

# Constitutional Guarantees of Judicial Independence in Germany

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## I. Introduction: The Legal Framework

Judicial independence constitutes one of the fundamental principles of the German Constitution.<sup>1</sup> The status and structure of the judiciary is

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<sup>1</sup> BVerfGE 2, 307, at 320; 87, 68, at 85. For the guarantee of judicial independence in Germany generally, see *e.g.* J. Limbach, Im Namen des Volkes –

elaborated in Chapter XI (Articles 92-104) of the Constitution, the so-called Basic Law ("Grundgesetz"). Article 97 guarantees the independence of judges.<sup>2</sup> It reads:

- (1) Judges shall be independent and subject only to the law.
- (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

This guarantee applies to federal and state ("Land") judges alike since the German judiciary is mixed, being composed of state and federal courts.<sup>3</sup> While the highest courts are federal courts,<sup>4</sup> the courts of first instance and courts of appeal<sup>5</sup> are state courts. As a general rule, judgments from the highest state courts may be appealed to the supreme federal courts provided they concern significant cases. Judicial independence of state judges is also guaranteed by the constitutions of the

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Macht und Verantwortung der Richter, 1999, 89-104; A. Baer, Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland und in der DDR, 1999; J. Zätzsch, Richterliche Unabhängigkeit und Richterauswahl in den USA und Deutschland; J. Limbach, Die richterliche Unabhängigkeit – ihre Bedeutung für den Rechtsstaat, Neue Justiz 1995, 281; F. Lansnicker, Richteramt in Deutschland, 1996. See also K. Eichenberger, Die richterliche Unabhängigkeit als staatsrechtliches Problem, 1960.

<sup>2</sup> Judicial independence, furthermore, is implicitly guaranteed by Article 20 and 92 Basic Law. For the status of judges see G. Barbey, Der Status des Richters, in: J. Isensee/ P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, 2<sup>nd</sup> ed., 1996, 815-857; Niebler, Die Stellung des Richters in der Bundesrepublik Deutschland, DRiZ 1981, 281.

<sup>3</sup> Accordingly, judges employed either by the federal government or the state. See § 3 DRiG.

<sup>4</sup> Article 95 Basic Law. See also Art. 96 for other federal courts.

<sup>5</sup> This includes the courts of second and third instance, namely "Landgerichte" and "Oberlandesgerichte" for civil litigation and criminal proceedings.

states which copy verbatim or analogously repeat Article 97 (1) Basic Law.<sup>6</sup>

The legal status of federal and state judges is specified in federal laws, namely the “Federal Judges Act” (“Deutsches Richtergesetz”: DRiG) and the “Judicature Act” (“Gerichtsverfassungsgesetz”: GVG) which, along with other legal acts, provides the basis for procedural law in Germany.<sup>7</sup> Both acts reproduce almost verbatim Article 95 (1) Basic Law and provide for specific safeguards of judicial independence.<sup>8</sup> With respect to state judges this law only provides for framework provisions. Their legal status is set out in the various state constitutions and further regulated by special state laws pursuant to paragraph 3 of Article 98 Basic Law.

## II. The Elements of Judicial Independence in Germany

Judicial independence is commonly regarded as an institutional safeguard for the judiciary as such, not as a right or privilege for the individual judge.<sup>9</sup> It is a genuine feature of the judiciary mandated by the rule of law<sup>10</sup> and the separation of powers<sup>11</sup> and serves the protection of the parties to a conflict. This has important structural and substantive implications for the organization and the powers of the judiciary.

The guarantee of judicial independence is directed against all government bodies, primarily against the legislative and executive branches. Whether it includes a protection against interference by the public is

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<sup>6</sup> Art. 65 (2) Bad-Württ Verf; Art. 85 Bay Verf; Art. 63 (1) Berlin Verf; Art. 135 (1) Brem Verf; Art. 62 (1) Hamb. Verf; Art. 126 (2) Hess Verf; Art. 39 (3) Niedersachs Verf; Art. 121 Rheinl.-Pfalz Verf; Art. 110 Saar Verf; Art. 36 (1) SchlHLandessatzung; Art. 108 (1) Brand Verf; Art. 76 (1) Meckl-Vorp. Verf.; Art. 55 (2) Sachs.Verf; Art. 83 (2) Sachs-Anh Verf; Art. 86 (2) Thür Verf.

<sup>7</sup> See Chapter IV “Deutsches Richtergesetz” (§§ 25 *et seq.*).

<sup>8</sup> § 1 GVG; § 25 DRiG.

<sup>9</sup> BVerfGE 27, 211, at 217; 48, 246 at 263. *J. Wittmann*, Richterliche Unabhängigkeit – Freiheit und Verantwortung, in: Hans-Detlef Horn (ed.), *Recht im Pluralismus*, Festschrift für Walter Schmitt Glaeser zum 70. Geburtstag, 2003, 363, at 366.

<sup>10</sup> Art. 20 (2) Basic Law.

<sup>11</sup> See *S. Detterbeck*, Art. 97, in: M. Sachs/ U. Battis (eds.), *Grundgesetz-Kommentar*, 3<sup>rd</sup> ed., 2003, 1563 (Rn.1).

controversial.<sup>12</sup> There is no rule on contempt of court such as in the United Kingdom which protects the court from pressure by the media.

Despite the prominence of the substantive guarantee of judicial independence in the German Constitution, there are only weak sanctions.<sup>13</sup> A judge, however, may challenge interference with judicial independence in an individual complaint before the Federal Constitutional Court.<sup>14</sup>

Judicial independence traditionally has been interpreted to comprise three elements: substantive independence, structural independence and personal independence. They are protected by different provisions of the German Constitution and federal legislation. In the following the protection of these elements under German law shall be elaborated. Specific aspects of judicial independence, such as appointment and dismissal, will be discussed in the second part.

### 1. Substantive Independence

Substantive independence is guaranteed by Article 97 (1) Basic Law and applies, pursuant to the Federal Constitutional Court, to all those exercising judicial power including lay judges.<sup>15</sup> It requires that the judge in her or his decision-making process is only bound by law, not by any determination or other means of influence by other parties. This applies not only *vis-à-vis* the litigants<sup>16</sup> but also *vis-à-vis* the entire government. In particular, substantive independence guarantees freedom from instruction,<sup>17</sup> freedom of action, and freedom of insight.<sup>18</sup> Even indirect

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<sup>12</sup> R. Wassermann (ed.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Alternativ Kommentar), 2<sup>nd</sup> ed., Vol. 2, 1989, Art. 97, Rn. 86 ff.

<sup>13</sup> § 29 DRiG; § 839 (2), 1 BGB. For the latter see T. Tombrink, *Der Richter und seine Richter – Fragen der Amtshaftung für richterliche Entscheidungen*, DRiZ, 2002, 296.

<sup>14</sup> BVerfGE 12, 81, at 88; 55, 372, at 391. See also § 26 (3) DRiG.

<sup>15</sup> BVerfGE 26, 185, at 201.

<sup>16</sup> The freedom from interference by parties may not be compromised on the basis of a legal enactment. BVerfGE 21, 139, at 146; 26, 141, at 154; 30, 149, at 153.

<sup>17</sup> BVerfGE 3, 214, at 224; 27, 321, at 322; 87, 68, at 85.

means of influence,<sup>19</sup> such as recommendations, solicitations and suggestions, and psychological influence are not allowed.<sup>20</sup> Protected are all actions concerning judicial functions including activities in the preparation and execution of decisions. Even scheduling, summons, and policing measures may not be interfered with.<sup>21</sup> For example, once a hearing has been scheduled by a single sitting judge, the chief justice may not contact the counsel with the intent to reschedule the hearing.<sup>22</sup>

In order to avoid indirect influence, criminal, civil and disciplinary responsibility for judicial action is limited.<sup>23</sup> As § 26 (1) Federal Judges Act (“Deutsches Richtergesetz”) stipulates, judges are only subject to disciplinary supervision as long as it does not interfere with judicial independence. Judges may only be prosecuted for perversion of justice with respect to adjudication in case of a fundamental violation of the administration of justice.<sup>24</sup> With respect to civil liability, only a breach of duty which constitutes a crime provides the basis for damages with respect to adjudication.<sup>25</sup>

#### *a) Independence from the Legislature*

Judicial independence *vis-à-vis* the legislature<sup>26</sup> does not relieve the judiciary from compliance with the law. As stipulated by Article 97 (1), the judge is subject to the law. But the legislative branch may not interfere with individual cases by enacting case-specific legislation.<sup>27</sup> Neither

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<sup>18</sup> W. Meyer, in: I. v. Münch/ P. Kunig (ed.), Grundgesetz-Kommentar, Vol. 3, 4/5<sup>th</sup> ed., 2003, Art. 97, 705 (Rn.8).

<sup>19</sup> BVerfGE 12, 81, at 88; 26, 79, at 93 and 96; 38, 1, at 21.

<sup>20</sup> BGHZ 57, 344, at 348. C. D. Classen, in: H. v. Mangoldt/ F. Klein/ C. Starck (eds.), Das Bonner Grundgesetz, Kommentar, Vol. 3, 2001, Rn. 18.

<sup>21</sup> D. Leuze, Richterliche Unabhängigkeit, DÖD 4/2005, 78, at 79.

<sup>22</sup> BGH, NJW-RR 2002, 574, at 575.

<sup>23</sup> Whether adjudication can at all provide the basis for disciplinary action is contested. O. R. Kisse/ H. Mayer, Gerichtsverfassungsgesetz, 4<sup>th</sup> ed., 2005, § 1 GVG, Rn. 202.

<sup>24</sup> § 339 StGB. This requires a conscientious and grave breach of the law. BGHSt 32, 363; 40, 40; 44, 258.

<sup>25</sup> § 839 (2), 1 BGB. See BGHZ 50, 19.

<sup>26</sup> BVerfGE 12, 67, at 71; 38, 1, at 21.

<sup>27</sup> S. Detterbeck, in: Sachs (note 11), Rn.12.

may the parliament adopt decisions which put a judge under pressure to decide a case one way or the other.<sup>28</sup> A call to boycott the execution of a decision would also be impermissible. This, however, does not mean that members of parliament are prevented from criticizing judgments.<sup>29</sup>

*b) Independence from the Executive*

The judiciary is to be free from any interference by the executive in the exercise of judicial functions. Instructions to decide a case one way or the other,<sup>30</sup> adoption of administrative regulations with this intent or any other form of influence,<sup>31</sup> such as organizational entanglement, is impermissible.<sup>32</sup>

In order to determine which executive measures are permissible, the Federal Constitutional Court distinguishes between the inner sphere of judicial exercise and the outer sphere. With respect to the core judicial functions, which are functions directly related to the finding of justice,<sup>33</sup> any interference is impermissible. Among the protected core functions are not only judgements, but also procedural measures taken in preparation of a decision or subsequently.<sup>34</sup> This includes the maintenance of law and order during hearings,<sup>35</sup> transcripts,<sup>36</sup> recusal,<sup>37</sup> taking of evidence<sup>38</sup> and the evaluation of potential settlements.<sup>39</sup> The impermissible

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<sup>28</sup> *Ibid.* Rn.12.

<sup>29</sup> For this issue see *R. Mishra*, Zulässigkeit und Grenzen amtlicher Urteilschelte, 1997; *G. Kisker*, Zur Reaktion von Parlament und Exekutive auf „unerwünschte“ Urteile, NJW 1981, 889.

<sup>30</sup> BVerfGE 14, 56, at 69; 26, 186, at 198; 27, 312, at 322; 31, 137, at 140; 36, 174, at 185; 60, 175, at 214.

<sup>31</sup> BVerfGE 26, 79, at 92 *et seq.*; 55, 372, at 389.

<sup>32</sup> But the merger of the ministry of justice and the ministry of the interior in North Rhine-Westphalia was not considered to be impermissible by the competent court. VerfGH NW NJW 1999, 1243 *et seq.*

<sup>33</sup> Included are optional cognisance and the allocation of cases.

<sup>34</sup> BGHZ 42, 163, at 169.

<sup>35</sup> BGHZ 67, 184, at 188.

<sup>36</sup> BGHZ 67, 184, at 188.

<sup>37</sup> BGHZ 77, 70, at 72.

<sup>38</sup> BGHZ 71, 9, at 11.

interference with judicial core functions is of particular relevance for the disciplinary supervision of judges<sup>40</sup> and will be elaborated below together with the permissible disciplinary measures regarding the outer sphere of judicial activity.

*c) Independence within the Judiciary*

Substantive independence according to the Federal Constitutional Court even applies within the judicial branch.<sup>41</sup> The competent judge or bench alone has to decide the case on the basis of the applicable law. The judge is protected against internal interventions unless there is a legal mandate to perform such judicial functions. For example, a chief justice may not change the judgement of a judge sitting singly.<sup>42</sup>

Judges are free in their decision-making and only bound by the law, that is the constitution, legislation and other forms of legal regulation.<sup>43</sup> Pursuant to Germany's civil law tradition they are not obliged to follow prior jurisprudence. Though a judge may not decide arbitrarily he is not bound by the prevailing interpretation of the law by other courts.<sup>44</sup> According to the Federal Constitutional Court, as a result of the constitutional principle of judicial independence adjudication in Germany is not uniform.<sup>45</sup> The only substantive control permissible is the one exercised by higher courts on appeal. But no disciplinary measures are allowed which allude to purportedly wrongful decision-making.

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<sup>39</sup> BGHZ 47, 275, at 284 *et seq.*

<sup>40</sup> See below at 3.

<sup>41</sup> BVerfG, NJW 1996, 2149, at 2150 *et seq.*

<sup>42</sup> BVerfG, NJW 1996, 2149, at 2150.

<sup>43</sup> Decrees are binding if they comply with the constitutional empowerment. BVerfGE 18, 52, at 59; 19, 17, at 31 *et seq.*

<sup>44</sup> BVerfGE 87, 278; 78, 123, at 126. For the definition of arbitrariness see BVerfGE 62, 189, at 192; 86, 59, at 62. There are, however, exceptions provided in the law, such as § 31 (1) and (2) BVerfGG (Law on the Federal Constitutional Court).

<sup>45</sup> BVerfGE 87, 278.

## 2. Structural Independence

Structural independence of the judiciary requires a structural separation from the other branches of government and is guaranteed by the second sentence of Article 20 (2) Basic Law.<sup>46</sup> The organization of the courts, therefore, needs to be independent. Entanglement with administrative or legislative functions is to be avoided. Pursuant to § 4 Federal Judges Act (“Deutsches Richtergesetz”) judges are not allowed to exercise legislative or executive functions simultaneously with judicial functions excluding tasks of court administration.<sup>47</sup> In practice, however, it has been tolerated when judges take over unsalaried avocational municipal functions.<sup>48</sup>

## 3. Personal Independence

Personal independence further supplements substantive independence by protecting the judge as a person against external interventions.<sup>49</sup> This concerns the access to the profession, as well as the working and living conditions of judges. Personal independence is in part guaranteed by Article 97 (2) and 98 Basic Law. Article 97 (2) prohibits any avoidable influence on the status of judges<sup>50</sup> and guarantees an adequate remuneration fixed by law.<sup>51</sup> Further guarantees of personal independence are to be found in the Federal Judges Act (DRiG). As a general rule, there is life tenure for judges with full-time positions on condition of good behavior which is only terminated at a set retirement age.<sup>52</sup> No recall or transfer is permissible without consent.

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<sup>46</sup> See also § 1 GVG. An alternative basis for structural independence is foreseen in Art. 92 and 95 Basic Law.

<sup>47</sup> See also Art. 97 Basic Law which requires the division of judicial and administrative functions.

<sup>48</sup> *E. Schmidt-Jorzig*, Aufgabe, Stellung und Funktion des Richters im demokratischen Rechtsstaat, NJW 1991, 2377, at 2381. In order to justify these double-functions, the argument is made that § 36 DRiG only mentions incompatibility with membership in federal or state parliament.

<sup>49</sup> BVerfGE 14, 56, at 69.

<sup>50</sup> BVerfGE 12, 81, at 88.

<sup>51</sup> BVerfGE 12, 81, at 88.

<sup>52</sup> Art. 97 (2) Basic Law. See also below at. V.1.



Though Article 97 (2) Basic Law applies only to judges with full-time positions,<sup>53</sup> the Federal Constitutional Court has held that other judges (such as auxiliary judges, law clerks and lay judges) need to be protected personally so that their substantive independence is guaranteed.<sup>54</sup> Personal independence of lay judges is explicitly protected by § 44 (2) Federal Judges Act (DRiG). Without consent a judge may only be removed from office before the expiry of his or her term by a court in accordance with the law. The status of judges is further elaborated on in §§ 8- 24 Federal Judges Act which regulate the appointment of judges and the termination of office.

### III. Appointment of Judges

#### 1. The Necessary Qualifications for Judicial Appointment

As a general rule, pursuant to Article 33 (2) Basic Law “[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements.”<sup>55</sup> The necessary qualifications for full-time judges are set out in § 5 Federal Judges Act (DRiG) which requires the completion of legal university studies with the first degree in law and legal training for an overall period of two years at a civil court, the prosecutor’s office or a penal court, with the government, in a lawyer’s office and in an elective position<sup>56</sup> followed by the second state examination. At least two of the four years of legal studies need to be conducted in Germany.<sup>57</sup> These common rules are further regulated by state laws. Additional requirements for the appointment of judges are as follows: the applicant has German citizenship, advocates the free democratic basic order of the Federal Republic of Germany and

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<sup>53</sup> Full-time judges may not exercise functions other than judicial ones and occupy a permanent position.

<sup>54</sup> Legal basis is the principle of Art. 33 (5) Basic Law. BVerfGE 12, 81 (88). But see BVerfGE 14, 56, at 71 *et seq.*

<sup>55</sup> See also § 38 (1) DRiG. For the appointment of judges in general see S. Khorrami, *Das Einstellungs- und Beförderungsverfahren englischer und deutscher Richter*, 2005.

<sup>56</sup> § 5 b DRiG.

<sup>57</sup> § 5 a (1) DRiG.

has the necessary social competence for being a judge.<sup>58</sup> Rules on the appointment of state judges are further to be found in the constitutions of the states.<sup>59</sup>

## 2. The Selection and Appointment Process

In general, the selection process for full-time judges is initiated by an application, and selection is based on eligibility, qualification and professional performance.<sup>60</sup> In order to take office a judge needs to be appointed. The judges are appointed by the head of state or a competent government agency. Appointment is made by means of an official document.<sup>61</sup>

The selection and appointment process varies from court to court. Half of the judges of the *Federal Constitutional Court* are elected by the “Bundestag” (federal parliament) and half by the “Bundesrat” (state chamber).<sup>62</sup> The court is made up of federal judges and other members who, however, may not be members of the “Bundestag”, of the “Bundesrat”, of the Federal Government, or of any of the corresponding bodies of a state (“Land”).<sup>63</sup> For the selection a two-thirds majority is necessary.<sup>64</sup> This has led to a practice where the political parties repre-

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<sup>58</sup> § 9 DRiG.

<sup>59</sup> See e.g. Art. 69 Berlin Verf; Art. 136 Brem Verf; Art. 63 Hamb. Verf; Art. 127 Hess Verf; Art. 122 (1) and 126 (1) Rheinl.-Pfalz Verf; Art. 111 Saar Verf.

<sup>60</sup> Art. 33 (2) and 60 Basic Law; Art. 51 BadWürttVerf.; Art. 69 Berl Verf.; Art. 63 (1) Hbg. Verf.; Art. 29 II Nds Verf; Art. 31 SchlH Verf.

<sup>61</sup> § 17 DRiG.

<sup>62</sup> Art. 94 Basic Law, see also BVerfGG.

<sup>63</sup> Art. 94 (1) Basic Law.

<sup>64</sup> § 6 V und § 7 BVerfGG. They read:

### Article 6

(1) The judges to be elected by the Bundestag shall be elected indirectly.

(2) The Bundestag shall, by proportional representation, elect a twelve-man electoral committee for the Federal Constitutional Court judges. Each parliamentary group may propose candidates for the committee. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the list. If a member of

sented in the federal parliament nominate their candidates in turn with the result that an equilibrium of political ideologies is represented at the court. While the “Bundesrat” elects the judges directly, a parliamentary electoral committee of twelve members who are elected by the “Bundestag” (representing the strength of the political parties represented in the federal parliament) are entrusted with the selection of judges on behalf of the “Bundestag.”<sup>65</sup> The fact that in practice candidates are chosen who are close to the nominating party has been subject to criticism, but the mode of selection has not been invalidated by the Federal Constitutional Court.<sup>66</sup> Three judges of each of the two panels of the court are elected among the judges of the five supreme federal courts of justice. Those elected are appointed by the Federal President.<sup>67</sup> Each judge takes an oath binding her or him as an impartial judge to observe faithfully at all times the Basic Law of the Federal Republic of Germany and to perform conscientiously the judicial duties towards others.<sup>68</sup>

The *supreme federal courts* – the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court – are chosen jointly by the compe-

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the electoral committee retires or is unable to perform his functions, he shall be replaced by the next member on the same list.

(3) The eldest member of the electoral committee shall immediately with one week's notice call a meeting of the committee to elect the judges and shall chair the meeting, which shall continue until all of them have been elected.

(4) The members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.

(5) To be elected, a judge shall require at least eight votes.

#### Article 7

The judges to be elected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat.

<sup>65</sup> § 6 BVerfGG. For the question whether this procedure is compatible with Art. 94 (1) and for reform proposals see S. Koch, *Die Wahl der Richter des BVerfG*, ZRP 1996, 41-44.

<sup>66</sup> BVerfGE 40, 356 *et seq.*; 65, 153, at 154 *et seq.* See also A. Voßkuhle, in: H. v. Mangoldt/ F. Klein/ C. Starck (eds.), *Das Bonner Grundgesetz*, Kommentar, Vol. 3, 2001, Art. 94, Rn. 14-15.

<sup>67</sup> § 10 BVerfGG.

<sup>68</sup> Article 11 of the Law on the FCC (BVerfGG).

tent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.<sup>69</sup>

The appointment process for federal courts differs from the one applicable to state judges. The election of *state court judges* is regulated by special Land laws.<sup>70</sup> The Federal Constitution provides that Land judges may be chosen jointly by the Land Minister of Justice and a committee for the selection of judges.<sup>71</sup> Due to the state competence to regulate the selection process, the procedures differ considerably from state to state.<sup>72</sup> There are the following models: Some states provide for mandatory participation of the judges council ("Präsidialrat"). Others require a joint appointment by the competent minister and a conciliation committee if the judges council objects. In several states a judicial appointments commission has been established which either appoints on its own or together with the competent minister. Not only does the procedure vary but also the composition of judicial selection committees. The judges sitting on these committees are either elected by the judges or the state parliament from proposal lists by the judges. In some states the judges on the committee are empowered to prevent appointments.

Some systems provide for a quorum, so that a judge may only be elected on the basis of a compromise between the political parties. It is, however, doubtful whether this concept adequately serves the interest of judicial independence, because in practice the quorum requirement often leads to political deals.<sup>73</sup> Accordingly, criticism has been voiced as to the influence of political motivations in the appointment process which concerns not only the Federal Constitutional Court but also the highest federal courts.<sup>74</sup> According to the Federal Constitutional Court,

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<sup>69</sup> Art. 95 (2) Basic Law. See also § 2 *seq.* RiWahlG.

<sup>70</sup> See Art. 98 (3) Basic Law.

<sup>71</sup> Art. 98 (4) Basic Law.

<sup>72</sup> For a detailed overview see *J. Schmidt-Räntsch*, Deutsches Richtergesetz, Kommentar, 5<sup>th</sup> ed., 1995, § 8, paras 4-15. For the necessary parameters of judicial selection on the basis of the Basic Law, see *E.-W. Böckenförde*, Verfassungsfragen der Richterwahl, 1974.

<sup>73</sup> *E. Schmidt-Jorzig* (note 48), 2382.

<sup>74</sup> *E. Schmidt-Jorzig* (note 48), 2381; *A. Emmerlich*, FAZ 6.2.1986, at 9; *B. Erhard*, FAZ 10.2.1986, at 9; *B. Erhard*, Gedanken zur Wahl der Richter des Bundesverfassungsgerichts und der obersten Gerichtshöfe des Bundes, in: F.

election of state constitutional judges by simple majority in state parliament does not interfere with judicial independence.<sup>75</sup>

## IV. Independence of Judges while in Office

### 1. Judicial Tenure

One aspect of personal independence is the appointment for life until retirement which is usually at the age of 65.<sup>76</sup> As a general rule, judges should be full-time and in a permanent position.<sup>77</sup> They are assigned to a specific court.<sup>78</sup> Other judges who do not enjoy full personal independence may only be hired to the extent that there are compelling reasons, such as the training of judges.<sup>79</sup> Trainees are appointed as temporary judges. Temporary appointment is only allowed on the basis of a legal act and only for functions specified by law.<sup>80</sup> Judges on a tenure track are appointed on probation for at least three years and need to be appointed for life after five years in office.<sup>81</sup>

Specific rules apply to the *Federal Constitutional Court*: The term of office of the judges of this court is twelve years without the possibility of re-election. In any case, the term ends when a judge reaches the age of 68.<sup>82</sup> A judge may ask to be released from service at any time. Before the expiry of her or his term a judge of the Federal Constitutional Court may be involuntarily retired or dismissed only in pursuance of a plenary decision which is subject to stringent conditions.<sup>83</sup> No such decision has yet been taken.

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Klein (ed.), *Der Bundesfinanzhof und seine Rechtsprechung*, Festschrift für H. Wallis, 1985, 35, at 41 *et seq.*

<sup>75</sup> BVerfG, NJW 1999, 638, at 640.

<sup>76</sup> § 10 DRiG; § 15 VwGO.

<sup>77</sup> Art. 97 (2) Basic Law; BVerfGE 87, 68, at 85.

<sup>78</sup> § 27 (1) DRiG.

<sup>79</sup> There is also an option to appoint judges with a specific task for two years provided they are on tenure track. § 14 DRiG.

<sup>80</sup> § 11 DRiG.

<sup>81</sup> §§ 10, 12 DRiG.

<sup>82</sup> § 4 BVerfGG.

<sup>83</sup> § 105 BVerfGG.

## 2. The Scope of Judges' Authority and Powers

Pursuant to Article 92 (1) Basic Law:

“The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.”

Judicial Power may only be exercised by the courts as an institution and is no exercise of personal power.<sup>84</sup> Accordingly, the protection of personal independence does not seek to serve the judge as an individual, but the interest of justice.

Nonetheless, the protection of judicial independence in Germany is far-reaching in the interpretation of the courts.<sup>85</sup> According to the Federal Court of Justice personal independence even protects the judge from the regulation of working hours. Apart from the court proceedings she or he is free to choose her or his working time and location. The Federal Court of Justice elaborated that the judge in the decision-making process should also be free from all contextual and atmospheric constraints.<sup>86</sup> If presence at court is not required by the proceedings a judge is free to work whenever and wherever desired.<sup>87</sup>

In order to ensure judicial independence, the Federal Judges Act also imposes obligations on the judges. At the swearing-in a judge has to undertake to exercise her or his powers in accordance with the Basic Law and the laws of Germany, to judge in the best of his or her conscience without respect of person and to serve only verity and justice.<sup>88</sup> This oath demonstrates that personal independence not only concerns the protection against interference from outside. It also requires an inner independence which is the responsibility of the judge her- or himself.<sup>89</sup> Judges are required to be impartial, unbiased and open for different positions which enables them to scrutinize and evaluate the submis-

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<sup>84</sup> *G. Barbey* (note 2), at 824.

<sup>85</sup> For the scope of judicial powers, see the part on substantive independence above.

<sup>86</sup> BGHZ 113, 36 = NJW 1991, 1103.

<sup>87</sup> BVerwG DÖV 1981, 632; BVerwGE 78, 211; BGH NJW 1991, 1103. Critical *K. Redeker*, Justizgewährungspflicht des Staates versus richterliche Unabhängigkeit?, NJW 2000, 2796.

<sup>88</sup> § 38 (1) DRiG.

<sup>89</sup> *E. G. Mahrenholz* DRiZ 1991, 433 *et seq.*; *E. Benda*, Bemerkungen zur richterlichen Unabhängigkeit, DRiZ 1975, 166.

sions of the parties.<sup>90</sup> The Federal Constitutional Court regularly refers to the concepts of impartiality, neutrality and distance.<sup>91</sup>

There is a duty of political restraint for judges pursuant to Article 39 Federal Judges Act (DRiG). Judges must act in and outside their office, including in political activities, in a manner which does not jeopardize their independence. This duty is considered to be a safeguard of judicial independence rather than interference therewith.<sup>92</sup> The duty of restraint in public statements and collective expressions of opinion has been subject to controversy<sup>93</sup> and various judicial disputes.<sup>94</sup>

### 3. Independence and Disciplinary Supervision

In order to ensure that judges act dutifully, they are subject to disciplinary supervision, provided the principle of substantive independence is guaranteed.<sup>95</sup> The underlying rationale is the right of access to justice.<sup>96</sup> Supervision includes monitoring and correction. Judges may be reproached with the performance of their official functions and admonished to undelayed and orderly execution unless this interferes with a judge's substantive independence.<sup>97</sup> If a judge considers a measure of supervision to be in conflict with his or her independence, the matter is referred to a competent court for decision.<sup>98</sup> Even measures by the su-

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<sup>90</sup> *G. Barbey*, (note 2), 832.

<sup>91</sup> BVerfGE 21, 139, at 146; 26, 141, at 154.

<sup>92</sup> § 39 DRiG.

<sup>93</sup> *W. Rudolf*, Meinungs- und Pressefreiheit in der „verwaltungsrechtlichen Sonderverbindung“ der Soldaten, Beamten und Richter, in: P. Selmer (ed.), *Gedächtnisschrift für Wolfgang Martens*, 1987, 199.

<sup>94</sup> See e.g. BVerfG, in: NJW 1983, 2691.

<sup>95</sup> BVerfG, DRiZ 1975, 284. See also § 26 (1) DRiG. *H. Grimm*, Richterliche Unabhängigkeit und Dienstaufsicht in der Rechtsprechung des Bundesgerichtshofs 1972; *G. Pfeiffer*, Zum Spannungsverhältnis richterlicher Unabhängigkeit – Dienstaufsicht – Justizgewährungspflicht, in: A. R. Lang (ed.), *Festschrift für K. Bengl*, 1984, 85.

<sup>96</sup> *H.-J. Papier*, Die richterliche Unabhängigkeit und ihre Schranken, NJW 2001, 1089, at 1091.

<sup>97</sup> § 26 (2) DRiG.

<sup>98</sup> § 26 (3) DRiG.

pervisory board with an indirect impact on the judicial function may be challenged.<sup>99</sup>

As indicated above, there may not be any interference with the *core judicial functions*.<sup>100</sup> Even indirect instructions or psychological influence having an effect on the finding of justice are impermissible.<sup>101</sup> There has only been one case in which an intervention by disciplinary supervision was allowed in case of a manifestly erroneous decision by a judge contrary to the law. In this case the judge had ordered counsel forcibly expelled from the courtroom in violation of the Judicature Act (§§ 177, 178 GVG).<sup>102</sup> Consequently, there was no room to object disciplinary measures on the basis of judicial independence as a rule of law principle. With respect to scheduling, a judge may not be called upon to deal with specific proceedings first.<sup>103</sup> To ask a judge to prioritize based on efficiency and in keeping with the rules, however, is allowed.<sup>104</sup>

On the other hand, functions concerning the *outer sphere of a judge's activities* being remote from adjudication are subject to disciplinary supervision.<sup>105</sup> This includes the manner and form of decisions even if the decision itself is in the exercise of a core judicial function.<sup>106</sup> Measures to ensure the orderly course of business are permissible.<sup>107</sup> For example, the timeliness of the setting of a court hearing may be subject to supervision.<sup>108</sup> A judge may be called upon to explain the excessive duration of court proceedings.<sup>109</sup> Non-judicial functions, such as administrative

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<sup>99</sup> BGHZ 90, 40, at 48 *et seq.*

<sup>100</sup> See II.1.b. The distinction between core and outer sphere functions has not gone unchallenged. According to the critics, the distinction is not clear and there should not be an interference with core judicial functions in the case of manifest errors. *N. Achterberg*, Die richterliche Unabhängigkeit im Spiegel der Dienstgerichtsbarkeit, NJW 1985, 3041, at 3045.

<sup>101</sup> BGHZ 42, 163, at 169 *et seq.*; 70, 1, at 4; 90, 41, at 43 *et seq.*

<sup>102</sup> BGHZ 67, 184, at 187 *et seq.*

<sup>103</sup> BGH, NJW 1987, 1197, at 1198.

<sup>104</sup> BGH, NJW 1998, 421, at 422.

<sup>105</sup> BGHZ 42, 163, at 169; BGH, NJW-RR 2001, 498, at 499.

<sup>106</sup> BGHZ 67, 184, at 187; 90, 41, at 45.

<sup>107</sup> BGHZ 90, 41, at 45.

<sup>108</sup> BGH, DRiZ 1997, 467, at 468.

<sup>109</sup> BGH, DRiZ 1991, 20, at 21.



tasks<sup>110</sup> and private conduct, are not protected by judicial independence and therefore also subject to supervision, provided they have an impact on the official duty of a judge.<sup>111</sup> Also permissible are personal reviews<sup>112</sup> and the prosecution for perversion of justice.

#### 4. The Financial Independence of Judges

There is a guarantee of adequate income provided by law.<sup>113</sup> A number of basic guarantees concerning remuneration and pension have been elaborated by the German Constitutional Court in order to ensure personal independence.<sup>114</sup>

### V. Dismissal and Transfer of Judges from Office

Another aspect of personal independence is that judges appointed to full-time positions may not in principle be removed from office or transferred to another court against their will.<sup>115</sup> Measures of similar effect, for example excluding a judge from judicial functions by allocation of duties, are also impermissible.<sup>116</sup> Permissible measures on the basis of law include, however, temporary suspension in formal disciplinary proceedings.<sup>117</sup>

#### 1. Grounds of Dismissal

Article 97 (2) Basic Law provides:

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<sup>110</sup> See § 4 (2) No. 1 DRiG.

<sup>111</sup> BGH, DRiZ 1977, 215 *et seq.*

<sup>112</sup> BVerwGE 62, 135, at 138; BGH NJW 1988, 419 *et seq.*

<sup>113</sup> BVerfGE 12, 81, at 88; 23, 321, at 325; 26, 79; 26, 141, at 157; 32, 199; 56, 146.

<sup>114</sup> BVerfGE 8, 1, at 17 *et seq.*; 11, 203, at 215 *et seq.*; 44, 249, at 265 *et seq.*; 56, 146, at 164 *et seq.*; 56, 353, at 359; 61, 43, at 58 *et seq.*

<sup>115</sup> BVerfGE 14, 56, at 70; 26, 186, at 198 *et seq.* See also § 21 DRiG.

<sup>116</sup> BVerfGE 17, 252, at 259, 262.

<sup>117</sup> BVerfG, NJW 1996, 2149, at 2150.

Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

The principles of irremovability and immovability apply to federal and state judges alike. Apart from Article 97 (2) Basic Law some state constitutions have also incorporated this guarantee.<sup>118</sup>

The *reasons for dismissal* are specified in the Federal Judges Act (§ 21 DRiG). The reasons are predominantly formal and seek to ensure the independent status of the judge by *inter alia* preventing incompatibility. Employment in a different public service, entry into the armed forces as a soldier and loss of German citizenship regularly result in *automatic* dismissal. A judge is to be released in the following cases: a judge refuses to take the necessary oath pursuant to § 38 Federal Judges Act; is a member of parliament;<sup>119</sup> reaches the retirement age or becomes unfit for service;<sup>120</sup> becomes a resident of a foreign country without permission; or upon request.<sup>121</sup> These reasons reflect the necessary requirements for the appointment of judges.<sup>122</sup>

Dismissal on the basis of a *judicial decision* is provided for if a judge is sentenced to at least one year imprisonment for the commission of a wilful crime, if a judge is sentenced for treason, endangering the democratic legal order or endangering German national security, if a judgement denies a judge's professional capability for public office or in case of forfeiture of civil rights pursuant to Article 18 Basic Law.<sup>123</sup>

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<sup>118</sup> See e.g. Art. 66 (1) Bad-Württ Verf; Art. 87 Bay Verf; Art. 137 Brem Verf; Art. 128 Hess Verf; Art. 122 (2-4) Rheinl.-Pfalz Verf; Art. 111 Saar Verf. For the issue of immovability see R. Gröschner, Reichweite richterlicher Immovibilität im Verfassungsstaat des Grundgesetzes, 2005.

<sup>119</sup> See § 36 DRiG.

<sup>120</sup> See § 34 DRiG.

<sup>121</sup> § 21 (2) DRiG. For the release of judges on probation and those assigned for a specific task, see §§ 22, 23 DRiG.

<sup>122</sup> See above III.1.

<sup>123</sup> § 24 DRiG.

Finally, the Federal Constitution provides for *judicial impeachment*. Article 98 (2) of the Basic Law reads:

If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed.

Pursuant to Article 98 (5), the states may enact corresponding provisions with respect to state judges. The states have exercised this competence in their constitutions.<sup>124</sup> The decision in cases of judicial impeachment rests with the Federal Constitutional Court.<sup>125</sup>

A judge may be barred from performing judicial functions without, however, terminating her or his status only for the reasons specified by § 30 Federal Judges Act (DRiG).<sup>126</sup> This form of removal or transfer of a full-time judge or temporary judge without written consent is permissible on the basis of a final judicial decision in case of impeachment pursuant to Article 98 (2) and (5) Basic Law, in a judicial disciplinary action, in the interest of administration of justice<sup>127</sup> or upon change of the judicial structure.<sup>128</sup>

## 2. The Body Authorized to Dismiss Judges and to Make Final Decisions on Disciplinary Measures

As a general rule, judges may only be dismissed on the basis of a court decision. There is a specific chamber at the Federal Court of Justice for matters of supervision over federal judges (“Dienstgericht”).<sup>129</sup> It renders final decisions in disciplinary proceedings, on transfer of judges, dismissal, and retirement due to disablement and decides appeals

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<sup>124</sup> See e.g. Art. 66 (2) Bad-Württ Verf; Art. 63 (3), (4) Hamb. Verf; Art. 40 Niedersachs Verf; Art. 73 Nordrh.-Westf Verf; Art. 123 Rheinl.-Pfalz Verf; Art. 36 (2) SchlHLandessatzung.

<sup>125</sup> Art. 98 (5) Basic Law.

<sup>126</sup> J. Schmidt-Räntsch (note 72), § 30, para 9.

<sup>127</sup> See § 31 DRiG.

<sup>128</sup> See § 32 DRiG.

<sup>129</sup> § 61 DRiG.

against secondment and on complaints against disciplinary measures allegedly interfering with judicial independence.<sup>130</sup> The chamber also decides on revision against decisions by state disciplinary courts.<sup>131</sup> In the interest of judicial independence the term “disciplinary measures” is interpreted broadly to encompass also measures by the supervisory board having indirect influence on the judicial function.<sup>132</sup> Any measure which has the potential to influence a judge’s professional conduct may be subject to challenge. For example, a press interview by the minister of justice which is critical of a judge’s professional or private conduct could have an effect on his or her independence.

## VI. Conclusion

Judicial independence in Germany has led to far-reaching protection of the judiciary. While the basic principles are laid down in the Federal Constitution and elaborated in several state and federal laws, courts have specified the exact parameters and scope of judicial independence. Several cases, such as the impermissibility of regulating a judge’s working hours, may lead one to question whether the notion of judicial independence has been overly stretched. Accordingly there have been voices which call for a reassessment and a concentration on the constitutional guarantees.<sup>133</sup> After all, judicial independence is not a privilege or an end in itself. Its purpose is to preserve the rule of law.

Grave encroachments upon judicial independence are isolated events. Judicial independence has most often been raised as a defense against supervisory measures. In general, there is less interference by the other branches of government than by the judiciary itself.<sup>134</sup>

A current issue with respect to judicial independence is the introduction of modern oversight mechanisms to ensure efficiency. The underlying idea is to make use of business management techniques in the ad-

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<sup>130</sup> § 62 DRiG.

<sup>131</sup> §§ 62 (2), 77 DRiG.

<sup>132</sup> BGHZ 93, 238, at 241.

<sup>133</sup> *G. Barbey*, (note 2), 828; *E. Schmidt-Jorzig*, (note 48), 2377 *et seq.*

<sup>134</sup> *S. Haberland*, Problemfelder für die richterliche Unabhängigkeit, DRiZ 2002, 301, at 310.

ministration of justice and the budget in order to enhance its output.<sup>135</sup> The planned restructuring of the court work routine has been subject to controversial discussion.<sup>136</sup>

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<sup>135</sup> See e.g. C. Schütz, Der ökonomisierte Richter: Gewaltenteilung und richterliche Unabhängigkeit als Grenzen Neuer Steuerungsmodelle in den Gerichten, 2005; U. Mäurer, Justiz – Aufbruch oder Abbruch? – Ressourceneinsatz und Arbeitsleistung der Justiz, DRiZ 2000, 65, at 66; B. Kramer, Modernisierung der Justiz: Das Neue Steuerungsmodell, NJW 2001, 3449 *et seq.*; K. F. Röhl, Justiz als Wirtschaftsunternehmen, DRiZ 2000, 220-230; W. Hoffmann-Riem (ed.), Reform der Justizverwaltung – Ein Beitrag zum modernen Rechtsstaat, 1998.

<sup>136</sup> H. Schulze-Fielitz, in: H. Dreier (ed.), Grundgesetz-Kommentar, Vol. 3, 2000, Art 97, Rn. 35.