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Jurisdiction and Pluralism: Judicial Functions and Organization in Federal Systems. The Case of Germany

by

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Abstract

This article analyses the model of judicial federalism that has developed in the Federal Republic of Germany. As the constitutional history of Germany reveals, federal regulation of the judiciary has often been associated with centralization and even authoritarian centralization. On the other side, a federal constitution based on the rule of law should guarantee its protection by the judiciary. The conflict between federalist organization and central guarantee of the rule of law determines the actual system

Key-words

Germany, federalism, rule of law, unity of the judiciary, judicial pluralism

1. Federal systems and the role of subnational entities in the judiciary.

While in the process of regionalization, devolution and decentralization the subnational entities are normally involved in administrative, perhaps in legislative, but not in judicial functions, the classical federalist States are based on pre-existing member States. Therefore, these entities or States have their own judiciary. The problem arises whether and how these are unified and integrated in a federal system, or to which degree they remain independent.

As far as Germany is concerned, all the member States – called, at least since 1919, *Länder* – had their own judicial system, and these systems were extremely different, as the differences of territory and population were enormous, in the time of unification 1867/71 with nearly two thirds belonging to Prussia and with very small principalities of about 50,000 inhabitants. Therefore, harmonizing the judicial systems, important for the economic development as well was one of the essential problems of the new Empire. Among the first legislative projects, there was the judicial organization (*Gerichtsverfassungsgesetz*) of January 27, 1877, and the laws on civil procedure of January 30, 1877 (*Zivilprozessordnung*) and on criminal procedure of February 1, 1877 (*Strafprozessordnung*). These laws, very often modified, but in principle valid until nowadays, provide for a central (federal) court, the *Reichsgericht*, since 1950 called *Bundesgerichtshof*, who decides in last instance on *Revision,* a remedy limited on the control of application of the law with exclusion of the control of the facts. The laws regulate the inferior instances and remedies as well. On administrative law, there was, in the beginning, no federal jurisdiction.

However, with the growing centralization, especially in the First World War and then in the Nazi time, federal power on the judiciary was extended. This leads to an ambiguity: On the one side, federal regulation could appear as an authoritarian, even totalitarian tendency; on the other side, the constitution of a Federal State based on the rule of law should guarantee its protection by the judiciary. It is this conflict between federalist organization and central guarantee of the rule of law that determines the actual system.

2. The functional unity of the judiciary

In this sense, article 19 IV of the Basic Law (BL) of the Federal Republic of Germany guarantees the access to the judiciary (*Rechtsweg*) against every violation of the rights – especially the fundamental rights – by all public powers, either of the Federation, the *Länder* or other authorities. One may conclude that this guarantees the power of the courts in civil law cases as well. Articles 92-104 BL regulate the judiciary and attribute it – exclusively – to the judges. Furthermore, they distribute it to the Federation and the *Länder*. Article 93/94 provide for the Federal Constitutional Court, article 95 for the supreme federal courts, article 96 for some other federal courts, while all the other courts are matter of the *Länder*. But their functions and position are regulated by the following articles of the Basic Law and, based on it, by the federal legislation. Therefore, the judiciary is considered as a functional unity, guaranteed and determined by the Federation. There seems to be no space for judicial pluralism.

However, there is an exception. As the *Länder* are considered to be States, they have their own and autonomously regulated constitutional system. Between the constitutional organs, there may be – and are established in all the *Länder* – constitutional courts. These are regulated exclusively by the constitutions and laws of the *Länder*, and there are, as a matter of fact, certain differences: different regulations of the conflicts between the constitutional organs of the *Länder*, of judicial review of the constitutionality of laws, only a part of the *Länder* has introduced a constitutional complaint etc. That may produce conflicts with federal regulation and is limited by this, especially for the judicial review of constitutionality of laws (art. 100 I BL, see below, nr. 7), and the Basic Law provides for a solution of differences of interpretation (art. 100 III).

With this exception, it has to be underlined that legislative power in the field of judicial organization, process law and the main areas of civil and criminal law belongs to the Federation (art. 74 I nr. 1 BL). This is important above all for the ordinary jurisdiction, but the power to regulate judicial organization and procedure concerns all the courts. Therefore, there are, besides the above mentioned laws for the ordinary jurisdiction, federal laws – very often modified – for the administrative courts (*Verwaltungsgerichtsordnung*, 1960), the financial courts (*Finanzgerichtsordnung*, 1965), the labour courts (*Arbeitsgerichtsgesetz*, 1953), the social security courts (*Sozialgerichtsgesetz*, 1953). For most of these fields, federal

legislation is prevailing. It is mainly in administrative law that many fields are regulated by the *Länder*, but nevertheless the judicial control is determined by the federal legislation.

3. Organization of the court system

a) In general: – According to this constitutional and legal framework, it has to be emphasized that only the courts mentioned in the Basic Law are federal, while all the other courts belong to the *Länder*. Therefore, there is the Federal Constitutional Court (art. 93/94 BL); there are the five supreme federal courts, for ordinary (civil and criminal law), administrative, finance, labour, social security cases (art. 95 I BL); and there are some special courts of the Federation for patents and for disciplinary matters of federal public servants, judges and soldiers (art. 96 I, III BL; the military criminal courts, art. 96 II BL, have not been established). But all the other, the inferior courts of first and often second instance, in the ordinary, administrative, finance, labour, social security jurisdiction, are courts of the *Länder*, although provided and regulated by federal laws.

b) Courts on the *Länder* level: – In detail, we meet, besides the constitutional courts in every *Land* according to its constitution and a law of the *Land* concretizing it, the following courts:

- Ordinary jurisdiction (civil and criminal law cases): For smaller cases, courts of first degree called *Amtsgericht*, for more important cases and as courts of appeal in smaller cases the *Landgericht*, furthermore as courts of appeal the *Oberlandesgericht*, normally one or two in every *Land*.

- Labour jurisdiction: As first degree the *Arbeitsgericht*, as court of appeal the *Landesarbeitsgericht*, normally one or two for every *Land*.

- Administrative jurisdiction: First degree *Verwaltungsgericht*, appeal to *Oberverwaltungsgericht,* or *Verwaltungsgerichtshof*, one for every *Land*.

- Social security jurisdiction: First degree *Sozialgericht*, appeal to *Landessozialgericht*, normally one for every *Land* or for two smaller *Länder*.

- Finance jurisdiction: One, in bigger *Länder* two courts, called *Finanzgericht*.

For the regulation of details, like the number, the place and the limits of the single courts, there are laws of the *Länder* concretizing the federal legislation and providing for the necessary structures.

c) Appointment of judges: – For the federal judges, article 94 BL for the Federal Constitutional Court prescribes the election of half of the judges by the federal Parliament (*Bundestag,* operating by a special committee for that purpose), the other half by the *Länder*-representation, the *Bundesrat*, in both cases with a two thirds majority. The judges of the supreme federal courts are appointed by the competent federal minister, according to German tradition, but now (article 95 II BL) on the proposal made by a committee composed of the competent ministers of the *Länder* and the same number of deputies of the federal Parliament. In that way, a unilateral choice by the federal minister is excluded, the selection between the qualified judges in the service of the *Länder* is guaranteed, but the decision is taken on the federal level.

The judges of the *Länder* are traditionally appointed by the competent minister of the *Land*, but according to article 98 IV BL the *Länder* may install committees for the election of judges participating in the proposal. This solution, which may improve the impartiality and the legitimation of judges, has been made in about half of the *Länder*, according to the *Land* constitution or a law, with different composition of the committees: deputies of the *Länder* Parliaments, other ministers, judges, lawyers. Details are controversial, but the fundamental situation is that the Basic Law itself allows the different solutions and therefore pluralism.

d) Guarantees of independence. – The principle and the essential regulations of independence of judges are declared by the Basic Law, article 97: Subordination of the judges only to the law, not to governmental or administrative decisions, protection against measures concerning the personal position of judges and reserve of decisions in these fields to the judiciary. But the details of these regulations have to be ruled, according to article 98 I, III BL, by laws. Therefore, there is a special federal law on judges, enacted in 1961, and containing some dispositions for the judges in the *Länder* as well. But their position has to be concretized and regulated in detail by a law of each *Land* which contains, among others, dispositions on the committee for the election of judges, disciplinary sanctions, procedure in case of modification of the court system etc. There is a large jurisprudence, above all on disciplinary measures concerning judges. In addition, the development of judicial organization has enforced the tendencies of self-government of the courts, with presidencies composed of the president and a number of judges elected by all the judges of the court. These presidencies have the power to organize the distribution of tasks in the

court on the singular deciding chambers and the judges. The respective rules have to be enacted with respect of the position of the single judges and are public, valid for a determined time, so that manipulations of competence are excluded and that the independence of the judiciary is improved. Therefore, the participation of committees, mainly with members of Parliament, in the appointment, the federal structure and the self-government of courts equalize the missing of an organ such as the *Consiglio Superiore della Magistratura* in the Italian system. Nevertheless, the promotion of judges is mainly in the hands of the judicial bureaucracy and of the ministers. This may intimidate judges and be considered as a weak point in the German system.

4. The way of judicial remedies

a) Initial competence of the *Länder* courts: – From the functional unity of the judiciary and the historical background follows that the judicial processes regularly begin before the courts on the *Länder* level. This is the case not only in the ordinary jurisdiction, but also in conflicts with public authorities. Even if a federal authority is involved and has issued an order, the question of violation of rights and of legality has to be submitted to the competent court of the *Land*. Furthermore, for the public servants appointed by the Federation as well, the first decision of judicial conflicts is in the hands of the *Länder* courts. The power to give judicial protection does not depend on the position of the deciding authority in the structure of the Federation or the *Land*. There are very few exceptions from this rule, e.g. in case of administrative conflicts between the Federation and a *Land*, dissolution of forbidden organizations ordered by the federal minister of the interior, conflicts on secret services; in such cases it is the federal administrative court who decides (see § 50 VwGO). In certain criminal cases regarding heavy violations of international law or the State security, the federal public prosecutor is empowered to defend the case before the *Land* court (art. 96 V BL). But the entire normal jurisdiction is, in the first instance, attributed to the *Länder* courts and allows a large space for judicial pluralism.

b) Remedies. – On the other hand, the functional unity of jurisdiction, ensured by the federal legislation, includes a system of remedies with a determinant position of the federal courts. The principle and normal system is the possibility of appeal against the original

decision, to decide by a higher court of the *Land*, who controls, in that way, the jurisprudence of the original court. Against the decision of the court of appeal, there is the possibility of the so called "*Revision*", a remedy which, without re-examining the facts, controls the interpretation and application of the law. The judgment on this remedy is entrusted to the supreme federal courts that have, in this way, a control over the jurisprudence. In case of difference of jurisprudence, there is a "common senate" of the supreme federal courts who decides the question. The control includes interpretation and application of federal law, in some cases of law of the *Länder* – e.g. the laws on administrative procedure (§ 137 I nr. 2 VwGO) – as well, while in other cases, interpretation and application of the *Länder* laws is left to the *Länder* courts, so that, so far, judicial pluralism is guaranteed by the federal legislation.

c) Limitation of remedies and acceptation of pluralism. – Nevertheless, in the practical concretization the mentioned model has been modified. There have been for a long time different solutions, e.g. for smaller civil law cases decided, in first instance, by the *Amtsgericht*, with the right of appeal to the *Landgericht*, but without the possibility of access to a supreme federal court, and for smaller criminal law cases decided by the *Amtsgericht* with the right of appeal to the *Landgericht* and the *Revision* to the *Oberlandesgericht*; however, in these cases differences of jurisprudence are to be submitted to the *Bundesgerichtshof*, so that the uniformity of jurisprudence is ensured. But for the smaller civil law cases, judicial pluralism has always been accepted. Therefore, in house renting e.g., judicial differences between the courts are tolerated.

Besides that, there are cases where the difficult or complicated clearing of facts recommends renouncing on a repetition and thus on the right of appeal. Therefore difficult criminal cases are entrusted to the *Landgericht*, in certain very important and politically relevant cases to the *Oberlandesgericht*, with the right of *Revision* to the *Bundesgerichtshof*. Similar solutions have augmented; so in administrative law, there are more categories of cases now conferred to the *Oberverwaltungsgericht*, so that only the *Revision* to the *Bundesverwaltungsgericht* is possible, and in the finance jurisdiction, there is only one degree on the *Land* level, so that appeals are not possible, but only the *Revision* to the *Bundesfinanzhof*. These and other simplifications – above all the possibility of *Revision* to the supreme federal court against the original decision, if both parties agree – are signs for the need of a shorter and faster judicial procedure.

It is the same need that has motivated the legislator to limit the judicial remedies. Therefore, especially in civil law conflicts the values of litigation necessary for remedies have increased, and in many cases, especially in administrative law, the appeal is possible only in important cases, defined by law (§ 124 II VwGO), and after admission either by the administrative court, or by the administrative court of appeal (§ 124a VwGO). So the parties first have to pass through this procedure which diminishes the number of remedies. For the procedure of the *Revision*, first for the processes of administrative law, then in civil law and a part of the other processes as well has been introduced a procedure of admission by the deciding court, with the possibility of a complaint for not admission to the *Revision* court.

It certainly has to be admitted that among the criteria for the admission of remedies is always the unity of jurisprudence – avoiding differences form the precedent jurisprudence of higher courts – and the fundamental importance of the case, however with different formulation of these criteria. But nevertheless it results from the mentioned development that the function of remedies to ensure the uniformity of jurisprudence is reduced; a final judgment may be not appealed and therefore legally binding, even if its conformity with the jurisprudence is doubtful or missing. Therefore, the limitation of remedies leads to an increase of judicial pluralism. In a complicated legal order with limited resources of jurisprudence the primordial function of the judiciary must be the legally binding decision of cases, and the uniformity of these decisions has to cede. It is this situation; more urgent in larger States and legal systems, that characterizes the recent development of legislation and practice.

5. Influence of the *Länder* on the federal judiciary

It follows from what has been said before that the federal judiciary is essentially linked with that of the *Länder* and determined by it. Notwithstanding the control of the supreme federal courts on the jurisprudence in the *Länder*, it is this jurisprudence which fixes the objects of federal jurisprudence. Furthermore, there is a personal entanglement, because the normal career of judges goes from a first appointment and possibly promotion in a *Land* to the appointment as federal judge, which is better paid (except some functions of president of big courts in a *Land*) and therefore the natural aim of judges, sometimes as

well of university professors, public servants of a *Land*, too. It is quite rare that federal public servants may be appointed as judges of a federal court.

To this situation contributes the cooperation of the ministers of justice of the *Länder* through the *Bundesrat*, the representation of the *Länder* on federal level. As said before (supra, 3c), either the *Bundesrat* (for the half of the Federal Constitutional Court judges), or a committee for the election of judges with membership of the *Land* ministers (for the judges of the superior federal courts) cooperate in these decisions. Therefore, besides the information on the quality of candidates who are judges in the *Land*, these authorities largely determine the composition of the federal judiciary. On the other hand, this does not permit an influence of a single *Land* as such and neither of the community of *Länder*, because the *Bundesrat* and the committee for the election of judges are federal authorities, in spite of the de facto-influence of the *Länder*.

6. Guarantee of federal constitutional values and fundamental rights

Notwithstanding the constitutional autonomy of the *Länder* (supra, 2), an additional unifying factor may be seen in the prevalence of the federal constitution and especially of the fundamental rights, article 1 III, 20 III BL. Therefore, every judge is bound to respect and to apply this prevalence. This is important for judicial review (below, 7), but the same for the interpretation and application of the laws as such. Every control of legality includes the control of interpretation and application of the Basic Law, and the system of judicial remedies contributes to this purpose.

Although this legal situation and the very large and developed judicial system, the legal concretisation of the Federal Constitutional Court has introduced, based on older and especially Bavarian traditions, an additional constitutional complaint (*Verfassungsbeschwerde*) to the Federal Constitutional Court in protection of fundamental rights. This decision, later laid down in articles 93 I nr. 4a, 4b, 94 II phr. 2 BL as well, has had an essential impact on the German constitutional system. The constitutional complaint permits to pretend for protection of fundamental rights against every action of public authorities by the Federal Constitutional Court. This means, besides the possibility of reviewing legislative action and, in urgent cases, acts of government or public administration, that after having exhausted

the judicial remedies every court case may be brought before the Federal Constitutional Court for a control of violation of fundamental rights.

In fact, the interpretation of fundamental rights by the court has been extremely generous. Through the protection of the human dignity (art. 1 I BL), the general freedom to develop the personality (art. 2 I BL), the principle of equality (art. 3 BL) and even the right to vote (art. 38 BL), the protection of rights may allow the control of constitutionality under aspects of competence, of the rule of law, of the principle of the social State (art. 20 I BL) etc. As a matter of fact, the number of constitutional complaints has been very high from the beginning and has even increased in the now over sixty years old history of the court.

This leads two a double problem. On the one hand, the enormous number of constitutional complaints can be decided only in procedures of simplified examination. Therefore, in a development by many degrees, the actual procedure of acceptation has been introduced (§§ 93a-93d BVerfGG). Every constitutional complaint needs acceptation and is accepted only in case of fundamental constitutional relevance or in case of specific importance for the protection of fundamental rights (§ 93a BVerfGG). This acceptation is decided by "chambers" of three judges of the constitutional court. If they refuse it, no motivation or further procedure takes place, and if the question has been decided before, the chamber may decide on the case, either in positive, or in negative sense. In this way only the really important questions are decided by a "senate" of the court, composed of eight judges, in normal procedure.

On the other hand, it is just the high number of cases that gives to the constitutional court, above the supreme federal courts whose decisions are the normal object of constitutional complaints, a role of a real supreme court, ensuring a unity of jurisprudence and determining it through the application of the fundamental rights. Certainly the constitutional relevance as condition of control focusses on the constitutional aspects, but thanks to the interpretation of fundamental rights, these determine all the legislation and the application of the laws. Therefore, the constitution in its application by the Federal Constitutional Court is an instrument unifying judicial protection.

Nevertheless, even this unity of jurisprudence is influenced by judicial pluralism. The Basic Law (art. 142) and the constitutional court recognize the power of the *Länder* to have their own constitutions and fundamental rights – however without limiting the guarantees

of the Basic Law –, and the jurisprudence of the constitutional court has amplified the importance of the *Länder*-constitutions. This is why half of the *Länder* have introduced constitutional complaints to their constitutional courts, and they have developed, even in spite of the federal regulation of process law, their jurisprudence in these fields. Necessarily this raises the problem of differences, of their solution and, to this purpose, of the cooperation of the constitutional courts. The problem is similar to the cooperation of courts in other multilevel systems, like between the national courts, the court of justice of the European Union and the European court of human rights. It illustrates the pluralism inherent in more complex systems.

7. Judicial review of laws

A similar problem of courts cooperation is raised by the regulation of judicial review. The problem has been very old in Germany, but under the monarchic form of State, it has been answered in a negative way, once the law was signed by the monarch and correctly promulgated. Only under the Weimar constitution, the court of the *Reich* claimed for a right to exercise the review, but the question was highly controversial. So the Basic Law (art. 100) approved the right of control of every judge whether the law which has to be applied is conform to the constitution, but it did not give the power to the ordinary courts not to apply an unconstitutional law, reserving that power to the constitutional courts. Therefore, the deciding court has to submit the question to the constitutional court, if he finds that the law in question is unconstitutional, and it is only the constitutional court which may declare the law unconstitutional and therefore not to be applied.

However, the contrast can exist either to the Basic Law, or – in case of laws of the *Länder* – to the constitution of the *Land*. In the first case, it is the Federal Constitutional Court that has to decide, in the second case the constitutional court of the *Land*. Already with this alternative we find a tendency to judicial pluralism. Even more, frequently there are fundamental rights involved that are regulated in the Basic Law and in the constitution of the *Land* as well; both are valid (art. 142 BL). In such cases the deciding court may choose whether it wants to submit the question to the federal or to the *Land* constitutional court, so that there is a further pluralistic alternative. To resolve conflicts of interpretation possibly resulting from these alternatives, there is the procedure regulated in article 100 III

Basic Law (see above, nr. 2) which reserves the final decision to the Federal Constitutional Court.

8. Language regulations

Different from federal States like Belgium or Switzerland, federalism in Germany is not linked to language pluralism. Linguistic minorities have been always of small importance in the German empire, and they have diminished after the world wars. Since 1877, the *Gerichtsverfassungsgesetz* (§ 184, see above, nr. 1) declares German as the courts' language. For not German speaking people there is the right to use interpreters, nowadays guaranteed by the European Convention on Human Rights (art. 6) as well, and of increasing importance due to the international migration, but that does not seem to relativize the unity of jurisdiction.

9. Conclusion

According to a first impression, the influence of judicial pluralism in the German system seems slight. The courts and judges of the *Länder* are integrated in a functionally uniform system based on the Basic Law and concretized by central legislation already in the 19th century for the ordinary jurisdiction, under the Basic Law for all jurisdictions. The guarantees of the judiciary, essentials for the rule of law, are anchored in the Basic Law and protected by the possibility of constitutional complaint to the Federal Constitutional Court. Even the exception for the independent regulation of constitutional courts of the *Länder*, which has augmented its importance through the constitutional complaint to them, is harmonized by limits and rules of the Basic Law.

Nevertheless, the influence of judicial pluralism has always conserved its importance in detail, and in the last decades, it even has increased. This may be seen already in the federal legislation that leaves influence to the *Länder* regarding the places, numbers, resources of their courts and regarding the details of the position of their judges. Namely the appointment of their judges may be regulated with different solutions and exercised by decisions on the *Land* level; for promotion of judges, the influence of the judicial bureaucracy in the *Länder* may even be criticized as reduction of the independence of

judges. Cooperating in the appointment of federal judges, the *Länder* influence the federal judiciary.

But especially the regulation of judicial remedies may reduce the unifying role of the federal supreme courts. That has always been the case for smaller conflicts, especially with a smaller value in dispute, but the tendencies of the last decades have limited the judicial remedies, as the appeals, the *Revision* as well. Finally, the legislative powers of the *Länder* often reserve the final judgment on the interpretation of these laws to the *Länder* courts, excluding a federal control. As a result, the cost of judicial protection necessitates economy and reduces, in this way, with the reduction of judicial remedies the ideal of unitary jurisdiction which, independent from that, has been relativized by the principles of federalism.

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