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The Concept of *Stare Decisis* in the German Legal System – A Systematically Inconsistent Concept with High Factual Importance

Koncepcja stare decisis w systemie prawa niemieckiego – niespójna systemowo koncepcja posiadająca wysoką realną wartość

SUMMARY

It is worth mentioning that the German legal system is based on the codified law. This system lacks in *stare decisis* and precedents in general, which – in principle – does not raise doubts. The role of precedent in the decisional process is relative and dependent on the question as to whether the case may be resolved pursuant to a legal act. In that case, precedents would not play any or almost any role at all. However, the role of precedents increases, when there is a lack of appropriate legal rights, or if legal rights require interpretation. It should be emphasised that *stare decisis* understood as a formally binding precedent refers only to rulings issued by the Federal Constitutional Court, whereas precedents of higher courts have a significant meaning to everyday judicial practice in Germany, despite the fact that they are not formally binding.

Keywords: *stare decisis*; precedent; German legal system; Federal Constitutional Court

INTRODUCTION

Stare decisis is an abbreviation of the Latin phrase *stare decisis et non quieta movere*, meaning "to stand by decisions and not to disturb settled matters"[1]. This essay will first give a brief draft of the evolvement of the German civil law sys-

[1] T. Lundmark, *Umgang mit dem Präjudizienrecht*, JuS 2000, p. 546 (548).

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tem[2], decide whether *stare decisis* (in the sense of a binding precedent) has a systematically coherent place in the German legal system, and where it might be of relevance even without being consistent with German legal doctrine. EU law and the judgments of European courts will not be subject of this analysis.

THE GERMAN LEGAL SYSTEM AS A CLASSIC CIVIL LAW SYSTEM IN THE ROMAN LAW TRADITION

1. Evolution of German private law

To better understand the relation between Roman law and today's German private law, it is helpful to recapitulate the process of *Reception* (i.e., the rediscovery and amendment of ancient Roman law) in medieval continental Europe. Around the 11th century A.D., the rediscovery of Roman law triggered an unprecedented scholarly analysis, evolution, and advancement of the ancient law. The ancient texts were studied and taught at universities in northern Italy (notably in Bologna) and – later – annotated and commented to solve contradictions between different sources and to establish underlying principles, thereby harmonizing the texts. The annotations are commonly referred to as *glosses*, their authors as *glossators*. Since the scholars and graduates of these universities often assumed positions of power within government, church and administration, a "common law" – the *ius commune* – gradually extended across the European continent, albeit with stark regional differences in its implementation and application. During the period of Enlightenment, when the idea of natural law led to critical scrutiny of the *ius commune*, and the emerging nations were eager to have their laws codified, the *ius commune* fragmented even more. Nonetheless, it represents a historical cornerstone of modern European codes, such as the French Code Civil or the German *Bürgerliches Gesetzbuch* (BGB)[3].

2. Evolution of German criminal law

As with private law, criminal law – both procedural and material – was highly fragmented throughout the countless sovereign territories within the Holy Roman Empire[4]. However, the first (subsidiary[5]) penal law code for the entire Holy Roman

[2] For the sake of clarity, "civil law" refers to a codified legal system (synonymous to "code law"). The law governing relation between individuals will be referred to as "private law".

[3] Cf. B. Häcker, *Das englische Common Law – Eine Einführung*, JuS 2014, pp. 872–876.

[4] H. de With, *In memoriam Bambergensis und Carolina*, NJW 1982, p. 1440.

[5] The *Constitutio Criminalis Carolina* included a clause that allowed regional rulers to continue to use their former penal laws. Cf. M. Hirte, R. Hübsch, *Einführung in die ältere Strafrechtsgeschichte*, JA 2009, p. 606 (610).

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Empire, the *Constitutio Criminalis Carolina* was ratified in 1532 – long before such efforts were accounted for in private law[6]. Furthermore, the *Carolina*, as it is commonly abbreviated, proved to be a success – increasingly accepted by the territories, it remained in force for over 300 years. The last judgments based on the *Carolina* are accounted for in the 19th century[7]. In 1871, the newly founded German Empire received a uniform penal code, the *Reichsstrafgesetzbuch*, which is the basis for today's *Strafgesetzbuch* (StGB).

3. Key differences between common law and civil law

The most prominent difference between today's civil law systems and common law systems is that the latter lacks – with particular exceptions – a categorical codification of its laws. Consequently, wherever the legislature did not make an effort to codify a certain area of the law, evolvement and development of the law was – and is to this day – entirely determined by case law, i.e., the finding of justice is not primarily based on interpretation and application of statutes or codes, but rather on tradition and precedent[8]. Every new case extends the body of case law, and the reasoning from case to case contributes to the incremental development of the law[9]. New or even yet unknown advancements of society – technological, social or other – do not require anticipation by the legislature, common law judges may "cross the river when they come to it"[10]. Extensive statutory provisions are therefore rather rare. Quite the contrary is true for the German civil law system: the German system is a code system. There are, apart from constitutional adjudication, no strict rules on the binding force of precedents and it is not a common practice to categorize different kinds of precedents according to their bindingness. Rather, it is discussed how strong the binding force of precedents is in general, or if there is any binding force at all[11]. Without a provision, there is no law. This legal principle is strictly applied in the area of criminal law, where Article 103 § 2 of the German Constitution Section 1 of the German Penal Code (*Strafgesetzbuch*) states that there is no punishment without law. This is also true for German administrative law, where any infringement of a citizen's right by the government or the administration must be based on a statute or provision allowing for such infringement. This principle is

[6] It should, however, be noted that the *Constitutio Criminalis Carolina* did cover some aspects of private law as well.

[7] H. de With, *op. cit.*, p. 1440.

[8] U. Karpen, *Rechtssetzungslehre*, JuS 2016, p. 577 (579).

[9] B. Häcker, *op. cit.*, p. 872 (874 ff.).

[10] U. Karpen, *op. cit.*, p. 577 (579).

[11] Cf. A. Dreier, *Precedent in the Federal Republic of Germany*, [in:] *Interpreting Precedents: A Comparative Study*, eds. N. MacCormick, R.S. Summers, A.L. Goodhart, London 1997, p. 24.

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laid out by Article 20 § 3 of the German Constitution[12]. This principle is softened with regard to matters of private law, however, the *Bürgerliches Gesetzbuch* with its concept to define very broad legal principles in its general sections has proven to be able to cope with change and advancements of society quite well.

4. The meaning of precedent in the context of *stare decisis*

Precedents (*Präjudizien*) are the subject of *stare decisis*. They are usually taken to mean any prior decision possibly relevant to a present case to be decided. The notion presupposes some kind of bindingness but lacks a determination about the nature or the strength of that bindingness. Neither is it necessary for a deciding court to expressly adopts or formulates a decision to guide future decision making in order to qualify it as a precedent. Being relevant for any future decision is sufficient[13].

5. Principal inconsistency of *stare decisis* with the German legal system

As a consequence of the foregoing, the concept of *stare decisis* – i.e., a binding judicial precedent – is, in principle, inconsistent with the German civil law system that allots the development and advancement of the law to statutes, codes and provisions, i.e., the legislative branch, leaving little to no room for case law. However, Germany's legal system is not prone to "blind positivism"[14]. Besides the interpretation of code law (*Gesetzesauslegung*), the further development of the law by judges (*richterliche Rechtsfortbildung*, which is a technical term) is nowadays universally accepted as one of the core tasks of the German judicial branch[15]. *Richterliche Rechtsfortbildung* is codified in Section 132 § 4 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG) and empowers Federal Judges (and only those) to further develop the law. Ironically enough, the concept of *richterliche Rechtsfortbildung* originated in case law itself, through the German Federal Court ruling from 1951[16] (making reference to Article 20 § 3 of the German Constitution), and conceding rulings of the German Federal Constitutional Court in 1953[17],

[12] For a more in-depth analysis cf. P. Lassahn, *Rechtsprechung und Parlamentsgesetz*, Mohr Siebeck 2017, p. 18 ff., 33 ff.

[13] Cf. A. Dreier, *op. cit.*, p. 22.

[14] For a more in-depth analysis of legal positivism in post-war Germany cf. P. Olivet, *Rechtsverständnis im Wandel Rechtspositivismus und Überpositivität des Rechts heute*, NJW 1989, pp. 3187–3194.

[15] P. Meier, F. Jocham, *Rechtsfortbildung – Methodischer Balanceakt zwischen Gewaltenteilung und materieller Gerechtigkeit*, JuS 2016, p. 392 (393).

[16] BGH, 10.10.1951 – II ZR 99/51 – *Rejection of an arbitrator*.

[17] BVerfG, 18.12.1953 – 1 BvL 106/53 – *Equality amongst husband and wife*.

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1973[18], and 1997[19]. These rulings, however, merely draft the outmost limits of *richterliche Rechtsfortbildung* without defining specific legal requirements. The aforementioned limits are crossed if a federal court places its own (legal or even political) views in place of the codified law. While *richterliche Rechtsfortbildung* is a tolerated exception, the prerogative of code law remains[20].

FACTUAL IMPORTANCE OF *STARE DECISIS*

In the foregoing section, the development and ratio of the German code law were outlined, along with the tolerated exception of *richterliche Rechtsfortbildung*. The following section will focus on *stare decisis* above and beyond the aforementioned limits. While it has been established that such *stare decisis* is dogmatically inconsistent with the German legal system, it does, in fact, exist in various forms.

1. During legal education

The legal education in Germany is split in two sections. First, approximately five years of legal studies at a law school that are concluded by the First State Exam. After passing that exam, an aspiring law student will then enter the *Referendariat*, a two-year clerkship period, where practical training in private law, criminal law, administrative law – both in the judicial system and private practice – takes place. The *Referendariat* is concluded by the Second State Exam. After that, the then fully qualified German jurist can choose to enter public service or private practice (albeit that choice being limited by the grades achieved in both exams – less than 10% qualify for public service as a judge or prosecutor). Since every aspiring lawyer, judge or other legal practitioner has to undergo this education, it is worthwhile to examine how students and *Referendare* are taught to handle court decisions. Hereby one can observe a stark difference between the study period at law school and the *Referendariat*. While students at law school are encouraged (especially in criminal law) to challenge and critically reflect past adjudication and even the settled and common practices by the high court, the exact opposite takes place during the *Referendariat*. In order to succeed in the clerkships and the Second State Exam, the *Referendar* has to produce "practically usable" decisions, i.e., decisions that are aligned with the settled opinion of the high courts, the Higher Regional Court in which the *Referendariat* takes place, and even with unwritten "common practices" or "local customs" of the court district – the latter being mostly of formal

[18] BVerfG, 14.02.1973 – 1 BvR 112/65 – *Soraya*.
[19] BVerfG, 12.11.1997 – 1 BvR 479/92, 1 BvR 307/94 – *Child as damage*.
[20] H. Wiedemann, *Richterliche Rechtsfortbildung*, NJW 2014, pp. 2407–2412.

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nature. Since it is in the best interest of *Referendars* to successfully conclude their legal education, the abidance by precedents becomes somewhat of an imperative, factually forcing *Referendars* to treat precedents as binding.

2. Lower courts (*Amtsgerichte* and *Landgerichte*)

According to German procedural law, there is no doctrine of *stare decisis*. Precedents are not formally binding. Section 322 of the German Rules of Civil Procedure (*Zivilprozessordnung* – ZPO) stipulates that court rulings are only binding between the two parties as well as with regard to the matter at hand in the current proceedings[21]. Therefore, while the subject matter at hand is barred from further (excluding, of course, appellate) proceedings, the identical question of law may be answered differently in another court or even by the same judge in a different ruling. The same holds true for criminal proceedings. The idea of *ne bis in idem* laid down in Article 103 § 3 of the German Constitution, while prohibiting a second trial in the same matter[22], does not bind other courts in the way they interpret a certain provision. The only way lower courts may be bound by higher courts in their interpretation of the law is *via* a distinct order during appellate proceedings (see below 3.). As shown above, rulings of appellate courts are only binding with regard to the parties and subject matter at hand. The higher courts' ability to refer cases back to the trial court leads to those courts usually following the interpretation of "their" appellate courts – unbeknownst, however, whether out of genuine persuasion by legal arguments or out of sheer necessity[23]. It should be noted in this context that lower court judges are evaluated – *inter alia* – by the number of cases that held up in the second instance in case of an appeal. These evaluations are relevant for potential promotions, so there is a possibility that in some cases, existing precedents are followed out of intrinsic motives.

3. Higher courts (*Oberlandesgerichte*) and federal courts (*Bundesgerichte*)

German high courts are not bound by their own past rulings, however, the courts are very active in *richterlicher Rechtsfortbildung* in certain areas of the law that are insufficiently governed by provisions. This is especially true for German labour law, i.e., the ruling of the Federal Labour Court (*Bundesarbeitsgericht* – BAG) in matters of labour law disputes and strikes. This domain belongs to one of the few cases of pure judge-made law in Germany; therefore the question of the binding force of

[21] MüKo-ZPO/Gottwald, 2016, Sec. 322 §39; BGH NJW 1989, 2133 (2134).

[22] BVerfGE 12, 62 (66).

[23] While the independence of judges is guaranteed by the constitution (Article 97 GG), courts apply certain statistical metrics to govern and control the workload of individual judges.

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precedent – i.e., *stare decisis* – comes up very clearly[24]. The Federal Constitutional Court treats the problem of the binding force of precedent of higher courts and federal courts as a constitutional problem. As described above, Article 20 § 3 of the German Constitution binds the judiciary to statute and law. The Federal Constitutional Court does not subsume precedents under this clause. Deviation from them, therefore – as a matter of principle – does not violate the Constitution. Therefore a proof of a major change of circumstances or general belief is not necessary to enable a court to deviate from its former ruling without violating Article 20 § 3[25]. According to this, precedents do not have bindingness because they are not binding law. Nevertheless, precedents do have a major factual role in the German legal system. Precedents are cited in most of the published decisions by the highest courts. If there is a deviation from a court's own precedent, it will generally be recognized and substantiated. The lower courts usually follow the precedents of the higher courts, and lawyers and administrative authorities tend to handle precedents in a similar way as legislative decisions[26] (see above). In cases of appeal, the appellate instance confines itself to a reversal of the decision of the lower court and refers the case back for final decision. If this happens, the legal opinion of the higher court is binding upon the lower court (cf. Section 565 § 2 ZPO, Section 358 § 1 StPO).

This is, still, not a case of *stare decisis* because said bindingness is restricted to the specific case being decided by both courts[27]. The five supreme federal courts almost exclusively decide appeals based on questions of law, not of fact. Appeals are possible in a twofold manner. The first manner consists in appeals being directly admitted by the law. In these cases, the courts have no power to select. In the second manner, an appeal depends on the admission by the respective appellate court. Again, there are two possibilities. The first is chosen when the court of the second level (against whose decision the appeal is filed) has the power to admit or not to admit the appeal to the court of the highest level, that is, to the supreme court of the respective jurisdiction. The grounds on which an appeal has to be admitted are named by the respective codes of procedure. The most important and interesting grounds are that (1) the case is of fundamental importance in principle (*grundsätzliche Bedeutung*), or (2) the decision does not follow a precedent set by the respective supreme federal court, or the Common Panel of the Supreme Federal Courts, or the Federal Constitutional Court (cf. Section 546 ZPO and below)[28].

[24] Cf. A. Dreier, *op. cit.*, p. 27.
[25] BVerfG, 26.06.1991 – 1 BvR 779/85 – *Labor Strikes*.
[26] Cf. A. Dreier, *op. cit.*, p. 26.
[27] *Ibidem*, p. 25.
[28] *Ibidem*, p. 19.

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4. Duties of presentation (*Vorlagepflichten*) amongst state and federal high courts

If a constitutional court of one of the federal states wants to deviate from a precedent set by the constitutional court of another federal state or by the Federal Constitutional Court, it must present this to the Federal Constitutional Court (cf. Article 100 § 3 of the German Constitution). Similarly, if one of the five supreme federal courts (BGH, BVerwG, BAG, BSG, BFH) wants to deviate from a decision of another supreme federal court, it has to present the divergence to the Common Panel of the Supreme Federal Courts (*Gemeinsame Senat der Obersten Gerichtshöfe des Bundes*, cf. Article 100 § 3 of the German Constitution, Section 2 § 1 of the High Court Judgement Uniformity Act – *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes* – RsprEinhG). Finally, if one of the panels of a supreme federal court wants to deviate from a decision of another panel of that court, the divergence will have to be presented to the so-called 'Great Panel' (*Großer Senat*; cf. Section 132 § 2 ZPO)[29].

5. Federal Constitutional Court (*Bundesverfassungsgericht*)

The only formally binding precedents are those of the Federal Constitutional Court, which are strictly binding. According to Section 31 § 1 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG), all decisions of the Federal Constitutional Court are binding for all constitutional organs of the federation and the states as well as for all courts and authorities. It is further provided in Section 31 § 2, that – especially where the Federal Constitutional Court invalidates legal provisions, codes or norms – these decisions have the force of statutes (*Gesetzeskraft*)[30]. The Federal Constitutional Court has, however, decided that it is not bound by its own precedent[31]. In conclusion, the decisions of the Federal Constitutional Court in Germany are formally binding without exception and without being subject to overruling or modification except by the Federal Constitutional Court itself[32]. If lower courts do not follow them, their decisions will be unlawful and reversed on appeal. The legislature and the court are exempted from this bindingness. Therefore, vertical *stare decisis* exists in the German legal system with regard to decisions of the Federal Constitutional Court. Duties of presentation exist within the Federal Constitutional Court as well: for divergence between the

[29] Cf. A. Dreier, *op. cit.*, p. 29, 34, 43.

[30] *Ibidem*, p. 24 ff.

[31] BVerfG, 11.08.1954 – 2 BvK 2/54 – *5%-Quota*; BVerfG, 19.07.1966 – 2 BvF 1/65 – *Party Financing*; BVerfG, 06.10.1987 – 1 BvR 1086/82, 1 BvR 1468/82, 1 BvR 1623/82 – *Employee leasing*.

[32] Cf. A. Dreier, *op. cit.*, p. 25.

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two panels of the Federal Constitutional Court, the case has to be presented before the *Plenum* of the court (cf. Section 16 § 1 BverfGG).

6. The example of explicit "anti" *stare decisis*: *Nichtanwendungserlasse* regarding German fiscal court rulings

Legal disputes in German tax law – i.e., between the taxpayer and the tax authority – are decided by the Federal Fiscal Court (*Bundesfinanzhof* – BFH). If a ruling by the BFH is "inconveniently" pro-taxpayer, the German fiscal can issue an internal administrative ruling that the case decided will not be used as a basis to treat similar or even identical cases on the administrative level. The ratio behind is that, if another taxpayer in a similar situation as in the case decided, he or she would also have to go through all instances of the fiscal court system, which will consume time and money. While the legality of this practice is subject to fierce debate in academia, it is more or less reluctantly accepted in practice[33].

CONCLUSIONS

The German system is based on the idea of codification. In such a system the nonexistence of *stare decisis* – or even precedents at large – is, in principle, not a problem. Judges have to interpret the law with the help of precedents or without it. The relative overall role of precedent in the decision making of courts depends on which other authoritative materials are relevant. If the case can be decided according to the wording of a statute, precedents will play no or nearly no role. Problems arise in the lack of applicable statutes. If there is no relevant statutory law or if the statutory law needs interpretation, precedents will become all the more important[34]. *Stare decisis* in the sense of a formally binding precedent only applies for rulings of the Federal Constitutional Court. However, whilst not formally binding, precedents of higher courts are of significant importance for the everyday practice of law in Germany.

[33] Cf. W. Spindler, *Der Nichtanwendungserlass im Steuerrecht*, DStR 2007, pp. 1061–1066; H.-F. Lange, *Die Nichtanwendung von Urteilen des BFH durch die Finanzverwaltung – Nichtanwendungserlass und Nichtveröffentlichung*, NJW 2002, pp. 3657–3661.

[34] Cf. A. Dreier, *op. cit.*, p. 23 ff.

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STRESZCZENIE

Należy wskazać, że niemiecki system prawa opiera się na prawie skodyfikowanym. W systemie tym brak *stare decisis* oraz precedensów w ogóle, co do zasady nie budzi to wątpliwości. Rola precedensu w procesie decyzyjnym sądów jest względna i zależy od tego, czy sprawa może zostać rozstrzygnięta zgodnie z brzmieniem ustawy. Wówczas precedensy nie będą odgrywać żadnej roli lub będzie ona marginalna. W przypadku, gdy brak jest odpowiedniego prawa ustawowego lub jeśli ustawowe prawo wymaga interpretacji, rola precedensów wzrasta. Należy podkreślić, że *stare decisis* w sensie formalnie wiążącego precedensu odnosi się tylko do orzeczeń Federalnego Trybunału Konstytucyjnego. Natomiast precedensy wyższych sądów, choć nie są formalnie wiążące, mają istotne znaczenie dla codziennej praktyki prawniczej w Niemczech.

Słowa kluczowe: *stare decisis*; precedens; niemiecki system prawny; Federalny Sąd Konstytucyjny