

## A Comparative View on the Judiciary in the modern Rechtsstaat/Negara Hukum - the Example of Germany -

Contribution to the course Indonesian Judiciary

### I. Introduction

1. Why study public law with a comparative approach?
  - for a better understanding of the own law, possible alternatives and perspectives
  - for a better critical analysis of the own courts and institutions and their performance
  - as a source of inspiration
2. A common background: the commitment of Indonesia and Germany to a democratic system based on separation of powers, rule of law<sup>1</sup> and the respect for human rights
  - cf. for Indonesia preamble, art. 1(2, 3), 24 et seq., 28 et seq. Constit. 1945
  - cf. for Germany art. 1(3), 20(1-3), 28(1), 92 et seq. BL (= Basic Law for the Federal Republic of Germany of 1949)
  - this requires in both countries a strong, well-functioning, independent and impartial judiciary

### II. History and structure of the German judiciary

- a historical turn at the beginning of modern times: in 1495, the Ewige Landfriede [Perpetual Public Peace], an important law passed by the German King Maximilian I, tackled to put an end to the longstanding medieval tradition of feud (vendetta) and obliged everyone to settle legal disputes through the courts
  - the contemporary court system was historically shaped by the German federalism; first national regulation in 1877 in the Courts Constitution Act [Gerichtsverfassungsgesetz]
  - Germany has an integrated system of *courts of the Länder and of the Federation*, in which the *federal courts*, unlike in the USA, perform the function of *supreme courts*
  - it is likewise a differentiated system of *ordinary and specialised courts* (→ in 2020: 1083 courts with 21.942 judges)
1. **Ordinary jurisdiction** (regulated in the Courts Constitution Act)
    - district courts [Amtsgerichte]
    - regional courts [Landgerichte]
    - higher regional courts [Oberlandesgerichte]
    - Federal Court of Justice [Bundesgerichtshof]
  2. **Labour jurisdiction** (regulated in the Labour Courts Act [Arbeitsgerichtsgesetz])
    - labour courts [Arbeitsgerichte]
    - higher (regional) labour courts [Landesarbeitsgerichte]
    - Federal Labour Court [Bundesarbeitsgericht]
  3. **Administrative jurisdiction** (regulated in the Code of Administrative Court Procedure [Verwaltungsgerichtsordnung])
    - established as separate branch already in the second half of the 19<sup>th</sup> century
    - administrative courts [Verwaltungsgerichte]
    - higher administrative courts [Oberverwaltungsgerichte/Verwaltungsgerichtshöfe]
    - Federal Administrative Court [Bundesverwaltungsgericht]
  4. **Social jurisdiction** (regulated in the Social Courts Act [Sozialgerichtsgesetz])
    - social courts [Sozialgerichte]
    - higher (regional) social courts [Landessozialgerichte]
    - Federal Social Court [Bundessozialgericht]
  5. **Fiscal jurisdiction** (regulated in the Code of Procedure of Fiscal Courts [Finanzgerichtsordnung])
    - fiscal courts [Finanzgerichte]
    - Federal Fiscal Court [Bundesfinanzhof]
  6. **Constitutional jurisdiction** (regulated in the constitutions and constitutional court acts)
    - constitutional courts of the Länder
    - Federal Constitutional Court [Bundesverfassungsgericht]

### III. The judiciary in the German system of separation of powers

- the *judicial power* is the power to *clarify the legal situation in a dispute with final binding effect* within the framework of specially regulated procedures
- it is vested *exclusively in the judges* (art. 92 BL); this excludes intra-administrative tribunals

<sup>1</sup> Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

- in addition to their judicial function, the local district courts have a non-contentious jurisdiction [Freiwillige Gerichtsbarkeit] in some special fields (e.g. family and inheritance law), and operate the public registers (land register, commercial register etc.)
- the judicial power is *equal to the legislative and executive power*; there is no legal or de facto hierarchy or control by the others (except the possibility to exert a certain influence via the election judges, see infra, VI.1)
  - the Federal Constitutional Court even has the status of a constitutional organ (with own rules of procedure and independent budgeting)
- the judicial power is *more strictly separated* from the other powers than those from each other
  - no functional interlockings as they exist between legislative and executive
  - stricter personal separation of powers:
    - federal const. justices may not be member of federal or Land constitutional organs (art. 94(1) phrase 3 BL) or practise any other profession than that of a law professor (sect. 3(4) FCC Act)
    - judges may not perform concurrently duties of judicial function and of legislative or executive function (sect. 4(1) German Judiciary Act (= GJA) [Deutsches Richtergesetz])

#### IV. The mission of the judiciary under the rule of law

- partially regulated in the Basic Law but mainly worked out in the jurisprudence and/or developed in practice
1. The mission to enforce the law in every individual case
    - under the rule of law, the law is not a vague guideline but absolutely binding and must be respected and, where necessary, enforced by the courts in every single case
    - this is reflected in special fundamental rights that guarantee *effective individual legal protection* to the citizen:
      - the right to effective legal protection in civil law matters
      - the right to effective legal protection against public authority (art. 19(4) BL)
      - the right to the lawful judge (art. 101 BL)
      - the right to be heard at the court (art. 103(1) BL)
  2. In particular: the mission to enforce fundamental rights
    - the fundamental (constitutional) rights of the citizen bind the legislature, the executive and the judiciary in every single case as *directly applicable law* (art. 1(3) BL)
    - this makes it the primary mission of every court of justice, within its jurisdiction, to enforce them
      - thus, special human rights courts, commissions or commissioners are obsolete
      - wherever the applicable statutory law is incompatible with fund. rights, the court must suspend proceedings and refer the law to examination by the Federal Constitutional Court (concrete constitutional review, art. 100(1) BL)
  3. The mission to enforce the law, not the will or interest of the people
    - the judge is bound only by the law and his mission is solely to enforce the law - nothing else (cf. art. 97(1) BL)
    - it is not the mission of the judge to defend the interest of the people (public interest) against cronyism or self-serving politics, except where they condense in illegal acts which fall under his jurisdiction
    - the *judge must resist any social or political pressure* and enforce the law independently from the will, if necessary even against the firm resistance of the people

##### Practical case: Defending the freedom of assembly against the people

In a German city, a satanic sect causes a stir: They pray to Satan, worship for the reign of evil and follow rites considered immoral by others. One day, the sect plans a public march with a public service in honour of Satan. Although all legal requirements are met and there are no indications for any possible illegal actions, the police authority prohibits the march. It points out that according to surveys 90 percent of the population are strictly against it, all major religious groups in the city have asked for its prohibition and there may be the risk of violent attacks of angry citizens on the demonstration. After an objection has been rejected, the sect files an action for the annulment of the prohibition before the competent administrative court. How will the court, all judges being devout Catholics, decide?

The judges will annul the prohibition, because the march does not bear the risk of violations of the law and therefore not represent a threat to public security and order and, consequently, the legal requirements for a ban are not met and the freedoms of assembly and of religion of the sect and its followers are violated. It is irrelevant that 90 percent of the population are strictly against the march and other religious groups ask for its prohibition, since the fundamental rights of the sect and its followers apply without regard to the attitude of others. Other citizens may express their disgust at a counterdemonstration but cannot request the prohibition of a demonstration they do not like. In case of violent attacks the police must intervene against the intolerant mob, not against the peaceful demonstrators. Only in the rare case that the local police forces would not be strong enough may the organisers be asked to postpone the march so that the police can organise more robust security forces.

The judges will annul the prohibition, although they are devout Catholics and may be disgusted themselves. Their own religious beliefs and the demands of their Church will not influence their judgment. They may, however, later join a peaceful counterdemonstration privately.

4. The phenomenon, legitimacy and limits of judicial further development of law
  - in the modern complicated and fast-changing civilisation and society, the legal provisions in statutes, regulations and the constitution cannot capture in their wording all the new emerging problem and case constellations; often, they confine themselves to take basic decisions, provide a legal framework and determine the direction, but leave specific legal questions to the courts, who answer them by way of judicial further development of law
  - besides, judicial further development of law can be necessary to avoid loopholes or ensure the operability and practical effect of the existing law
  - main areas: constitutional law (concretisation of constit. principles, fundamental rights doctrine), administrative law (adaptation of classical concepts like "public security and order") but also civil law (continuing development of concepts such as "in bona fide/good faith" [Treu und Glauben], "boni mores" [gute Sitten] or "unfair commercial practices" [unlautere geschäftliche Handlungen])
  - common methods of judicial further development of law:
    - *creative interpretation of indefinite legal concepts* in written norms
    - *creative interpretation of several norms read together*, leading to the "discovery" of new rights and principles
    - in some cases also creation of unwritten legal institutions that integrate well with the written law

**Example: the Census Act decision of the German Federal Constitutional Court of 1983** (BVerfGE 65, 1)

- "discovery" of a fundamental right to informational self-determination (data protection right) in the Basic Law of 1949, derived from art. 2(1) read together with art. 1(1) BL
- background and legitimation: the need for a fund. right of data protection - even under a constitution that is older than the first computers

- the often not so clear limits of judicial further development of law:
  - "*further developing*" of the existing law, consistently within its lines and concepts, *not making of new law*
  - further development of, not against the existing written law (→ no "correction" of the law by the judge)

## V. The independence of the judiciary in Germany

- judicial independence shall *ensure the objectivity and impartiality* of the judiciary
  - the German law focuses on the *independence of the individual judge*, not of the court (art. 97 BL, sect. 25 et seq. GJA)
    - not only a privilege but *also an obligation*: even in private life, including political activities, a judge must conduct himself in such a manner that confidence in his independence is not jeopardised (sect. 39 GJA)
    - for this reason, judges are not allowed to give legal opinions or legal advice for remuneration outside of their official duties (sect. 41 GJA)
  - public prosecutors do not enjoy independence; they are civil servants and bound by instructions
1. Professional independence
    - the judge is not subject to any instructions in his substantive work with the cases, including in his procedural decisions
    - he is, however, not independent in purely organisational matters (e.g. the use of IT), matters of court administration or the performance of non-judicial functions
  3. Personal independence
    - the Basic law guarantees that professional judges may not be involuntarily dismissed, suspended, transferred or prematurely retired, except for reasons and in a manner specified by the laws and by virtue of a judicial decision (art. 97(2) BL)
    - the German Judiciary Act concretises that judges can only be transferred to another office or discharged from office in judicial impeachment proceedings, in formal disciplinary proceedings (if reasons unconnected with their judicial occupation make it imperative to avoid grave prejudice to the administration of justice), or on changes made to the organisation of the courts (sect. 30, 31 GJA)
    - disciplinary measures against judges are taken by the judiciary itself - by special *judicial service courts* established within the Federal Court of Justice and courts of the Länder
    - judges turning militantly against the free and democratic constitutional order can be *impeached* before the Federal Constitutional Court (art. 98(2) BL and corresponding Land law, sect. 13 no. 9, 58 et seq. FCC Act)
      - so far, this element of defensive democracy has not been used in practice

## VI. How to become a judge in Germany

1. The recruitment of judges in Germany
  - candidates must be German, back the free and democratic constitutional order, be qualified to hold judicial office (see *infra*, VI.2.d) and have the necessary social skills (sect. 9 GJA)
  - they will first be appointed judges on probation and after no more than 5 years judges for life (sect. 12 GJA)
  - there is no judicial commission as in Indonesia
  - the judges of the Länder (the largest part) are selected
    - in some Länder by the Ministry of Justice
    - in others jointly by the Ministry and a committee for the selection of judges
    - in others by the higher regional courts;the *selection is strictly based on personal and professional qualifications*, without regard to personal relations or the political or religious orientation of the candidates; usually only the best lawyers have a chance
  - the small number of federal judges is appointed by the Federal President but chosen jointly by the competent federal minister and an ad hoc committee for the selection of the judges [Richterwahlausschuss] consisting of the competent Land ministers and an equal number of members elected by the Bundestag (art. 95(2) BL, Judges Election Act [Richterwahlgesetz])
    - this procedure opens possibilities for political influence, which are sometimes criticized in and outside Germany
  - the *Federal Constitutional Court justices* are appointed by the Federal President but *elected with two-thirds majority* half by the Bundestag (upon proposal of a special Committee), half by the Federal Council (art. 94(1) BL, sect. 5 et seq. FCCA)
    - almost all are members of or close to the big parties (in rare cases to a small party) but nevertheless highly qualified
    - although the election is politicised, following intransparent informal arrangements, the elected justices have shown over decades an impressive political neutrality, due to their scientific professionalism and professional ethics but also under the pressure emanating from the constant critical review of their jurisprudence by the peers
2. The professional education of judges in Germany
  - a) The study of law at a German university
    - comprehensive integrated studies of at least 4, usually 5 years, followed by a *combined university and state examination*; *no bachelor or master degree*
    - structure: first basic studies [Grundstudium] with intermediate examination [Zwischenprüfung], then main studies [Hauptstudium] with option to choose a focus area [Schwerpunktbereich]
    - no tuition fees
    - many students make use of the option to study one semester in another European country under the European Union's Erasmus+ programme.

- b) The First Legal Examination [Erste Juristische Prüfung]
- a demanding examination at the end of the academic studies, comprising two parts: a state examination on a broad spectrum of compulsory subjects plus a university examination on the chosen focus area  
- previously conducted exclusively by the state and therefore called First Legal State Examination [Erste Juristische Staatsprüfung]
  - the state examination is a strictly impartial examination, conducted without involvement of the universities by special judicial examination offices of the Länder [Justizprüfungsämter]
  - high failure rates make lengthy thorough preparation necessary and result in strong psychological pressure on the exam candidates
- c) The general legal traineeship [Rechtsreferendariat]
- two years *comprehensive professional training* in all important fields of law (civil law, criminal law, admin. law) at different training stations: with a judge, a public prosecutor, an administrative authority and at an elective station which can also be spent abroad
  - for the period of the traineeship, the trainees have the status of a civil servant and receive a small salary
- d) The Second Legal State Examination [Zweite Juristische Staatsprüfung]
- the last step towards the "*qualification to hold judicial office*" ["Befähigung zum Richteramt", sect. 5 GJA], which provides a general access to almost all legal professions in Germany
  - having passed it, the young lawyers can directly apply for the position of a judge

## VII. Working in the German judiciary

- judges enjoy high reputation and show high professional self-confidence and awareness of their special role and position
- a rather free but often also isolated way of working, as in the lower instances many cases are settled by a single judge
- more organisational freedom than in other legal professions: judges can work from home on days without court hearings or meetings
- still a paper-based way of working (→ fax still a common medium of communication) but with the Covid-19 pandemic digitalisation is finally progressing (→ more court hearings with the option to attend via video conference)
- a steady increase of the workload over the past decades, due to an ever-growing flood of court cases and an insufficient number of judges; despite some procedural facilitations, this affects more and more the courts' capacity to handle each individual case with the due level of thoroughness

## VIII. Conclusion: the role of the judiciary in a modern constitutional state based on separation of powers and the rule of law

### Table of legislation

Part IX of the Basic Law for the Federal Republic of Germany (BL) [Grundgesetz für die Bundesrepublik Deutschland] of 1949

Courts Constitution Act [Gerichtsverfassungsgesetz]

German Judiciary Act (GJA) [Deutsches Richtergesetz]

Labour Courts Act [Arbeitsgerichtsgesetz]

Code of Administrative Court Procedure [Verwaltungsgerichtsordnung]

Social Courts Act [Sozialgerichtsgesetz]

Code of Procedure of Fiscal Courts [Finanzgerichtsordnung]

Federal Constitutional Court Act (FCC Act) [Bundesverfassungsgerichtsgesetz] and constitutional court acts of the Länder

Code of Civil Procedure [Zivilprozessordnung] and Code of Criminal Procedure [Strafprozessordnung]

Law on Procedures on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction [Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit]

### Further Reading

Böttcher, Hans-Ernst: The Role of the Judiciary in Germany, German Law Journal 5 (2004), no. 10, p. 1317 ff., <https://doi.org/10.1017/S2071832200013237>

Bunke, Christian; Vofßkuhle, Andreas: German Constitutional Law. Introduction, Cases and Principles, 2019, no. 2425 ff.

Deutscher Richterbund [German Judges' Association]: Judicial Ethics in Germany, 2018, [www.drj.de/fileadmin/DRB/pdf/Ethik/1901\\_DRB-Broschuere\\_Richterethik\\_EN\\_Judicial\\_Ethics.pdf](http://www.drj.de/fileadmin/DRB/pdf/Ethik/1901_DRB-Broschuere_Richterethik_EN_Judicial_Ethics.pdf)

Robbers, Gerhard: An Introduction to German Law, 7<sup>th</sup> edition 2019, see p. 24 ff.

Seibert-Fohr, Anja: Constitutional Guarantees of Judicial Independence in Germany, in: Eibe Riedel; Rüdiger Wolfrum (editors), Recent Trends in German and European Constitutional Law. German Reports Presented to the XVII. International Congress on Comparative Law, 16 to 22 July, 2006, p. 267 ff.

Terry, Patrick C.R.: Judicial Independence in Germany within the European Context, Theoretical and Applied Law, 2020, no. 1(3), <https://ssrn.com/abstract=3860102>

Wittreck, Fabian: German Judicial Self-Government - Institutions and Constraints, German Law Journal 19 (2018), no. 7, p. 1931 ff., <https://doi.org/10.1017/S2071832200023282>