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THE IMPLEMENTATION OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE IN THE RELATIONS BETWEEN COURTS (BETWEEN ORDINARY COURTS AND ORDINARY COURTS AND THE CONSTITUTIONAL COURT)

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Coming from Germany, I am going to deliver my report on the basis of the German legal system. Therefore I will first give you a short outline of the structure and organisation of the German court system in general, before I come to the question of how to implement the principle of judicial independence in the relations between courts.

A. Outline of the structure and the organisation of the German court system in general

Germany is not a unitary, but a federal state. It consists of sixteen states, the so-called ”Länder”.

I. The judicial power

1. As far as the judiciary is concerned, Art. 92 clause one of the Federal Constitution of Germany, the so-called Basic Law, reads: ”The judicial power shall be vested in the judges.” That means that it is only the judges, i.e. the courts, and not legislative or executive bodies, that exercise judicial power.

2. The professional requirements of a judge are also established by the Basic Law itself. Art. 97 of the Basic Law states that judges shall be independent and subject only to the law. Once they are appointed permanently, they cannot, against their will, be dismissed, suspended, transferred or retired before the expiration of their term of office.

II. The German court system

As to the German court system, the fundamental provisions are also laid down in the Basic Law itself.

1. Art. 92 clause two of the Basic Law reads: ”The judicial power shall be exercised by the Federal Constitutional Court, the federal courts provided for in this Basic Law, and by the courts of the Länder”, i.e. the courts of the sixteen different states. Thus, there are federal courts as well as state courts, and there is the Federal Constitutional Court.

2. As to the different branches of jurisdiction, Art. 95 sub-section 1 of the Basic Law states that for the purpose of ordinary, administrative, financial, labour and social security jurisdiction, the Federation shall establish one federal supreme court for each of these respective five jurisdictions.
Below these five federal supreme courts, each jurisdiction has its own court system of state courts. Thus, in Germany, we have five different branches of jurisdiction, these being the ordinary jurisdiction dealing with all criminal and civil cases, the financial jurisdiction, the labour jurisdiction, the social security jurisdiction and, last but not least, the administrative jurisdiction, dealing with all public law not covered by one of the other four jurisdictions.
All of these five jurisdictions have - at least in general – one or two courts of first instance for each, and one or two higher regional courts, i.e. one or two courts of the second instance for each state. These courts are state courts. At the top, every jurisdiction has its supreme court, which is a federal court.

3. In general, the courts of first and second instance are trial courts, i.e. they consider a case on points of law as well as on points of fact, whereas the competence of the supreme court, in contrast, is mostly restricted to the review on points of law only.

4. Besides these five jurisdictions each of them dealing with the respective substantive law, there is the Federal Constitutional Court, dealing exclusively with constitutional law. In addition, most of the sixteen ”Länder” have their own constitutional court, dealing with specific state constitutional law.

III. The competent court to decide the case

Within the stages of appeal in the respective jurisdiction, it is (at least in general) always the court of first instance that is competent to decide the case. Higher courts, i.e. the courts of appeal, can only become competent if seized with an admissible legal remedy. They are not entitled to review the decision of the lower court ex officio; it is more often only the parties of the case who decide whether or not a higher court shall review the lower court´s decision.

To suumarise as to the German court system:
1. The judicial power is vested exclusively in the judges who are independent and subject only to the law.
2. There are five different branches of jurisdiction, each of them having, in general, several courts of first instance for each state, one or two courts of second instance for each state and, at the top, one supreme court, which is a federal court. Besides these five jurisdictions, there are the Federal Constitutional Court and the constitutional courts of the sixteen Länder, dealing exclusively with constitutional law.
3. Within the respective jurisdiction, the competent court is generally one of the courts of first instance. Higher courts are only entitled to review a lower court´s decision if and to the extent they are seized with a legal remedy, but never ex officio.

B. The implementation of the principle of judicial independence in the relations between the ordinary courts

After these introductory remarks concerning the German court system in general, I would now like to draw your attention to the question of the implementation of the principle of judicial independence in the relations between the ordinary courts - ordinary courts, in this context, meaning all courts of the five branches of jurisdiction in contrast to the constitutional courts.

I. The principle

In principle, lower courts in Germany are not bound by precedent decisions of other, especially higher, courts. As I mentioned before, Art. 97 of the Basic Law states that judges are independent and subject only to the law. Though this provision does not exclude that a binding by precedents could be enacted by law, as long as there is no such law, judges deciding a case are generally neither bound by the rulings of the other courts in the region, nor by the rulings of the higher courts, nor by the ruling of the supreme court of the respective jurisdiction.

Consequently, the rulings of the different courts on the same point of law may differ considerably. This is, of course, dangerous for the stability of law, and, in consequence, for legal certainty. Therefore there is, generally, the need for precautions that may prevent rulings of courts that differ too much on the same point of law. One possible way would be, of course, to generally bind lower courts to higher courts´ decisions. Nevertheless, there are other, less binding ways, too. In the following, I would like to give you a short outline of the main legal precautions we have in Germany in order to prevent instability of law by a differing court ruling.

II. Legal precautions to ensure uniformity of law

1. First of all, a uniform interpretation of the law can be achieved by providing the parties with the right to legal remedies. If the parties of a case have the right to challenge a court´s decision because that court deviated from the ruling of another, especially of a higher court, there is the possibility that the higher court will set aside the challenged decision. The higher court, seized with such an appeal, may decide whether it overrules its own precedent ruling, or instead, sets aside the deviating decision of the lower court. In the latter case, having set aside the lower court´s decision, the higher court then decides the case in accordance with its own precedent ruling, and by this means ensures the uniform interpretation of the law. Thus, to give the parties of a case the right to challenge a court decision that deviates from the ruling of a higher court, is an important means of ensuring a uniform interpretation of the law.

2. Another way to ensure a uniform interpretation of the law is, as I mentioned before, to establish legal provisions that state a certain binding between ordinary courts. Though rare, such provisions also exist in the German law system. As an example, I would like especially to draw your attention to the two following categories:

a) As I mentioned before, it is in particular the task of the supreme courts, i.e. the highest courts in the respective jurisdiction, to decide on controversial questions of law, and, by this, to ensure a uniform interpretation of the law. As each of the supreme courts consists of several divisions, it must somehow be assured that at least these different divisions within the same supreme court do not rule differently on the same question of law. Thus, in order to prevent such a non-uniformity, it is established by law that a division within a supreme court that has to deviate from the precedent ruling of another division of the same supreme court has to interrupt its own proceeding and has to present the controversial question of law as well as the reasons why it wants to deviate to the so-called joint division. This joint division is a special division that consists of members of all divisions of the respective supreme court. The joint division, seized in such a case, then decides, but only on the question of law presented, and not on the outcome of the original proceeding. The division that presented the question to the joint division is bound to the joint division´s decision and has to decide the original proceeding under consideration and in compliance with the joint division´s decision.

b) The same proceeding is used in certain rent dispute litigations. To prevent non-uniformity of the law in this area, courts that want to deviate from a higher court´s ruling in certain rent dispute cases have to interrupt their proceeding and have to present the controversial question to the higher court. The higher court, in this specific case, only decides on the question presented, and the court that presented the question is bound to this higher court´s decision when it decides the original proceeding.

So, all in all, there are specific precautions in the German procedural law, too, to ensure uniformity of law.

3. But even if there were no such precautions, the danger that different courts decide differently on the same question of law would only be small. This is, because normally, lower courts follow higher courts´ decisions voluntarily. The main reasons for this are the following:

First of all, lower courts tend to respect higher courts´ decisions, especially when they are well founded.

Furthermore, if a lower court follows a higher court´s decision, it normally does not have to state in detail the reasons for its decision; it is sufficient to state the main reason for that decision and for the rest, to refer to the higher court´s decision. In contrast, a lower court that wants to deviate, must lay down in detail all the reasons why it came to the conclusion that the higher court´s precedent ruling is incorrect and cannot be followed. Thus, deviating from a higher court´s decision takes considerable effort, and there is still the risk that the lower court´s decision, even though well founded, will be set aside by the higher court if challenged by the party having lost the case because of the deviation.

Another important reason why lower courts tend to follow higher courts´ decisions voluntarily is as follows: Even though independent, a judge deciding a concrete case has to take into account that the parties of the case count on the stability of law and on a consistent practice of the courts. Therefore, once there is already a precedent decision especially of the respective supreme court on a certain question of law, lower courts tend to follow this practice and only deviate if they come to the conclusion that the practice is really untenable.

To summarise, there is, thus, in general, no need for a strict binding of lower courts to the ruling of higher courts in order to ensure a uniform interpretation of law and by this stability of law. Taking into account that lower courts normally tend to follow well founded higher courts´ decisions voluntarily, it is generally sufficient to give the parties of a case the right to challenge a decision that deviates from a constant court ruling.

4. Before coming to the relations between the ordinary courts and the Constitutional Court, I would like to draw your attention to a last question concerning the relations between the ordinary courts themselves. So far, I have talked about whether or not lower courts should be bound by higher courts´ decisions. But there are also cases within the German legal system, where higher courts are bound by lower courts´ decisions. This is the case when the right to appeal is limited.
As I mentioned before, higher courts are only entitled to review lower courts´ decisions if seized with an admissible legal remedy. There is no review ex officio. As a consequence, courts of appeal can only review a lower court´s decision to the extent that it is challenged. Thus, if you limit the right of appeal, you also limit the power of review of the higher court seized with such an appeal.

In the following, I would like to give you a short outline of the most common cases of such limitations within the German legal system:

a) The most common limitation, especially for the right to appeal to the supreme courts, is to limit the power to review to an appeal on points of law only. That means that a party that wants to challenge a decision can only challenge it as far as the law applied by the lower court is concerned. The parties thus can only argue, that the lower court applied the law incorrectly. They will (at least in general) not be heard with the appeal that the facts found by the lower court were incorrect. In consequence, the higher court, in such a case, is bound by the facts as they were found by the lower court. The higher court has, in this case, no power to find facts of its own.

In Germany, this kind of limitation is quite common as far as appeal to the supreme courts is concerned. They are mostly limited to a review on points of law only. The main reason for this is, that the respective supreme court in a specific jurisdiction does not have, primarily, the function to guarantee a correct decision, but to guarantee a uniform interpretation of the law. Therefore, its jurisdiction shall be primarily to decide questions of law and not questions of fact. To guarantee that the correct facts of a case are found is primarily the function of the lower courts, especially those of the first instance.

b) Another common category of limitation is to limit the right to appeal depending on the monetary value of the matter in dispute. Pursuant to the relevant provisions in the German Civil Procedural Code, in cases where the parties sue solely for money, they have the right to appeal only to the second, and further to the third instance, if the monetary value of the matter in dispute is higher than a certain amount laid down in the relevant legal provisions. Consequently, in cases where the value of the matter in dispute does not reach at least the necessary amount to obtain the right to appeal to the second instance, there is only one instance, and the decision of the court of this first and single instance is final. The reason for this kind of limitation is, mainly, to relieve the higher courts of less important cases.

c) The last case of a limited right to appeal to which I would like to draw your attention is that the right of appeal depends on whether one court or the other admits the appeal.
Two forms have to be distinguished:

Firstly, it can be the lower court which, in its decision says whether or not the appeal to the higher court will be admitted. The higher court, is then bound by this decision on the admittance, i.e. it must take the appeal when admitted in the lower court´s decision, and vice versa, it has no power to review the decision when the lower court rejected to admit the appeal.

Secondly, it can also be the higher court itself that decides on whether or not, and if so, to what extent it admits the appeal.

The reason for these limitations is again to relieve the higher courts of less important cases. The main difference between the two forms is that, in the first case, it is the lower court that decides on whether or not a case is of importance, and in the second case, this decision is reserved for the higher court itself.
Nevertheless, in both cases, the reasons for whether or not, and if so, to what extent the appeal is admitted, must distinctly be laid down by law in order to prevent an arbitrary handling of the parties´ options to challenge a decision by the courts.

C. The implementation of the principle of judicial independence in the relations between the ordinary courts and the Constitutional Court

The Federal Constitutional Court is the highest court of Germany, but its jurisdiction is limited to the interpretation of the Basic Law. The court is therefore often called the supreme guardian of the Basic Law.

The competences of the Federal Constitutional Court are enumerated in the Basic Law and in the Federal Constitutional Court Act. Two of these competences are of special interest when looking at the relations between the Constitutional Court and the ordinary courts:

1. Concrete judicial review of constitutionality

The first competence of the Constitutional Court to which I would like to draw your attention is called concrete judicial review of constitutionality. Its requirements are set out in Art. 100 sub-section 1 of the Basic Law. This competence becomes relevant when a court - that is any court in Germany - comes to the conclusion that a law which is crucial to its decision is incompatible with the Basic Law.
Art. 1 sub-section 3 of the Basic Law reads: ”The following fundamental rights shall bind the legislature, the executive and the judiciary as directly enforceable law.” Every court in Germany

must therefore already consider constitutional issues in cases that are brought to it. But it is only the Federal Constitutional Court that can declare a statute incompatible with the Basic Law. This Constitutional Court´s monopoly expresses respect for the dignity of the legislature and shall promote uniformity of law; the latter being challenged if any court could declare statutes incompatible with the Basic Law.
Therefore, a court that considers a law - federal or state law - to be unconstitutional has to interrupt its proceeding and has to send the files of the case to the Federal Constitutional Court, stating in detail why its decision in the concrete case depends on the validity of the statute submitted for review and why it consideres that statute to be unconstitutional. The Federal Constitutional Court, then, only decides on whether or not the statute submitted for review is compatible with the Basic Law. If it concludes that the statute is, indeed, unconstitutional, that law may no longer be applied by any court or any other public authority. Thus, the Constitutional Court´s decision has binding force for all courts and public authorities.

It is important to note, however, that the Constitutional Court, seized with such a concrete judicial review of the constitutionality of a statute, only decides on the question whether or not the statute submitted is unconstitutional. The Constitutional Court is not entitled to also decide on the outcome of the original proceeding.

2. Constitutional complaint

The other competence of the Federal Constitutional Court which plays a role in the relation between that court and the ordinary courts is the constitutional complaint:

Any Person may claim before the Constitutional Court that his or her fundamental rights guaranteed in the Basic Law have been violated by an act of the legislative, the executive or the judicial power. Citizens therefore have a direct recourse not only to the ordinary courts, but also to the Constitutional Court. However, the requirement for lodging such a constitutional complaint is, inter alia, that there are no other means to eliminate the alleged violation of the constitutional right. In principle, all remedies within the relevant branch of jurisdiction therefore have to be exhausted before a complainant is allowed to initiate the proceeding for a constitutional complaint. In consequence, most constitutional complaints are directed against court decisions. But again, it is important to note that the Constitutional Court is not a general court of review. It is only permitted to review whether the ordinary court has violated the complainant´s constitutional rights. Such a violation requires more than a simple misreading of a legal provision. The Constitutional Court only intervenes if the deficiency of the challenged decision shows a fundamental error of the ordinary court concerning the significance and the scope of the fundamental right that is alleged to have been violated. Only if the challenged decision is of such a constitutionally relevant deficiency, the Constitutional Court sets aside the challenged decision and refers the case back to the ordinary court for re-trial under consideration of the Constitutional Court´s decision.

3. Unlawful interference in the competences of the ordinary courts?

The Constitutional Court is sometimes criticised for a too extensive interpretation of the Basic Law, thereby expanding the range of its own power to review court decisions and curtailing the competences of the ordinary courts. An example of this criticism is the constitutionalisation of private law, especially in the field of contractual relations. In 1993, a decision of the Constitutional Court concerning the validity of a guarantee attracted attention. The complainant was a 21-year old unemployed woman who had guaranteed for her father, so that he could

double the credit line of his business account. After her father went bankrupt, the bank tried to make use of the guarantee. The Federal Court of Justice, i.e.the supreme court for civil law matters, ordered the woman to pay the guaranteed sum to the bank. In her constitutional complaint the woman accused the bank of having taken abusive advantage of her lack of experience in business affairs.
Her constitutional complaint was successful: The Constitutional Court stressed that private autonomy, conceived of as the right to determine what the ”law” is between private persons, presupposes a certain balance of power among the contracting parties. If the balance is grossly disturbed, the contract tends to be dictated by the stronger party, leaving no room for the contractual liberty of the other party. The Constitutional Court obliged the ordinary courts not to narrow their decisions to the finding, that an adult is responsible for the contracts he or she signs, but to also take into account the fundamental rights guaranteed by the Basic Law as far as possible within the framework of statutory interpretation when they enforce contracts that bring forth distorted results. The case was therefore referred back to the Federal Court of Justice for re-trial.

Another example for the constitutionalisation of private law is a decision concerning the contractual relations between a landlord and a tenant. Seized with a constitutional complaint against a decision of an ordinary court in a rent dispute case, the Constitutional Court decided in 1993 that the tenant´s right of possession is to be seen as property under Art. 14 of the Basic Law which reads: ”Property and the right of inheritance shall be guaranteed.” Critics argued that the Constitutional Court produced a new constitutional right, thus enlarging its possibilities to review ordinary courts´ decisions.

However, in general, the Constitutional Court is held in high reputation and its decisions are respected by the ordinary courts as well as by all other public authorities, as wellas by the people.