Developments

Judicial Accountability and Public Liability—The German "Judges Privilege" Under the Influence of European and International Law

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A. Introduction

The emergence of an independent judiciary and the associated consistent implementation of the separation of powers principle are major achievements of modern times and important characteristics of the transition to the rule of law. Against this background, any attempt at reforming the independence, control structure or liability of the judiciary must be viewed critically, because reform efforts in this area often constitute modifications to the deep layers of a legal and political system. These changes are ultimately not easy to survey and the results are difficult to control. Consequently, those who seek to touch upon the liability of judges enter a rough and sometimes even downright hostile terrain. Does such liability not inevitably lead to an impairment of judicial independence, therefore damaging the "last bulwark against the erosion of law?"[1] Does it even perforate the traditional system of the separation of powers? Will not a *circulus vitiosus* in the sense of a never-ending flood of cases be created if after any legal proceedings the question of judicial liability remains to be asked (or even, from the lawyer's perspective, has to be asked to avoid recourse)? These questions can take on an even more dramatic tone and show that the area is to be treaded on lightly. Therefore, important clarifications have to be made in advance in order to put the following observations into perspective: The German judicial system is not at all a *bad* judicial system—the opposite is true. In a global comparison, the German system is easily able to compete with any other system in terms of speed of proceedings, judicial facilities and reputation of the courts. So then why even be concerned at all with state liability for judicial wrongs?

That the question must still be raised stems from phenomena known as *europeanization*, *globalization,* and *internationalization*. These developments inevitably subject the judiciary to new challenges that will ultimately lead to a change in thinking regarding the liability and control structures of the judiciary. At the core of the debate stand questions directed at judicial

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[1] Peter A. Albrecht, *Die Kriminalisierung der Dritten Gewalt – Ein verfehlter Beitrag der Exekutive zur Steigerung der Funktionstüchtigkeit des Kriminaljustizsystems*, *in* 37 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] No. 8, 259, 259 (2004).

accountability,[2] governance,[3] and the democratic legitimacy of the judiciary.[4] Not least, the jurisprudence of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) have over the last few years vividly demonstrated that reforms in the German legal system may be required, which until then had been met by hesitation.[5]

The focus of the following considerations shall thus be set onto these external impulses. The reasoning goes that the influence of European and international law in recent years has led to ever-increasing pressure against the immunization and insulation from liability that the judiciary has so far enjoyed. Its liability is therefore also an expression of a fundamental and world-wide change in judicial structures. Exemplary in this context is the jurisprudence of the ECJ, which holds that the Union's principle of state liability can also be applied to *judicial wrongs*; furthermore, the European Commission has, in the past, promulgated the notion that the infringement procedure[6] may also pertain to acts of the judiciary.[7] The connection between public international law and liability of the judiciary becomes even more obvious when looking at the European Convention on Human Rights (ECHR), where an individual application[8] requires that all domestic remedies be exhausted.[9] In other words, the ECHR is almost exclusively concerned with acts of the contracting state's judiciary and these cases often adjudicate compensation (*just satisfaction*) on the basis of Art. 41 ECHR.

These developments shall be examined in four main steps: First, the framework leading to a new complexion of the liability of the judiciary is considered. Second, the current German legal basis for a liability of the judiciary will be examined. Subsequently, the effects of ECJ case law

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[2] Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

[3] SABINE FRERICHS, JUDICIAL GOVERNANCE IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT: INTEGRATION DURCH RECHT JENSEITS DES STAATES (2008).

[4] For a German perspective, see ERNST-WOLFGANG BÖCKENFÖRDE, VERFASSUNGSFRAGEN DER RICHTERWAHL: DARGESTELLT ANHAND DER GESETZENTWURFE ZUR EINFUHRUNG DER RICHTERWAHL IN NORDRHEIN-WESTFALEN (1974); AXEL TSCHENTSCHER, DEMOKRATISCHE LEGITIMATION DER DRITTEN GEWALT (2006).

[5] Jörg P. Terhechte, *Zum Amtshaftungsanspruch bei Organisationsmängeln innerhalb der Dritten Gewalt – zugleich ein Beitrag zum Rechtschutz gegen den untätigen Richter*, *in* 122 DEUTSCHES VERWALTUNGSBLATT 1134, 1141 (2007).

[6] Consolidated Version of the Treaty on the Functioning of the European Union art. 258, 9 May 2008, 2008 O.J. (C 115) 47, 160.

[7] Steffen Augsberg & Christian Sellmann, *Entwicklungstendenzen des Vorlageverfahrens nach Art. 234 EG*, *in* 59 DIE ÖFFENTLICHE VERWALTUNG 533, 541 (2006); Jörg Philipp Terhechte, *Temporäre Durchbrechung des Vorrangs des Europäischen Gemeinschaftsrechts beim Vorliegen "Inakzeptabler Regelungslücken?"*, *in* 6 EUROPARECHT 828, 843 (2006).

[8] European Convention for the Protection of Human Rights, art. 34, 4 Nov. 1950, 213 U.N.T.S. 221.

[9] European Convention for the Protection of Human Rights, art. 35(1), 4 Nov. 1950, 213 U.N.T.S. 221.

on the liability of the judiciary must be analyzed. The final subject is the influence that the European Convention on Human Rights and other entities from public international law have on the liability of the judiciary.

B. Changing Tasks of the Judiciary

A key factor in the emergence of judicial liability as an important development in recent years is a change in both the role and the tasks of the judiciary. Another expression of this change is the realignment of accountability structures that so far have lacked a stark outline due to the immunization from liability granted by § 839(2) of the German Civil Code (GCC) and the principle of judicial independence in Art. 97 of the German Basic Law (BL). How do we define this change?

(1) An increasing portion of disputes are not decided by state courts, but by private arbitration bodies (such as courts of arbitration or the so-called "sports courts").[10] Of course this makes it problematic to even speak of a *judiciary* at all, which proves the traditional separation of powers is slowly losing its grip in the course of the internationalization (or privatization[11]) of the judiciary.

(2) Furthermore, even proceedings before state courts increasingly fail to lead to verdicts or judgements in the conventional sense. Rather, many judicial systems have undergone developments that are conducive to different forms of settlements, the terms of which are determined by agreements in advance of the actual hearing.[12] In addition, many procedural rules now include or even favor forms of decision which are less formal than traditional verdicts."

(3) Tasks formerly reserved to judges are increasingly often transferred to a judicial officer or registrar. This law officer has thus in the course of time become the proverbial "second pillar of the third power."

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[10] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2009); CHRISTOPH A. STUMPF, ALTERNATIVE STREITBEILEGUNG IM VERWALTUNGSRECHT – SCHIEDSGERICHTSBARKEIT, SCHIEDSGUTACHTEN, MEDIATION UND SCHLICHTUNG (2006).

[11] On this, see Doris M. Provine & Carroll Seron, *Privatization of Judicial Services*, 1 J. PUB. ADMIN. & THEORY 319 (1991); Wolfgang Voit, *Privatisierung der Gerichtsbarkeit*, 50 JURISTENZEITUNG 120 (1997); Wolfgang Hoffmann-Riem, *Justizdienstleistungen im kooperativen Staat*, *in* JURISTENZEITUNG 421 (1999).

[12] Christoph Möllers, *Kooperationsgewinne im Verwaltungsprozeß – zugleich ein Beitrag zur Theorie und Praxis der ökonomischen Analyse im Verwaltungsrecht*, *in* 53 DIE ÖFFENTLICHE VERWALTUNG 667 (2000).

(4) In recent times strategies to completely avoid legal disputes play an increasingly important role (e.g. Mediation).[13]

(5) The situation is further complicated by the existence of superseding legal systems with their own courts, such as the ECJ or the ECHR.

This fundamental change, which can only be explained by looking at the steady differentiation of the legal system and the associated trend towards a *judicialization* of all facets of life, has a number of connections to the liability of the judiciary: First, it is possible to ask whether exemption of liability of the judge applies at all, for example regarding a settlement that a judge has recommended. Activities of law officers fall completely outside the scope of judicial liability privileges. Ultimately, it is to be asked whether new and uniform liability standards are needed to ensure the consistency and predictability of the legal system. In any case, the transformation of the judiciary—or rather: the change and differentiation of its tasks—presents an occasion to reflect on the current legal situation.

C. Liability of the Judiciary in Germany

I. Overview

The basis for liability of the judiciary in most cases is the public liability claim under § 839(1) GCC, which regularly replaces tort liability under § 823(1) GCC. [14] The combination of § 839(1) GCC with Art. 34 BL automatically results in the exclusion of personal liability of the legal actor

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[13] FRITJOF HAFT & KATHARINA SCHLIEFFEN, HANDBUCH MEDIATION: VERHANDLUNGSTECHNIK, STRATEGIEN, EINSATZGEBIETE (2nd ed. 2009); Katharina Gräfin von Schlieffen, *Der Mediationsstaat*, *in* POLITISCHE KULTUR IM WANDEL VON STAATLICHKEIT 181 (Dieter Gosewinkel & Gunnar F. Schuppert eds., 2008); Katharina Gräfin von Schlieffen, *Mediation – Renaissance der Laienjustiz oder eine neue Ausdifferenzierung des Rechts?*, *in* ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 450 (2000); MEDIATION: RECHTSTATSACHEN, RECHTSVERGLEICH, REGELUNGEN (Klaus J. Hopt & Felix Steffek eds., 2008).

[14] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL] I § 839 (Ger.).

> (1) If an official wilfully or negligently breaches the official duty incumbent upon him as against a third party, he shall compensate the third party for the damage arising there from. If the official is only negligent, a claim can be made against him only if the injured party is unable to obtain compensation in another way.
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> (2) If an official commits a breach of official duty in giving judgment in legal proceedings, he shall be liable for the damage arising there from only if that breach of duty constitutes a criminal offence. This provision shall not apply to a wrongful refusal to exercise official duties or to a wrongful delay in exercising them.
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> (3) The obligation to compensate shall not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy.

(either the judge or law officer).[15] Only in cases of intentional wrongdoing or gross negligence is the liability of the legal actor even considered. In sum, one can thus say that the liability of the judiciary generally is a state liability and not the personal liability of the judge, as is the case in Anglo-American legal systems (which leads to a different accentuation of the topic of judicial accountability). This is often overlooked when relating liability of the judiciary to judicial independence—their points of contact can from the outset only be reflexes. The central topic here is not the judge himself but the judge's decision.

Due to the development of the liability of the judiciary on the basis of the said public liability claim, judiciary responsibility is automatically plagued by all the problems that characterize the public liability in Germany claim at present: compensation is limited to private actions, official acts cannot be awarded; it can be difficult to determine the direction of an official duty and third party implications; all liability restrictions (referral privilege) are also applicable to the state. A detailed examination of the shortcomings would prove too time consuming.[16] However, an inherent need to reform the public liability law is as certain as the current inactivity of the legislative branch regarding the subject. Even a corresponding stipulation in the coalition treaty between the CDU/CSU and FDP, the political parties currently governing Germany, has failed to lead to any relevant changes, even though it called for codification and reform of the law of public liability.

II. The "Judges Privilege" (§ 839 [2] German Civil Code)

When dealing with the application of the public liability claims to judicial acts, one soon comes across the limitations of such liability, phrased in § 839(2) GCC.[17] This so-called *Judge's Privilege* (*Spruchrichterprivileg* or, more precisely, *Richterspruchprivileg*) leads in many cases to an exclusion of—the wording here is important—state liability for judicial wrongs. This *privilege* has in recent years come under heavy pressure, for different reasons. One lies in the uncertainty as to whom, or to what purpose, the privilege even serves.

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[15] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] *23* May 1949, BGBl I at art. 34 (Ger.).

> If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

[16] In detail, see FRITZ OSSENBÜHL, STAATSHAFTUNGSRECHT 11 (5th ed., 1999).

[17] *See* Seron, *supra* note 11; Voit, *supra* note 11; Hoffmann-Riem, *Justizdienstleistungen*, *supra* note 11.

1. Ratio Legis

If one is to take the "normative power of the Constitution" seriously, the privilege has to be seen in light of Art. 34 BL.[18] Interestingly, this provision of the German constitution does not mention an exception for the judiciary. The provision, which is an expression of the principle of the rule of law, rather assumes that the state is liable for any violation of its official duties towards third parties. This right can only be restricted if there are sufficient and substantial reasons and the exceptions are proportionate.[19] A look at the reasoning for the liability privilege of the judge quickly casts considerable doubts as to the privilege's accordance with the constitution. Usually, § 839(2) GCC is attributed the function of securing the legal force of judgments (*Rechtskraftstützez*). Others see the liability privilege as protecting judicial independence. Finally—this view seems to become more and more common, due to the aforementioned interpretation's incoherency—there is also the general function of the judiciary to pacify, embodied in § 839(2) GCC. Ultimately, neither of these interpretations of the *ratio legis* come without certain deficits, as shown in the following.

The relationship between public liability claims and the legal force of a judicial decision is one that cannot lead to damage to the decision's legal force. Not only is the subject matter in a liability proceeding different from the original proceeding, but so are the parties involved. The original verdict is not automatically affected. The verdict's legal force alone does not justify such a far-reaching liability privilege of the judiciary. If this were to be the case, one would also have to rethink the current system of lawyer recourse and liability, since it too can touch upon the original verdict as subject matter.

In particular, the courts themselves stress that the *Spruchrichterprivileg* is intended to protect judicial independence.[20] It is certainly indisputable that judicial independence as guaranteed by the Basic Law in its Art. 97 is a necessary precondition for a functioning and organized judiciary. However, the scope and nature of the consequences of a more extensive application of judicial liability on said independence is subject to dispute. This is because it is not the judge himself who is party to a public liability proceeding, but the authority that has appointed the judge. Judicial independence can thus only become relevant if the authority takes recourse to the judge at a later stage. As soon as this occurs though, it is clear even from Art. 34 BL that the judge can no longer rely on his judicial independence.

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[18] *See* Möllers, *supra* note 12.

[19] Bundesgerichtshof [BGH – Federal Court of Justice] 30 Oct. 1986, 99 BGHZ 62, 64 (Ger.); Bundesgerichtshof [BGH – Federal Court of Justice] BGHZ 129, (1988).

[20] Bundesgerichtshof [BGH – Federal Court of Justice] 50 BGHZ 14, 19 (Ger.).

Occasionally, the "general pacification effect" of judicial decisions is cited, which would supposedly be jeopardized if one could *up the ante* with a public liability claim.[21] This course of reasoning fails to recognize that a public liability proceeding concerns alleged damages caused by miscarriages of justice. A plaintiff will weigh the risks and benefits of such a legal action, as he does with any other action. Miscarriages of justice can not per se have a general pacification effect, indeed the opposite is true.

Hence, it becomes increasingly clear that there lies a fundamental conflict at the core which always surfaces in democratic societies when there are legal issues to be decided by courts with binding effect. Does one aim for the highest level of material justice, or can it sometimes play a secondary role in favor of the principles of efficiency and legal certainty—preferring a quick decision over the right decision? Current development seems to accentuate the primary importance of material justice.

Overall, one cannot deny the impression that the foundations of the *Spruchrichterprivileg* are largely obscure. A look at the practical application shows there essentially has been no liability of the judiciary (or rather the state) in Germany, due to the fact that both scope and applicability are determined by the courts themselves.

2. Scope of Application

A more detailed analysis of the privilege shows, however, that it only grants an exemption from liability when a *verdict in a case* is concerned. Jurisprudence has so far only extended the privilege to judgments and so-called judgment-replacing verdicts. The category of judgment-replacing verdicts has been held to be decisions in contentious proceedings. These so-called *Erkenntnisverfahren* refer to proceedings regarding the existence of rights which either end the lawsuit proper—or at least at this instance—all the while binding the court so the verdict has not only formal but also material legal force. Also included are verdicts that are technically equal to a judgment in having a judgment's main features (including fair hearing, hearing of evidence and reasoning of the verdict). Violations of official duty by the judiciary outside of this *protective screen* are thus mostly limited to administrative activities. Jurisprudence also shows a certain tendency to steadily increase the range of judgment-replacing verdicts.

However, a number of verdicts are not included in § 839(2) GCC. These include arrest warrants as well as search and seizure orders, decisions in enforcement and bankruptcy proceedings and decisions made by voluntary jurisdiction.[22] In addition, the privilege does not extend to decisions in proceedings concerning legal aid as in §§ 114 et seq. of the German Code of Civil Procedure or decisions in orders or assessments of costs or valuation of disputes (so-called

[21] FABIAN WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT 153 (2006).

[22] 122 BGHZ 268 (Ger.); [BGHZ] Neue Juristische Wochenschrift – Rechtsprechungsreport [NJW-RR] 1992, 919.

Kostenfestsetzungsverfahren or *Streitwertbeschlüsse*).[23] However, even in these cases, only a particularly severe breach of duty in the course of application of the law constitutes a violation of official duty. This restriction is—especially by the German Supreme Court—held to be necessary in view of the constitutional principle of judicial independence.[24]

Section 839(2) S. 2 GCC itself identifies the inherent limitations of the *Spruchrichterprivileg*: "Where a violation of official duty on part of the judge constitutes a criminal offence, the liability privilege is omitted." These are essentially the (very rare) cases of judge bribery[25] or perversion of justice.[26] With the judge's "duties to interact" with the parties increasing and also a certain trend towards settlements on recommendation of the judge, coercion[27] might become relevant. Finally, the liability exclusion in § 839(2)S. 2 GPC does not apply when the violation of duties lies in the judge refusing to act or in wrongfully delaying the exercise of his duties.[28] This type of case has grown in importance, especially in light of ECHR's recent jurisprudence.

It should be noted, however, that although the delay or refusal is explicitly excluded from the privilege, not a single public liability action targeting said behaviour has been successful. Compensation in this context has always been awarded by the ECHR. Overall, this goes to show that although theoretically one could identify several groups of cases for liability of the judiciary, its effectiveness is practically non-existent due to the rather rigid requirements of the Civil Code and the respective concretization by the jurisprudence.

IV. Other Claims

It should be mentioned that the liability of the judiciary—always defined as *state liability*—is not just limited to public liability claims. Next to these stand claims arising from *infringement with confiscatory effect*. In a 2007 case concerning a delayed entry into the Registry of Deeds by a law officer, the Federal Supreme Court affirmed the existence of such a claim next to that from § 839(1) GCC, which is generally viewed as not being in a relationship of specificity with competing claims.[29] Generally, this constellation should in practice only play a role if the property of a plaintiff is concerned. Procedural delays can also be countered by special forms

[23] Oberlandesgericht Brandenburg, Monatsschrift für Deutsches Recht (MDR), 2002, 1192.

[24] Bundesgerichtshof [BGH – Federal Court of Justice] Neue Juristische Wochenschrift [NJW] 2003, 3252.

[25] STRAFGESETZBUCH [STGB] [PENAL CODE], 15 May 1871, BUNDESGESETZBLATT [BGBL] I at 3322, § 332 (Ger.).

[26] *Id.* § 339.

[27] *Id.* § 240.

[28] *See* Terhechte, *supra* note 5, at 1134.

[29] 170 BGHZ 260 (Ger.).

compensation of loss suffered in the public interest (so-called *Aufopferungsanspruch*, for example on the basis of the Detention Compensation Act, which contains in its § 1 a legal basis for the consequences of a judgment). But even here, the necessary practical implementation is very limited.

D. New Developments

I. The German "Judges Privilege" under the Influence of European Union Law

1. The Köbler *Judgement of the ECJ*

The discussion on the liability of the judiciary was triggered not least by a series of spectacular judgments of the ECJ. Worthy of particular mention are the *Köbler* judgment of 2003[30] and the *Traghetti* judgment of 2006.[31] The *Köbler* judgment concerned the question whether the state liability claim granted under Community law (now: Union law) even affects cases in which the infringement of Community law was committed by a Member State's court of final appeal. The ECJ confirmed this and thus massively influenced the privilege contained in § 839(2) GCC. It expresses that from the point of view of community law, it does not matter whether it is the legislature, the executive or the judiciary of a state that violates a commitment under European law. Instead, any violation is attributed to the state regardless of which institution perpetrated it. According to the ECJ, this should apply *a fortiori* to Community law, because all State authorities in a Member State are bound in performing their tasks to comply with the rules laid down by Community law, which directly govern the situation of individuals.[32]

Additionally, the Court refers to the *effet utile* or practical effectiveness of European Community law:

> In the light of essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision

[30] Case C-224/01, Gerhard Köbler v. Republik Österreich, 2003 E.C.R. I-10239.

[31] Case C-173/03, Traghetti del Mediterraneo v. Italy, 2006 E.C.R. I-5177, para. 36.

[32] Case C-224/01, Gerhard Köbler v Republik Österreich, 2003 E.C.R. I-10239, para. 31.

> of a court of a Member State adjudicating at last instance.[33]

In the ECJ's view, this does not threaten the legal force of the judgment in question for the liability proceeding concerns a different subject matter and has different parties partaking. This does not touch upon judicial independence, because that would only be the case if the judge were to be held personally liable. Finally, the ECJ maintains that liability of the judiciary will not lead to a diminution of judicial authority. Rather, "the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in a long run the authority of the judiciary."[34]

Based on these general considerations, the Court affirmed the possibility of compensation for judicial wrongs under three conditions: (1) The rule of law infringed must be intended to confer rights upon individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation incumbent on the state and the loss or damage sustained by the injured parties.

The Court assumes that the specific nature of the judicial function and the "legitimate requirements of legal certainty" must be regarded so that state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can only be successful in the exceptional case where a court manifestly infringes the applicable law.[35] In order to determine whether a manifest infringement has occurred, the following factors have to be heeded: (1) The degree of clarity and precision of the rule infringed; (2) whether the infringement was intentional; (3) whether the error of law was excusable or inexcusable; (4) the position taken, if applicable, by a Community institution; and (5) non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Art. 234 TEC (now Art. 267(3) TFEU). The ECJ also sees an infringement of Community law as sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.[36]

The *Köbler* judgment nevertheless left open the question as to how the state liability claim relates to national liability privileges.[37] It appears certain that this decision has modified a good

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[33] *Id*. at para. 33.

[34] *Id*. at para. 43.

[35] *Id*. at para. 51.

[36] *Id*. at para. 55.

[37] Gerhard Köbler himself never received compensation because the infringement in question was judged to not be sufficiently serious.

part of the traditional German doctrine of the judiciary's liability privilege. For example, a sufficiently serious infringement of Community law is not synonymous with the criminal offence necessitated by German law. Also, it has to be asked whether the principles posed apply to courts adjudicating at the last instance only or to courts in general. Some parts of the *Traghetti* judgment[38] point towards the latter interpretation.[39]

It also remains unclear whether the ECJ's ruling is to be applied to the Court itself. In its decision *Baustahlgewerbe*, the Court indicated that a claim could be construed at least in principle for "misconducts" of the CFI, following from Art. 288(2) TEC (now Art. 340(2) TFEU). The reasoning in that case was an excessive duration of proceedings.[40] In relation to himself, the Court has always denied a corresponding claim.[41]

2. The Traghetti *Judgements of 2006 and 2011*

Although the Court affirmed in the *Köbler* judgement the extension of Community law into state liability claims regarding acts of the judiciary, it avoided explaining any specific implications. This was especially glaring with regard to the claim's relationship towards national liability privileges that are inherent to nearly all Member States' legal systems. It is a given that the principles of the *Köbler* judgment will be of little to no effect as long as national liability privileges continue to be applied. Just this constellation was subject matter of the ECJ's judgment in the *Traghetti* case.[42]

The case saw an Italian receiver in insolvency overseeing the liquidation of an Italian shipping company (TDM). He had brought legal proceedings before an Italian court, reasoning that the *Corte suprema di cassazione*, being a court adjudicating at the last instance, had wrongly refused his cartel law claim against a competitor, thereby infringing Community law. Italian law generally excludes compensation claims against courts, which led to the acting Italian court asking for the ECJ's preliminary ruling on whether this exclusion was compatible with Union law. The principles outlined in *Köbler* were to play a central role in the ensuing proceedings.

The Court stressed in its ruling that the issue of liability in the context of the *Köbler* judgment only pertains to decisions of a supreme court that are not subject to appeal. It also emphasized the essential responsibility of the judiciary "in the protection of the rights derived by individuals

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[38] *See* lit. b.

[39] Case C-224/01, Gerhard Köbler v. Republik Österreich, 2003 E.C.R. I-10239, para. 36.

[40] Case C-185/95, Baustahlgewebe GmbH v. Commission of the European Communities, 1998 E.C.R. I-6601.

[41] Case 20/88, Roquette Frères v. Commission, 1989 E.C.R. 1553, para. 20.

[42] Case C-173/03, Traghetti del Mediterraneo v. Italy, 2006 E.C.R. I-5177.

from Community rules."[43] It also pointed to the exceptional character of judicial liability, it being only applicable if a national court adjudicating at last instance manifestly infringed the applicable law. In light of those considerations the Court then holds that:

> Community law precludes national legislation which excludes state liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the *Köbler* judgment.[44]

This ruling, almost ascribing legal character to the *Köbler* judgment, puts a clear limit on the scope of applicability of § 839(2) GCC. As far as courts adjudicating at last instance (not necessarily being supreme courts) are involved and responsible for a manifest infringement of Union law, any liability privileges become inapplicable due to the supremacy of Union law. In conjunction with the *Köbler* judgment ruling, the ECJ has thus limited the scope of § 839(2) GCC and vice versa extended the liability of the judiciary.

Whether § 839(2) GCC remains at all applicable in the scope of Union law has become at least doubtful: While the judgment is seemingly directed only at courts adjudicating at last instance, the ECJ implied an application to inferior courts (the inapplicability of the liability privilege in question is presented as an *argumentum a fortiori*).[45]

Consequently the ECJ held in its second *Traghetti* judgement in 2011 that "the exclusion of State liability, or the limitation of State liability to cases of intentional fault or gross negligence, is contrary to the general principle that Member States are liable for an infringement of EU law by a court whose decision is not open to appeal" [46] This judgement will force all member states to reconsider all rules or laws concerning limitations or

[43] *Id*. at para. 46.

[44] *Id*.

[45] *Id*. at para. 36.

[46] Case C-379/10, Comm'n v. Italian Republic, 2010 EUR-Lex CELEX LEXIS 0006 (29 July 2010).

exclusions of state liability for judicial wrongs. After all, these rules are under special conditions inapplicable within the scope of the Union law.

*3. Union Law and National Provisions Concerning "Legal Force" (*Res Judicata*)*

The *Spruchrichterprivileg* is also reshaped indirectly by Union law, such as through the latter's power to *relativize* national provisions concerning legal force. The ECJ has repeatedly had the opportunity to judge this. Famously, it repealed the legal force of a judgment that would have prevented the recovery of aid declared incompatible with the common market in its *Lucchini* judgment.[47] *Lucchini* might or might not be a singular case due to the subject being a particularly aggravating infringement. In *Fallimento Olimpiclub*, the ECJ confirmed its line of reasoning that national provisions concerning legal force must not hinder the practical effectiveness of Union law.[48] If even legal force can be called into question by Union law, then liability privileges which—at least supposedly—assist the legal force of decisions must also be looked at in a different light.

It is therefore clear that Union law has superseded § 839(2) GCC on a wide scale. From a systemic point of view, this effect stems from the supremacy of Union law. The ECJ's motives are evident: On the one hand, the practical effectiveness of Union law is affected—this is why the offending court's failure to ask for a preliminary ruling and its failure to heed the ECJ's case law have been central to the discussion; on the other hand, the court seeks to ensure the uniform application of Union law within a multitude of national jurisdictions. Moreover, and this is especially obvious in the *Traghetti* case, the liability issue also affects the protection of the rights of individuals and therefore the entirety of Union liability law which poses a counterpart to the still-lacking primary law protection of the individual.

II. The German "Judges Privilege" under the Influence of International Law

It is not only Union law which puts the liability privilege of § 839(2) GCC under some pressure. Additional influences stem from the level of public international law. First, a few general considerations have to be made regarding the liability of international courts and tribunals as well as the influence of public international law on the judiciary in general, and then the ECHR shall be looked at in particular.

[47] Case C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini, 2007 E.C.R. I-6199, para. 63.

[48] Case C-2/08, Amministrazione dell'economia e delle Finanzeand Agenzia delle Entrate v. Fallimento Olimpiclub Srl, in liquidation, 2009 E.C.R. I-7501.

1. Liability of International Courts and Tribunals

After a considerable influx of new international organizations in the 1980s and 1990s (there are now around 300 total), it seems that today's focus lies more on the international differentiation of these organizations.[49] This presents itself especially in the rapid increase in entities of dispute resolution, such as permanent courts, tribunals and arbitration courts. In other words, the settlement of disputes through legal means and by decision of independent bodies represents a significant development of modern public international law.[50]

But as positive as this development is on the one hand, its *eo ipso* also has its downsides. Most problematic is a clear demarcation between the different courts' and tribunals' competences.[51] At the same time, their competences are in many cases so stumped that effective dispute settlement and jurisdiction becomes impossible. In addition to that, the judgments' binding effect and the addressee's need to comply is only mentioned rudimentarily by the respective statutes. Nevertheless, it can be stated that the importance of these settlement bodies has been greatly increasing.

But what about the responsibility and control structures of these settlement bodies? Apart from multiple provisions dealing with the qualifications of the judges,[52] explicit control mechanisms and provisions on responsibility on the public international level are rather rare.[53] Here, there arise two interesting issues in particular: (1) Is a liability of international courts and tribunals respective of their judges at all possible?; and (2) who carries this liability?

The first question has to be answered in accordance with international tort law. Where international organizations have legal status, they are usually also capable of committing torts. As far as their bodies commit a public international offence, the international organization in question shall be liable. In contrast to that, a liability of judges themselves should generally be impossible according to public international law. Not only do the statutes of most tribunals

[49] For more information, see PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, http://www.pict-pcti.org/ (last visited Mar. 6, 2012).

[50] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 219 (2003).

[51] *See* JASPER FINKE, DIE PARALLELITÄT INTERNATIONALER STREITBEILEGUNGSMECHANISMEN – UNTERSUCHUNG DER AUS DER STÄRKUNG DER INTERNATIONALEN GERICHTSBARKEIT RESULTIERENDEN KONFLIKTE (2004).

[52] *Cf.* Statute of the International Court of Justice, art. 2; World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 8(1); European Convention for the Protection of Human Rights, art. 21, 4 Nov. 1950, 213 U.N.T.S. 221.

[53] *But see, e.g.*, European Convention for the Protection of Human Rights, art. 24, 4 Nov. 1950, 213 U.N.T.S. 221.

grant immunity to their judges,[54] but there is also an increasingly often repeated claim that judicial independence even be a principle of customary international law.[55]

Another problem regarding liability lies in the question *Quis iudicabit*? Ultimately, the only possibility seems to be a recognition of the claims by the international organization, as practiced in other areas of international tort law. In this respect one is also dealing with the influence of *governance approaches* to international tort law.

2. The "Judges Privilege" and International Law

International law also exerts influence on the liability of the judiciary. First, there is the influence of the ECHR on the liability of the judiciary in the national context to consider. Where national courts do not respect the guarantees of the ECHR, generally only compensation as in Article 41 ECHR can be taken into account, since the parties to the ECHR are usually obliged to heed the definitive verdicts of the ECHR.[56] A similar scenario forms the background for Art. 22 DSU, which provides for compensation by the WTO Member States, albeit these payments are voluntary.

In addition, the general rules of public international law, such as non-intervention, the principle of state immunity and the principle of comity can be of importance for a liability of the (national) judiciary, for example in cases that have the plaintiff seeking compensation for a foreign court's action, but before a domestic court. Such proceedings are likely to fail, even if just recently they have become the focus of discussion more often.

3. The Role of the European Convention on Human Rights

The growing influence of the level of public international law on state liability best becomes visible in the jurisprudence of the ECHR. Even the overall structure of the ECHR's legal protection system has particularly strong ties to the issue of judicial liability, since the only possible object of an ECHR individual application is a judgment at last instance. A compensation that the ECHR grants on the basis of Art. 41 ECHR is therefore in many cases also a reparation for judicial wrongs. Consequently, proceedings that deal with infringements of the judiciary constitute a large portion of the ECHR's workload. The focus here lies on proceedings of excessive duration and thus on violations of Art. 6(1) ECHR.[57] Art. 6(1) ECHR grants that "any

[54] *See* Statute of the International Court of Justice, art. 19.

[55] *See also* Statute of the International Court of Justice art. 2; World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 8(2); European Convention on Human Rights, art. 6.

[56] *See* European Convention for the Protection of Human Rights, art. 46, 4 Nov. 1950, 213 U.N.T.S. 221.

[57] *See* MARTEN BREUER, STAATSHAFTUNG FÜR JUDIKATIVES UNRECHT: EINE UNTERSUCHUNG ZUM DEUTSCHEN RECHT, ZUM EUROPA- UND VÖLKERRECHT 521 et seq. (2011); MARCO OTTAVIANO, DER ANSPRUCH AUF RECHTZEITIGEN RECHTSSCHUTZ IM GEMEINSCHAFSPROZESSRECHT 16 (2009).

person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In particular, the requirement of a decision within a reasonable time has proven to be a persistent problem in German jurisdiction (with some cases going on for more than 16 years).[58]

In addition, the ECHR also identified structural deficits of the German legal system. It noted in its *Sürmeli* decision from 2006 that the German legal system did not provide adequate legal protection against excessive duration of proceedings. Currently, the only option in this regard is to go for a public liability claim which § 839(2) GCC explicitly does not exempt.[59]

As a reaction to this judgement of the ECHR, the German legislature worked for a couple of years to create an additional complaint on the grounds of inactivity (so-called *Untätigkeitsbeschwerde*) to comply with the ECHR. While some courts already acknowledged the necessity of such a mechanism based on the rule of law principle, Art. 19(4) BL, as well as Art. 3(1) BL, this development was strongly opposed by the financial and administrative judiciary.[60] Finally, a new § 198 was integrated in the German Code of Constitution of Courts (CCC) (*Gerichtsverfassungsgesetz*) in 2011. According to this provision, an excessive duration of court proceedings should be subject to compensation (§ 198(1) CCC). However, this compensation is under normal circumstances limited to 200 EURO for each year of delay.[61] In addition, such a public compensation claim could only be successful if a special inactivity complaint was proposed. Whether this shift in balance between primary and secondary legal protection would really turn out well, is at least doubtful, because the public compensation claim under § 198(1) CCC is extremely restricted in terms of the scope of application (the provision deals only with excessive duration of proceedings) and the possible amount of compensation (it is obvious that courts will refuse any attempt to extend the amount of compensation under the new law even in the case they have the ability to act in this way). Furthermore, a consequent application of § 839(1) GCC—and therefore a limitation of § 839(2) GCC—seems to be the best way to comply with the challenges brought by the European and international level.

E. Final Remarks

It has become clear that the traditional German concept of a *liability of the judiciary*, if its diminutive usage in practice even merits a generalized term, must be radically altered to suit the requirements of both the ECJ and ECHR. Initial approaches at making primary legal

[58] Terhechte, *supra* note 5, at 1134.

[59] Sürmeli v. Germany, Eur. Ct. H.R. 75529/01 (2006).

[60] *See* Verwaltungsgerichtshof Baden-Württemberg [VGH] 27 Aug. 2002, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2003, 154 (Ger.); Terhechte, *supra* note 5, at 1141.

[61] Code of Constitution of Courts § 198(2).

protection conform with Union law, such as the introduction of an inactivity complaint, have been unsuccessful so far, which could result in a vastly increased significance of secondary legal protection. At least in the Union law's scope of application, § 839(2) GCC will in the future be incapable of continuing its *protective* effect. In addition to that, the ECHR is obviously eager to extend the effectiveness of Art. 6 ECHR, which should serve to make liability claims because of excessive duration a real option in the future. Alongside these *hard in-instruments*—inactivity complaints, public liability claims—a number of initiatives are arising which aim at preventing the problem rather than suppressing it. An especially important role could here be played by the upcoming discussion on judicial ethics in the German language area, which has elsewhere been maintained intensively.[62] From the judiciary's perspective, this should not provoke anxiety or resistance, for there is also a lot of potential to behold. Judicial responsibility and liability—in terms of a state liability—if based on clear standards, does not erode judicial independence. The opposite is true: If such an instrument is used wisely, it can actually increase the authority and independence by giving exceptional cases an appropriate solution at the level of secondary legal protection. Such liability thus carries a considerable legitimacy effect, whose importance for a governmental power in change, like the judiciary, is not to be underestimated.

[62] Marion Eckertz-Höfer, *Vom guten Richter – Ethos, Unabhängigkeit, Professoinalität*, *in* 62 DIE ÖFFENTLICHE VERWALTUNG 729, 739 (2009); Jörg P. Terhechte, *Judicial Ethics for a Global Justice – How Judicial Networks Create Their Own Codes of Conduct*, 10 GERMAN L.J. 501 (2009).