

# Judicial Independence in Germany within the European Context

Patrick C. R. Terry

The Dean of the Faculty of Law at the University of Public Administration, Kehl, Germany

## ABSTRACT

At a time when judicial independence, or rather the lack of it in various European states, such as Poland or Hungary, is discussed, this seems an opportune moment to briefly reflect on judicial independence as it exists in Germany. While Germany has certainly gone a long way in trying to ensure judicial independence, it cannot be overlooked that the German system has some major deficiencies that threaten judicial independence. Despite much criticism in and outside of Germany, there has so far been no serious attempt in Germany to finally bring its rules on judicial independence more in line with European standards. This short article will first explain how judicial independence is guaranteed in Germany, before examining the system's weaknesses.

**Keywords:** judicial independence, Professional independence, personal independence, the German judiciary

## 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 legislative<sup>1</sup> nor the executive,<sup>2</sup> nor even higher-ranking members within the judiciary<sup>3</sup> can tell a judge how to decide a case.

Indeed, it goes further, for it applies to the whole handling of a case, so as to ensure the judge is wholly free from outside influence when coming to a decision. 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.<sup>4</sup>

Judges are free to determine the order in which they hear cases of comparable urgency<sup>5</sup> and free to decide how often their court is convened, provided the minimum number of sessions is completed.<sup>6</sup> 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 elected representatives at an annual meeting of the steering committee of the respective court.<sup>7</sup>

Furthermore, and most controversially,<sup>8</sup> 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, he/she is otherwise free to work at home, for instance.<sup>9</sup>

Crucially, beyond this professional independence, *personal independence* is seen as the only effective way of guaranteeing professional independence.<sup>10</sup> It means that judges cannot be dismissed or

<sup>1</sup> 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).

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

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

<sup>4</sup> Hans-Juergen Papier, "Die richterliche Unabhängigkeit und ihre Schranken", 1–13, at 2–3, 5–6. <http://www.hefam.de/koll/pap200402.html>; last accessed 2 December 2019.

<sup>5</sup> BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).

<sup>6</sup> BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).

<sup>7</sup> 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).

<sup>8</sup> Opposing the Federal Court's decision in this respect, for example: W. Hoffmann-Riem, "Über Privilegien und Verantwortung", AnwBl. 1999, 2–9, at 6; Konrad Redeker, "Justizgewährungspflicht des Staates versus richterliche Unabhängigkeit?", NJW 2000, 2796–2798, at 2797.

<sup>9</sup> BGHZ 113, 36, at pp. 40 (Decision by the German Federal Court of 16 November 1990; Case Reference: RiZ 2/90).

<sup>10</sup> Papier, no. 5, 1.

transferred to any other court without their agreement, which ensures that judges cannot be sanctioned for decisions the executive disapproves of.<sup>11</sup> Solely in cases of clearly defined and grave misconduct can a judge be dismissed or transferred and then only by a court decision.<sup>12</sup>

## 2. Limits to judicial independence

Nevertheless, there are some limits to judicial independence. The president of a court, for example, when engaged in office management, dealing with non-judicial staff or travel expenses, cannot claim to be protected by the principle of judicial independence when carrying out these duties.<sup>13</sup>

Should judges not fulfil their professional duties, disciplinary action can be taken against them by the Ministry of Justice,<sup>14</sup> 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.<sup>15</sup> There are regular evaluations of each judge, for example every four years,<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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 any negligence in coming to a decision, judges cannot be prosecuted<sup>19</sup> and the State is not liable for compensation if the judgement is "incorrect."<sup>20</sup> This is a key aspect of professional independence. However, if a judge intentionally passes a 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 sentence of one year in prison, which in turn automatically leads to the judge's dismissal. In this event, the State is liable to pay compensation for damages incurred.<sup>21</sup> A judge, however, is personally never liable to pay damages to the parties involved in a case, although the State, if forced to pay damages due to the judge's misconduct, may attempt to take recourse against the judge.<sup>22</sup>

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.<sup>23</sup> 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 three<sup>24</sup> up to a maximum of five years,<sup>25</sup> before being granted tenure. Probationers are not granted *personal* independence. Therefore, during this period, they can be transferred or dismissed without their consent.<sup>26</sup>

## 3. Criticism of the German system

The German system is certainly not without its critics. 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 pressure from the executive, that is, political pressure, due to their desire to be granted tenure. During the probationary period they are also dependent on the executive,

<sup>11</sup> 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.

<sup>12</sup> Section 24 Deutsches Richtergesetz (German law that defines the judiciary).

<sup>13</sup> Papier, no.5, 2.

<sup>14</sup> Papier, no.5, 5–10.

<sup>15</sup> Section 26 para. 3 Deutsches Richtergesetz.

<sup>16</sup> This is a matter the Federal States are entitled to regulate; see, for example, section 5 para. 1 LRiStAG (Baden-Württemberg)- a law defining judges' and prosecutors' rights and duties in the State of Baden-Württemberg.

<sup>17</sup> Section 5 para. 3 LRiStAG (Baden-Wuerttemberg).

<sup>18</sup> See, for example, section 41 ZPO (German Civil Procedural Code); section 22 StPO (Criminal Procedural Code).

<sup>19</sup> Section 339 StGB (German Criminal Code).

<sup>20</sup> Section 839 para. 2 BGB (German Civil Code).

<sup>21</sup> Section 839 para. 2 BGB (German Civil Code).

<sup>22</sup> Article 34 Grundgesetz (Basic Law).

<sup>23</sup> Section 5 Deutsches Richtergesetz.

<sup>24</sup> Section 10 para. 1 Deutsches Richtergesetz.

<sup>25</sup> Section 12 para. 2 Deutsches Richtergesetz.

<sup>26</sup> Section 22 Deutsches Richtergesetz.

as far as their salary and their general professional future are concerned. 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.<sup>27</sup>

Public prosecutors in Germany are granted neither professional nor personal independence, but instead are civil servants. Their actions can be subject to a veto by the regional Ministry of Justice. 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.<sup>28</sup> In contrast, the Italian constitution extends judicial independence to public prosecutors,<sup>29</sup> a fact many believe has led to some success in disentangling connections between justice, politics, and organised crime.<sup>30</sup>

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.<sup>31</sup> Even though an elected self-governing council of judges must grant its consent, promotions initially are always recommended and can finally only be granted by the Ministry of Justice.<sup>32</sup> 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.<sup>33</sup> Indeed, some have argued that aspects of the German system would not be acceptable in a state now applying for EU membership.<sup>34</sup>

To conclude, the German system of judicial independence is a keystone for applying justice but there is undoubtedly room for adjustment and improvement, especially as far as public prosecutors are concerned. Germany is currently at risk of joining states, such as Poland, that have not yet fully realized the principle of judicial independence.

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<sup>27</sup> „Becoming a Judge“, *Courts and Tribunals Judiciary*, available at: <https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/>; last accessed 2 December 2019.

<sup>28</sup> „Nullum ius sine actione“; Annelie Kaufmann, Markus Sehl, „EuGH zu Europäischem Haftbefehl, Deutsche Staatsanwälte nicht unabhängig genug“, Legal Tribune Online, 27 May 2019; available at: <https://www.lto.de/recht/justiz/j/eugh-europaeischer-haftbefehl-deutsche-staatsanwaelte-nicht-unabhaengig/>; last accessed 2 December 2019.

<sup>29</sup> Giuseppe Di Federico, „Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective“, available at: <http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf>; last accessed 2 December 2019.

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<sup>31</sup> Bernd Brunn (formerly Judge at the German Federal Administrative Court), „Richterliche Unabhängigkeit und ihre Gefährdung durch (die Art und Weise von) Beförderungen“, Lecture 20 January 2005; available at: [https://betrifftjustiz.de/wp-content/uploads/texte/Brunn\\_richterl\\_unabh.pdf](https://betrifftjustiz.de/wp-content/uploads/texte/Brunn_richterl_unabh.pdf); „Richterernennungen: Unabhängigkeit der Justiz in Gefahr“, SPD Baden-Württemberg, available at: <http://www.spd.landtag-bw.de/index.php?docid=1968>; Markus Sehl, „VG-Richter zweifelt an Unabhängigkeit seines Gerichts“, Legal Tribune Online, 9 May 2019; available at: <https://www.lto.de/recht/justiz/j/vg-wiesbaden-6k101615-vorabentscheidung-eugh-vorlage-unabhaengigkeit-gerichte-justiz/>; all last accessed 2 December 2019.

<sup>32</sup> 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“

<sup>33</sup> John Adenire, „Judicial Independence in Europe- The Swedish, Italian and German Perspectives“; *University College London*; available at: <https://pdfs.semanticscholar.org/c7fc/34a90d3f46501ec271ee5feea0998279fb80.pdf>; Ignacio Pando Echevarria, „The Spanish Judiciary: Structure, Organization, Government“; available at: <https://csd.bg › fileSrc>; both last accessed 2 December 2019.

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