).

3 BVerfG NJW 1996, 2149-2150 (Decision by the Constitutional Court of 29 February 1996; Case Reference: 2 BvR 136/96).

4 Hans-Juergen Papier, "Die richterliche Unabhängigkeit und ihre Schranken", 1-13, at 2-3, 5-6. <http://www.hefam.de/koll/pap200402.html>; accessed 15 September 2015.

they hear cases of comparable urgency⁵ and free to decide how often their court is convened, provided the minimum number of sessions is completed.⁶ Moreover, the judges at a given court must decide themselves which judge gets which case according to guidelines established by the judges themselves or their legal representatives at an annual meeting.⁷

Furthermore, and most controversially,⁸ professional independence grants judges the right to decide where and when they fulfil their respective duties. Judges cannot be required to work in their office or be generally available during office hours. Provided the judge is present when his or her duties require it, mainly during court hearings, they are otherwise free to work at home for instance.⁹

Crucially, beyond this professional independence, *personal independence* is seen as the only effective way of guaranteeing professional independence.¹⁰ It means that judges cannot be dismissed or transferred to any other court without their agreement, which ensures that judges cannot be sanctioned for decisions the executive disapproves of.¹¹ Solely in cases of clearly defined and grave misconduct can a judge be dismissed or transferred and then only by a court decision.¹²

2. Limits to judicial independence

There are limits to judicial independence. The president of a court, for example, while engaged in

office management, dealing with non-judicial staff or travel expenses, is in this regard not protected by judicial independence.¹³

Should judges not fulfil their professional duties, disciplinary action can be taken against them by the Ministry of Justice,¹⁴ but even then a judge can apply for a court decision by the Judges' Disciplinary Court to defend himself or herself against such disciplinary actions by arguing that his/her judicial independence has been infringed on.¹⁵ There are regular evaluations of each judge, for example every four years,¹⁶ but such appraisals must be limited to general comments for they may not infringe on the judge's professional independence. Specific comments on specific decisions are prohibited.¹⁷

In the event of conflicts of interests, judges are required to recuse themselves or at least declare to the parties involved any circumstances that might lead to the suspicion of a conflict of interest.¹⁸ Should they fail to do so, they can be subject to disciplinary action or indeed criminal proceedings. In keeping with that, judges may not work as lawyers or legal consultants.

In the event of their negligence in coming to a decision, judges cannot be prosecuted¹⁹ and the State is not liable for compensation if the judgement is "wrong."²⁰ This is a key aspect of professional independence. However, if a judge deliberately comes to the wrong judgement then he or she is subject to criminal charges of "perversion of the course of justice" (Section 339 Code of Criminal Law) with a minimum of one year in prison, which automatically leads to removal from office. In this event the State is liable to pay compensation for damages incurred.²¹ A judge, however, is personally never liable to pay damages although the State, if forced to pay damages due to the judge's conduct, may attempt to take recourse against the judge.²²

5 BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).
 6 BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).
 7 BGH NJW 1995, 2494 (Decision by the German Federal Court of 7 April 1995; Case Reference RiZ(R) 7/94). The right of judges to assign incoming cases among themselves once a year is also seen as a means of ensuring the right of due process as far as the principle of the lawful judge is concerned (guaranteed in Article 101 Basic Law).
 8 Opposing the Federal Court's decision in this respect, for example: W. Hoffmann-Riem, "Ueber Privilegien und Verantwortung", AnWBl. 1999, 2-9, at 6; Konrad Redeker, "Justizgewaehrungspflicht des Staates versus richterliche Unabhangigkeit?", NJW 2000, 2796-2798, at 2797.
 9 BGHZ 113, 36, at pp. 40 (Decision by the German Federal Court of 16 November 1990; Case Reference: RiZ 2/90).
 10 Papier, no. 5, 1.
 11 BVerfGE 87, 68, at 85 (Decision by the Constitutional Court of 8 July 1992; Case References: 2 BvL 27/91 and 31/91); Papier, no. 5, 1.
 12 Section 24 Deutsches Richtergesetz (German law that defines the judiciary).

13 Papier, no. 5, 2.
 14 Papier, no. 5, 5-10.
 15 Section 26 para. 3 Deutsches Richtergesetz.
 16 This is a matter the Federal States are entitled to regulate; see, for example, section 5 para. 1 LRiStAG (Baden-Wuerttemberg) - a law defining judges' and prosecutors' rights and duties in the State of Baden-Wuerttemberg.
 17 Section 5 para. 3 LRiStAG (Baden-Wuerttemberg).
 18 See, for example, section 41 ZPO (German Civil Procedural Code); section 22 StPO (Criminal Procedural Code).
 19 Section 339 StGB (German Criminal Code).
 20 Section 839 para. 2 BGB (German Civil Code).
 21 Section 839 para. 2 BGB (German Civil Code).
 22 Article 34 Grundgesetz (Basic Law).

The guarantee of *professional* independence applies to all judges. However, the guarantee of *personal* independence applies only to judges with tenure. Germany's judiciary operates on a system of career judges so that once you have passed both state exams in law you are eligible to become a judge.²³ Thus, newly appointed judges will normally be in their late twenties and in their first job. They are appointed as "judges on probation" for a minimum of three²⁴ up to a maximum of five years²⁵ before being granted tenure. Probationers are not granted *personal* independence. So, during this period, they can be transferred or sacked.²⁶

3. Criticism of the German system

The German system is not without its critics who see flaws in it. The practice of appointing probationary judges for instance means that people are both very young and not truly independent on appointment. They are thus potentially subject to influence through conflicts of interest relating to salary, integrity and gaining experience under the aegis of the Executive. Many European countries adopt this approach, though, for example, the UK does not, where at least 5-7 years legal experience are required before an individual can become a judge.²⁷

Public prosecutors in Germany are granted neither professional nor personal independence but instead are civil servants. In high profile, politically charged, cases this has led some to argue that judicial independence is inadequate if the executive can intervene through the prosecutor.²⁸ In contrast, the Italian constitution extends judicial independence to

public prosecutors,²⁹ a fact many believe has led to some success in disentangling connections between justice, politics, and organised crime.³⁰

A comparable concern is that the power to determine who is appointed as a judge, and who is promoted and when, lies in the hands of the executive.³¹ Even though an elected self-governing council of judges must agree, promotions are initially recommended and can finally only be granted by the Ministry of Justice.³² Moreover, the Ministry of Justice has the sole power to determine the first appointment of a judge (on probation). In many Southern and Eastern member states of the EU such decisions are the prerogative of independent Councils, usually consisting of elected parliamentarians and judges.³³ Indeed, some have argued that aspects of the German system would not be acceptable in a state now applying for EU membership.³⁴

To conclude, the German system of judicial independence is a keystone for applying justice but there is perhaps room for adjustment and improvement within the European context.

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23 Section 5 Deutsches Richtergesetz.

24 Section 10 para. 1 Deutsches Richtergesetz.

25 Section 12 para. 2 Deutsches Richtergesetz.

26 Section 22 Deutsches Richtergesetz.

27 „Becoming a Judge“, *Courts and Tribunals Judiciary*, available at: <https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/>; accessed 15 September 2015.

28 Winfried Maier, „Vortrag anlaesslich der 6. Speyerer Demokratietagung der Hochschule Speyer zum Thema ‚Korruption in Politik und Verwaltung‘, Wie unabhängig sind die Staatsanwalte in Deutschland?“, 24/25 October 2002, 1-5; available at: <https://www.transparency.de/fileadmin/pdfs/30.90.01MaierSpeyer02-10-05.pdf>; „Stellungnahme zu den Entwuerfen der Gesetze zur Herstellung der institutionellen Unabhängigkeit der Justiz (BT-Drs. 17/11701 und 17/11703)“, *Deutscher Richterbund*, April 2013; available at: <http://www.dr.de/cms/index.php?id=810>; both accessed 15 September 2015.

29 *The Italian Judicial System*, available at: <http://www.csm.it/documenti%20pdf/sistema%20giudiziario%20italiano/inglese.pdf>; accessed 15 September 2015.

30 Maier, no. 27, 4.

31 Bernd Brunn (Judge at the German Federal Administrative Court), „Richterliche Unabhaengigkeit und ihre Gefaehrung durch (die Art und Weise von) Befoerderungen“, Lecture 20 January 2005; shortened version available at: <http://www.gewaltenteilung.de/gewaltenteilung-in-deutschland/719.html>; „Richterernennungen: Unabhaengigkeit der Justiz in Gefahr“, SPD Baden-Wuerttemberg, available at: <http://www.spd.landtag-bw.de/index.php?docid=1968>; Christian Bommarius, „Missbrauch der Justiz“, *Frankfurter Rundschau*, 1 August 2011; available at: <http://www.fr-online.de/meinung/leitartikel-zur-richterernennung-missbrauch-der-justiz,1472602,8732194.html>; all accessed 15 September 2015.

32 A Prussian Minister of Justice (Adolf Leonhardt, 1815-1880) is often quoted as having said: „As long as I decide who is promoted I am happy to concede to judges their so-called judicial independence“

33 John Adenitire, „Judicial Independence in Europe- The Swedish, Italian and German Perspectives“; *University College London*; available at: <https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf>; accessed 15 September 2015; Ignacio Pando Echevarria, „The Spanish Judiciary: Structure, Organization, Government“.

34 Herbert Prantl, „Die Entfesselung der dritten Gewalt“, available at: <http://www.gewaltenteilung.de/tag/die-entfesselung-der-dritten-gewalt>; accessed 15 September 2015.

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