

Hilke Thiedemann

Judicial Independence

Eine rechtsvergleichende Untersuchung der Sicherung unabhängiger Rechtsprechung in Südafrika und Deutschland

Nomos Verlagsgesellschaft, Baden Baden, 2007, 469 pages, EUR 79,00;

ISBN 978-3-8329-2853-7

The publication at hand is *Hilke Thiedemann's* doctoral thesis on "Judicial Independence", a comparative analysis of how judicial independence is safeguarded and implemented in German and South African law and practice. The text is written in German. However, an English summary is given at the end of the book.

The aim of this publication, which is successfully achieved, is to answer the question how and to what extent the legal systems of Germany, as well as of South Africa, create an environment for judges to deliver their judgements independently. The author explains that one stimulus for doing this research was the 2001 UN Report on the Independence of Judges and Lawyers in South Africa, which raised concerns about judicial independence in South Africa's legal system.

The subdivision into four main chapters helps the reader not to lose orientation, considering the diverse legal spectrum covered by this well considered and detailed publication. This subdivision is outlined as follows: The first chapter gives some introductory remarks on the thesis itself, its structure and methodological aspects, before setting out an historical perspective on judicial independence in continental Europe, as well as in South Africa. Also, part of this first chapter is a general introduction to the South African legal system. The second chapter offers a broad overview of constitutional provisions and legislation, and of the international standards relevant to the issue of judicial independence. This is followed by a sub-chapter on the obligations of the judiciaries to their respective national constitutions, laws, and precedents. The third chapter of the book covers various aspects of the mechanisms suitable for safeguarding judicial independence, and discusses limitations to the principle of judicial independence under both South African and German law. How the concept of judicial independence is adhered to in Germany, compared to South Africa, is the focal point of the in-depth analysis found in this chapter. To this end, the author, *inter alia*, elucidates the concepts of impartiality with regard to potential impacts from the powers of the legislature, the executive and the judiciary itself. Again, this is dealt with from the South African as well as the German perspective. The final chapter summarises the contents of the preceding chapters, successfully focusing on the concept of the independence of the judiciary from a comparative perspective. For obvious reasons, only some of the conclusions can be highlighted in this review:

An independent judiciary is a key foundation for the democratic state governed by the rule of law, and is an indispensable prerequisite for concepts such as the separation of powers and checks and balances. The individual can have confidence in the judiciary if legal certainty is guaranteed by an independent and impartial judge. Considering that judi-

cial independence is an evolving concept, the author concludes that the relatively young South African democracy has established a high degree of judicial independence, comparable with that developed in Germany over several decades. Deficiencies in terms of the constitutional guarantee of judicial independence do, however, exist in both legal systems.

The author analyses the historical and legal background of judicial independence in both countries, and comes to the conclusion that constitutional concepts are implemented differently. She also reflects on specific common and civil law notions of the role of judges. What the author describes as the “decisive parameter” for an appropriate reconciliation of the aims of judicial independence and judicial accountability is the question whether the public truly has confidence in a functioning court system. For this reason, obvious issues like the appointment of judges and their security of tenure and employment, the independence of magistrates, court organisation and judicial self-administration, the reclusion of judges, judicial activism, the separation of powers, and the influence of society and the media on the judge all play fundamental roles in the determination of this decisive parameter.

The author emphasises that one of the major challenges to judicial independence is the executive’s potential influence when it comes to the appointment of judges. This, according to the author, applies specifically to Germany, which follows the approach of the principle of merit in terms of the appointment of judges. In this context, judicial independence has in principle been strengthened in South Africa by the establishment of the Judicial Service Commission, which plays a key role in the appointment of judges. The author recommends that such an institution should be established in Germany as well, nevertheless making the point, that due to the composition of the Judicial Service Commission in South Africa, it may in reality be susceptible to political influence.

Regarding security of tenure, the South African practice that acting judges are appointed at the discretion of the executive is not in conformity with the concept of judicial independence, even though it might be an adequate mechanism to cope with the massive workload of the courts, as these judges are not granted full judicial independence. One further point of criticism in this regard is the South African practice that judges may be asked to continue to perform their duties after retirement.

The tension between judicial independence on the one side, and the public demand for judges to be accountable for their decisions on the other, is discussed and weighed up in this book. The author points out that both legal systems provide a civil or penal liability for judges, related to strict requirements to safeguard judicial independence. South African, as well as German law, provides a mechanism for the impeachment of a judge under exceptional circumstances, namely on the ground of gross misconduct. In South Africa, such a process requires that the Judicial Service Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and a subsequent respective resolution is passed by the National Assembly, supported by at least two thirds of its members. In Germany judges can be removed from office upon a parliamentary initiative followed by a decision of at least two thirds of the members of the constitutional

court, in the case that the court finds that the judge has intentionally violated the constitutional order.

This publication is valuable in many regards: It makes an important contribution to the understanding of judicial independence in general, and it does excellent service as a source of reference with regard to the independence of the judiciary in Germany and in South Africa. The book's comprehensive bibliography is a useful source for comparative purposes, while its list of documents, press releases and the table of cases provide the reader with information predominantly relevant to South Africa.

The book provides a careful examination of the legal foundations of judicial independence under international, South African and German law. Moreover, a multitude of legal viewpoints pertinent to judicial independence, such as the appointment of judges and security of tenure, supervision of judges, civil and criminal liability of judges, impeachment, and the right of judges to freedom of expression are analysed. Practical examples and relevant court decisions are included. Furthermore, the book contributes significantly to comparative studies on constitutional guarantees, in this case the constitutional guarantee of judicial independence.

The comparative analysis is of particular interest, because the concept of judicial independence is not only analysed in two different countries, but also in different legal systems, namely the German civil law system and South African Roman Dutch law, which falls under the group of common law legal systems. Nevertheless, both countries show substantial similarities with regard to judicial independence at the constitutional level, which might be due to the fact that the German Constitution served, in many regards, as a model within the drafting process of the South African Constitution. On the other hand it is emphasised that the principle of judicial independence is implemented differently in Germany and in South Africa, mainly due to the fact that the role of judges within judicial proceedings differs substantially between the two countries. The book highlights the special role of judgements delivered in common law systems, as South African lawyers are bound to precedent, which is not the case under German law.

In my view, it is understandable that an introduction is only presented for the South African legal system, given that the thesis is published in German and in Germany. The author may have had in mind that the main target group of the book would be familiar with the German legal system. However, academics, especially those with a comparative law background who are not as familiar with the German legal system, may regret the absence of a German chapter comparable to the introduction to the South African legal system.

Even more value could have been added to this work if the shortcomings in judicial independence that have been identified had been translated into clear, practical recommendations, formulated under a separate heading.

Oliver C. Ruppel, Windhoek