

BAVARIA'S SUPREME COURT – A UNIQUE FEATURE IN HISTORY AND TODAY / Manfred Dauster

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Abstract: *Courts shape the rule of law. Their history is part of the culture of a country. The way judicial institutions are treated characterises a country's attitude towards the status they accord to courts and judges. In its almost 400-year history, Bavaria's Supreme Court has experienced all facets - from being held in high esteem to being abolished twice. Its history is a lesson that points to the future in the development of European legal culture.*

Key words: *Bavaria's Supreme Court; Legal Culture; European Rule of Law; Legal History*

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1. INTRODUCTION

If we look at the landscape of institutions in the countries of Europe, we see few, especially in the courts, which are so important for the European rule of law and which have a long tradition as evidence of the growth of a rule of law. Europe has experienced too many upheavals in the centuries of its history, which have had their effects on the judicial institutions in the European countries. The Supreme Court of Bavaria is an exception - not only in Bavaria and in Germany. Its very eventful, even painful history can be a lesson in how states deal with their judicial institutions. This handling is embedded in the constitutional and constitutional-political framework of the demand for a cultural state in the European countries, to which the legal culture belongs as one of its core elements. However, this legal culture can hardly be grasped in all its dimensions without institutional history.

2. COURT AND (LEGAL) CULTURE

Culture is not just about having opera houses and museums. Opera houses and museums are a given when it comes to culture, even if some political discussions about their funding suggest the opposite. Culture is a system of phenomena that includes the individual, society and the state and is characterized by a multitude of interdependencies between all these players. The absence of culture becomes a threat to the individual, society and the state, in particular if individual and social brutalization leads to the

abandonment of humanity, morals and law. This is still important to say in a country that has experienced the most horrific times of political, social, but also individual lack of culture. Hitler's passion for the Wagner Festival in Bayreuth does not make the Nazi State a "cultural state" (Kulturstaat). Thus, attending a festival did not make Hitler a supporter of the culture that had developed throughout German history. He never was, and neither were his cronies. This applies to him as a private person as well as the top representative of the state, and this statement has general validity for the entire Nazi regime. The lack of culture hurts. However, describing which individual, societal and anthropological aspects culture includes (of whom? of the individual?, of a certain society?, of a continent?) can and must be discussed in individual references. Not always and at all points such a discussion will lead to a consensus, but that is inherent to discussing culture.

It was the lack of culture under the Nazi regime that in 1946 prompted the Bavarian constitutional legislation to establish the Free State of Bavaria as a "cultural state" (Kulturstaat). The lack of culture was vividly in the minds of the members of parliament at the time, some of whom had experienced it themselves or even suffered from it; the consequences of Germany's cultural collapse were omnipresent in the ruined landscapes of Bavaria's cities, they were a painful permanent reminder. Explicitly including culture in the constitution, defined it a legal concept, although this still awaits detailed explanation in the case law of the Bavarian Constitutional Court. However, it can be stated: where there is law, there is also culture. Injustice shapes and causes lack of culture. Therefore, the commitment to the Bavarian cultural state was also a commitment to the Bavarian legal culture as it had been developed and cultivated over centuries until January 30th, 1933, the day of the National Socialist's seizure of power. Legal culture also includes the institutions that are indispensable to the rule of law, first and foremost independent courts. In this respect, the cultural state certainly also reflects the history of institutions, especially in Bavaria, which, with its Supreme Court in all its historical manifestations, has shaped the Bavarian legal landscape for many centuries¹ of its more than 1000 years of sovereignty. Bavaria's cultural state also includes political discourse and the democratic customs that sustain it. In the course of the 20th and 21st centuries, Bavaria's Supreme Court has not always been (morally) well treated with respect to this discourse. This article sketches this by means of reconstructing the institutional history of this court, but also by offering an outlook at the value of this unique institution in Germany and in Europe of the regions.

3. FROM THE 17TH CENTURY *REVISORUM* TO THE 19TH CENTURY MUNICH *OBERAPPELLATIONSGERICHT*

Germany's history is characterized by particularism in its public institutions. While in other European countries, such as France and England, the centralized nation state grew stronger at the turn of the Middle Ages to the modern era, the trend towards particular principalities intensified in Germany. This trend became even stronger with the religious division caused by the Reformation in 1517 and the formation of blocs between the then Protestant principalities and the states that remained Roman Catholic and were grouped around the Habsburgian Emperors, which remained Roman Catholic, with Bavaria developing to become a stronghold of Catholicism. When in 1806 the Holy Roman Empire ceased to exist, it was considered by some German law academics as a

¹ The Kingdom of Prussia, for example, the predominant power in the 19th century's Germany, always adhered to its higher courts and never decided to have a single supreme court.

“constitutional monster” consisting of several hundred of almost sovereign entities, a primarily ceremonial *Emperor* and the Imperial Parliament in Regensburg (*Reichstag*), acting somewhat like an international congress of talkative diplomats, who were more interested in their prerogatives and diplomatic rankings than in substance matter. At the turn of the 15th to the 16th century, a reform of the empire had aimed to counteract the fragmentation and powerlessness of the imperial institutions, which contemporaries were already aware of at the time. One remaining, though not very effective, result was the Imperial Court (*Reichskammergericht*), established by Emperor Maximilian in 1495 (Schmid, 2003, pp. 117–144). The *Reichskammergericht* (Schroeder, 1978, p. 368 et seq.) was the central judicial authority in Germany that could administer justice throughout the Empire in either penal, civil and other matters. Since Emperor Maximilian, this was the Imperial Court initially seated in Frankfurt, then in Worms, then in Speyer and finally in Wetzlar near Frankfurt (Hausmann, 1995, pp. 9–36, 2003, pp. 145–160). Johann Wolfgang von Goethe, the greatest of German poets, spent a short time there as a young assessor. In the course of time, the *Reichskammergericht* was paralleled by another semi-judicial institution, the Imperial Court Council (*Reichshofrat*), based at the Imperial Court in Vienna and performing administrative as well as judicial tasks, especially in the field of cases linked to the position of the Emperor and his prerogatives and of feudal cases (Kasper-Marienberg, 2012, p. 12; Ortlieb, 2003, p. 221 et seq.); often conflicting with the jurisdiction of the *Reichskammergericht*. In the increasingly fragmented Holy Roman Empire, the situation remained like this until August 6th, 1806, when against the background of Napoleon’s striving for power over Germany, Emperor Franz II laid down the German crown after he had declared himself Emperor of Austria in 1804.

However, the larger German states of the Empire, that is, first and foremost the Archduchy of Austria, the later Kingdom of Prussia and also the Electorate of Bavaria, were not much interested in being dragged before the barriers of the *Reichskammergericht* in legal disputes.² This contradicted their own understanding of the sovereignty of their territories, especially after the peace treaties of Münster and Osnabrück sealing the end of the Thirty Years War in 1648, which further strengthened the trend towards independence of the larger German territories. The means of separating the territorial court systems from the appeal supervision by the *Reichskammergericht* and its jurisdiction come with the “*privilegium de non appellando illimitatum*” (Eisenhardt, 1980; Kalkbrenner, 1975, p. 184), a privilege granted by the emperor to the most senior princes of German territories to complete the appeal processes within their territories and to avoid any supervision or interference by *Imperial Institutions*.³ The Dukedom of Bavaria received this privilege from Emperor Ferdinand II on May 16th, 1620, and is to be seen in the context of the elevation of Duke Maximilian I to the Electoral Dignity in 1623 in gratitude for his support of the Habsburgians (Wolf, 2012, pp. 188 et seq., 289 et seq.) in their struggle against the Count Palatine of the Rhine, Prince Elector and short-lived Bohemian King Frederick in the early years of the Thirty Years War (Merzbacher, 1993, pp. 1–2; see facsimile print of the Imperial Privilege of 1620 in Delius, Seitz, and Hilliges, 1993, pp. 90–91; Kalkbrenner, 1975, p. 184;). The new Bavarian Elector created the “*Revisorium*” on April 17th, 1625, as the last judicial instance

² See complaint of the *Revisorium* to Prince Elector Max III Joseph of 1748 about law suits filed with the *Reichskammergericht* by Bavarian subjects, which urged the *Revisorium* to justify its activities (Sagstetter, 1997, pp. 28, 41 et seq.)

³ However, in case of denial of justice by the territorial institutions (“*iniustitia denegata vel protracta*”), legal remedy could be sought with the Reich institutions (see Sagstetter, 1997, pp. 28, 42).

in his electoral lands⁴ replacing the appeals to the *Reichskammergericht* by “*beneficium revisionis*” (Merzbacher, 1993, pp. 1, 3)⁵ in the Bavarian Electorate (Merzbacher, 1993, pp. 1–2).⁶

The Supreme Court of the Free State of Bavaria dates back to this *Revisorium* and therefore may claim almost 400 years of existence.⁷

The first two decades of the 19th century were dramatic times for Germany and especially for Bavaria. Napoleon elevated the Bavarian Prince Elector Maximilian Joseph to kingship. More importantly, the territory of Bavaria was enlarged and in the process of dismantling the former Holy Roman Empire all small sovereign and semi-sovereign territories within the enlarged Bavarian territory (and elsewhere in Germany) disappeared and were incorporated in the new Kingdom of Bavaria (Kalkbrenner, 1975, pp. 184, 188; he counts 83 such new territories acquired by Bavaria). Foremost all ecclesiastic entities (bishopsrics, monasteries and abbeys) and all Free Imperial Cities lost their independence and became mediatised entities of the Kingdom of Bavaria or other German states). Each of these newly acquired territories brought its own legal order into the Kingdom, a contrast to any modern understanding of legal unity. Streamlining the public administration of the new kingdom (Doeberl, 1928, p. 466)⁸ and abolishing traditional feudal rights and privileges were mandatory and became the prerequisite for integrating the newly acquired territories and their population into Bavaria (Kalkbrenner, 1975, pp. 184, 188; Merzbacher, 1993, pp. 1, 7). Some of the achievements of the Napoleonic

⁴ In contrast to the *Reichskammergericht*, whose judges (and other personnel) were appointed by the Emperor on the proposal of the collegia of the *Reichstag*, the representations of the princes, nobles and the free cities in the old parliament, (*ius praesentationis et visitationis*), the Bavarian territorial collegia had not such a right of presentation, so that the *Revisorium* was a purely princely instance from the beginning (Merzbacher, 1993, pp. 1, 3).

⁵ The *Revisorium* was the ultimate instance in civil proceedings, while final legal remedies in criminal proceedings remained within the jurisdiction of the Bavarian *Court Council*, a semi-judicial, last instance and political as well as administrative body immediate to the Elector (Heydenreuter, 1981; Merzbacher, 1993, pp. 1, 3; Neudegger, 1921, p. 119; for the *Revisorium*'s jurisdiction, see Kalkbrenner, 1975, p. 184 et seq.)

⁶ See facsimile prints of the Electoral Law Degree of April 17th, 1625 on the “*Revisorium*” establishment and a letter of the Elector of April 18th, 1625 to the Chief Chamberlain of Straubing explaining the jurisdiction of the said “*Revisorium*”, in Delius, Seitz and Hilliges (1993, pp. 92–97 including reading the transcripts and explanations thereto on p. 98 and 99); Helmut Kalkbrenner also pointed to the enactment of the *Codex Maximilianeus* of 1616, a first attempt of codifying the law of the land in Bavaria after the *Lex Bajuvariorum* of the 8th century (1975, p. 184).

⁷ For its institutional history in the 17th and 18th century see Kalkbrenner (1975, p. 184 et seq.), Friedrich Merzbacher also pointed to the fact that at the end of the 70s of the 18th century official court documents began to name the *Revisorium* “*Oberappellationsgericht*” (1993, pp. 1, 3–7); in addition, the *Revisorium* experienced “revolutionary” developments through the Enlightenment of the 18th century and its ideas of natural law (Hugo Grotius and Samuel Pufendorf – as the most prominent representatives of the philosophy of natural law at the time, see more in Welzel [1962, pp. 123 et seq.; 130 et seq.]) when the Electorate reformed its legislation through the *Codex Iuris Bavaracii Iudicarii* of 1753, a codification of the rules on civil proceedings (see also Code of Civil Procedure for the Kingdom of Bavaria of April 29th, 1869 [supplement to GBl. 1869, p. 123], in conjunction with the law concerning the introduction of the Code of Civil Procedure for the Kingdom of Bavaria of April 29th, 1869 [GBl. 1869, p. 1233]), through the *Codex Maximilianeus Bavaricus Civilis* of 1756, a codification of civil law, and through the *Codex Iuris Bavaricii Criminalis* of 1751, which all marked the Bavarian legal history for more than the next 100 years. The 1751 Criminal Code was replaced by the Common Criminal Code for the Kingdom of Bavaria of May 16th, 1813 (RBl. 1813, p. 665), which entered into force only for the Bavarian territories on the right bank of the Rhine river, whereas the French Code Pénal remained effective in the Palatinate. It was not until 1861 that the criminal law was standardized in the Bavarian territories on the left and the right banks of the Rhine, in particular by the Criminal Code for the Kingdom of Bavaria of November 10th, 1861 (Supplement I to GBl. 1862, p. 321) (Biebl and Helgerth, 2004, p. 49 et seq.).

⁸ In this process, the *Revisorium* was dissolved by Electoral Edict of November 5th, 1802 and then (temporarily) replaced by three supreme justice authorities in “old” Bavaria, Swabia and Franconia located in Munich, Bamberg and Ulm (Kalkbrenner, 1975, pp. 184, 187).

reforms, such as equality before the law and independent courts (for Bavaria see Merzbacher, 1993, pp. 1, 7), had an impact on Germany and Bavaria in particular and could not be ignored (Rumschöttel, 1997, pp. 5, 9).⁹ The necessary and complex reform process began in the first years of the 19th century under Bavaria's omnipotent First Minister, Maximilian Joseph Count of Montgelas (1759 – 1838) (Grau, 1997b, pp. 43–44). He issued the Organic Edict of August 24th, 1808 to restructure the judicial system and replaced the traditional *Revisorium* as the last instance by a three-instance court structure with the Munich High Court of Appeal (*Oberappellationsgericht*) on top of the court system.¹⁰ The *Oberappellationsgericht* in Munich¹¹ gained greater importance in Bavaria's constitutional history when after the revolution¹² of 1848/1849, the State Court for the Kingdom of Bavaria¹³ (*Staatsgerichtshof*) was established within the *Oberappellationsgericht* in Munich (Grau, 1997c, pp. 49, 56). Here lay the beginnings of a constitutional court system in Bavaria. The *Staatsgerichtshof* was primarily responsible for prosecuting ministers of the state government for violations of the constitution and of the law,¹⁴ even though this jurisdiction did not acquire any real factual significance (Grau, 1997c, pp. 49, 56; Rumschöttel, 1997, pp. 5, 22).¹⁵

4. FROM THE *OBERAPPELLATIONSGERICHT* TO THE (FIRST) *BAVARIAN SUPREME COURT*

After the final defeat of Napoleon I, the German Confederation was formed as an essential but partial result of the Congress of Vienna, which endeavoured to rebuild Europe and Germany. In terms of international law, the Confederation was a union of sovereign German States. In particular, the German Confederation Act of 1815 did not establish a national court system within Germany as a whole. This topic was left to the Confederation's Member States so that courts in the individual German States began and ended there. For the Kingdom of Bavaria, which was created in 1806, the Munich

⁹ Today, Bavaria's State territory is located on the right bank of the Rhine River only. As a result of the Vienna Congress and the Treaty of Munich of April 30th, 1816, in exchange of Salzburg, Inn- and Hausruckviertel, Bavaria received also territories on the left bank of the Rhine River, the Palatinate, where in 1810 under the French regime the Code d'Instruction Criminelle was enacted and remained in force even after the Palatinate became Bavarian (Biebl and Helgerth, 2004, p. 23). The criminal institutions in Palatinate kept their French touch until in 1832 the Palatinate institutions were merged into the existing bodies on the right bank of the River Rhine (Royal Ordinance of June 29th, 1832 [RBl. 1832, p. 438], see also Biebl and Helgerth (2004, p. 25 et seq.) and Kalkbrenner (1975, pp. 184, 188)).

¹⁰ Facsimile print of Official Gazette of August 24th, 1808 in Delius, Seitz and Hilliges (1993, pp. 119, 121); see further Act Concerning the Bases of Legislation on the Organization of Courts, on Proceedings in Civil and Criminal Cases and on Criminal Law, of June 4th, 1848 (GBl. 1848, p. 137); and Biebl and Helgerth (2004, p. 29 et seq.).

¹¹ For its function to decide on complaints against State Ministers as of violations of the Constitution, which the King could submit (Title X § 6 of the 1818-Constitution) see Rumschöttel (1997, p. 5, 19); with view on the Prosecutor's Office in the 19th century see Biebl (1992, p. 717 et seq.).

¹² Act on the Responsibility of Ministers of June 4th, 1848 (GBl. 1848, p. 69).

¹³ Articles IX and X of the Act on the Responsibility of Ministers of June 4th, 1848 (GBl. 1848, p. 49). See further Merzbacher (1993, pp. 1, 8); facsimile print of the respective Official Gazette see Delius, Seitz and Hilliges (1993, p. 127/132).

¹⁴ Act on the State Court and the Proceeding against State Ministers of March 30th, 1850 (GBl. 1850, p. 133); as well as see Rumschöttel (1997, pp. 5, 20 et seq.) and Grau (1997c, pp. 49, 55 et seq.).

¹⁵ Prior to the establishment of the State Court, the *Landtag* and the *Reichsrat* dealt with the then Bavarian State Minister for the Interior, Eduard von Schenk, whose indictment before the *Staatsrat*, a semi-judicial institution (see Schlaich, 1965, pp. 460–522), almost came to pass (Grau, 1997d, pp. 57, 59–61; Weckerle, 1930) Eduard von Schenk prevented any indictment by resigning from office. His case was the only one seriously discussed in Bavaria under the terms of a ministerial impeachment.

Oberappellationsgericht crowned the inner-Bavarian court system.¹⁶ However, the situation changed completely after the German War of 1866 when victorious Prussia defeated the troops of the German Confederation, ousted Austria from the German Confederation and created the Northern German Federation. The Empire of Austria went its own different ways and later became the so-called “Double Monarchy” of (the Empire of) Austria and of (the Kingdom of) Hungary. However, within Germany (minus Austria), the Northern German Federation was only the first step on the way to a unified nation. The Franco-German War of 1870/1871 created the possibility of a unified nation under the roof of one State in Germany under international and constitutional law and, in particular, under the predominance of the Kingdom of Prussia. The Constitution of the so-called Second Empire of April 16th, 1871,¹⁷ created a state founded on an “eternal covenant of German Princes and Cities”, but nevertheless contained some clear centralist elements by giving the Reich the right to legislate on essential questions of national unity.¹⁸ Concessions were made to the southern German States, above all the Kingdom of Bavaria, especially with regard to the Bavarian Army, over which the King of Bavaria retained supreme command in peacetime. The German Empire very soon made use of its legislative rights in the field of justice as well. The North German Federation had already enacted the Criminal Code, which then the Reich legislator transposed into the Reich Act¹⁹ with national effect.²⁰ The *Reichsjustizgesetze* (Imperial Judiciary Acts), which entered into force on October 1st, 1879, comprised of the national Civil Procedure Code,²¹ the national Criminal Procedure Code²² and the national Bankruptcy Code.²³ However, it was the Courts Constitution Act,²⁴ which regulated the administration of justice nationally. In criminal and civil cases, the Courts Constitution Act created a chain of courts that went from district courts via regional courts to the Higher Regional Court or from regional courts to the *Reichsgericht* as the Empire’s Supreme Court,²⁵ which became operational on October 1st, 1879.²⁶ Conceptually, there was no longer any room in this new court system for the Supreme Court of one of the individual German States.²⁷

Against the background of the special rights granted to Bavaria anyway in the due process of Germany’s unification in the years 1870 and 1871 and with consideration for the pronounced sensibility about Bavarian statehood within the Reich and vis-à-vis the other individual German States, the Reich legislature by §§ 8 and 9 of the Introductory

¹⁶ With view on the legal developments and reforms of the 19th century in Bavaria see Merzbacher (1993, pp. 1, 8 et seq.) and Kalkbrenner (1975, pp. 184, 188 et seq.). It is noteworthy to say that the first national constitution, adopted after the revolution and times of unrest of 1848/1849 and never entering into force established the national Supreme Court, the *Reichsgericht*, but again left it with the German States how to design their inner-court system.

¹⁷ RGBl. 1871, p. 63.

¹⁸ See Articles 3 and 4 of the Constitution.

¹⁹ of May 15th, 1871 (RGBl. 1871 p. 127).

²⁰ Since only the *Reichsoberhandelsgericht* with limited competences was established in Leipzig in 1871 and it took another 8 years until the *Reichsgericht* was established, the Bavarian legislature made provisions through Article 63 of the Bavarian Introductory Act to the Criminal Code of December 26th, 1871 (GBl. 1871 Sp. 123) to ensure that the competences of the Oberappellationsgericht in Munich as the highest court in criminal matters were preserved (Merzbacher, 1993, pp. 1, 9 et seq.).

²¹ of January 30th, 1877 (RGBl. 1877 p. 83).

²² of February 1st, 1877 (RGBl. 1877 p. 253).

²³ of February 10th, 1877 (RGBl. 1877 p. 351).

²⁴ of January 27th, 1877 (RGBl. 1877 p. 41).

²⁵ Primarily having jurisdiction on final appeals in civil and criminal matters.

²⁶ § 1 of the Introductory Act to the Court Constitution Act (EGGVG) of January 27th, 1877 (RGBl. 1877 p. 77). For the *Reichsgericht*’s significance, see Müller (1997).

²⁷ See more details in Merzbacher (1993, pp. 1, 10 et seq.) with the discussions among Unitarists and Federalists as to whether the German States should be allowed to maintain their supreme courts.

Act to the Courts Constitution Act (EGGVG)²⁸ created the possibility for those federal states of the German Reich with more than one Higher Regional Court to concentrate the competences of the said higher regional courts on civil and penal matters within the State Supreme Court.²⁹ The Kingdom of Bavaria made use of this possibility. The government dissolved the Higher Appellate Court of Munich and created the *Supreme Court of the Kingdom of Bavaria* by the State Act on the Implementation of the Court Constitution Act of February 28th, 1879³⁰ and transferred the personnel of the *Oberappellationsgericht* to the new institution by Royal Ordinance of September 23rd, 1879.³¹ Being the highest court in Bavaria, the *Bavarian Supreme Court* dealt with appeals in criminal and civil cases,³² partly replacing the *Reichsgericht*, partly alongside the *Reichsgericht*. The quality of the jurisdiction was recognized. Some contemporaries even rated the decisions of the *Bavarian Supreme Court* higher in quality than those of the *Reichsgericht*.³³ However, after more than 50 years of acclaimed activity, times were to change dramatically for the *Bavarian Supreme Court* (and the entire court system in Germany).

5. THE FIRST ABOLITION UNDER NAZI-RULE

With the appointment of Adolf Hitler as Reich Chancellor on January 30th, 1933,³⁴ the construction of the Nazi state began (Merzbacher, 1993, pp. 1, 15). The Nazi-State-ideology was focused on the figure of the “Führer” and in doing so enshrined strong centralist tendencies, aiming at “Gleichschaltung” of all public institutions (Biebl and Helgerth, 2004, p. 185 et seq.) and concentration of power in the organs of the Reich

²⁸ of January 27th, 1877 (RGBl. 1877, p. 77).

²⁹ See the correspondence between Minister of Justice Johann Nepomuk von Fäustle and King Ludwig II on the matter of preserving a Bavarian Supreme Court in Delius, Seitz and Hilliges (1993, pp. 136–141); Merzbacher (1993, pp. 1, 10 et seq.); Kalkbrenner (1975, pp. 184, 187).

³⁰ In particular, article 42 of the law (GVBl. 1879, p. 273).

³¹ GVBl. 1879 p. 1044 et seq.; or Kalkbrenner (1975, pp. 184, 190).

³² It is noteworthy to mention that before the Civil Code came into force on January 1st, 1900 the legal landscape of Bavaria was characterized at least by eighty to ninety *Partikularrechte*. Civil *Partikularrechte* were inherited when Bavaria was enlarged at the beginning of the 19th century and acquainted many autonomous former independent territories with their “particular” legislation, which never were harmonized, amended or altered – often since centuries, and are still part of the Bavarian legal life but of minor importance (Eisenhardt, 2018, p. 311 et seq.; Fernandes Fortunato, 2009, p. 328 et seq.; Reiter, n.d., pp. 20–22). Such *Partikularrechte* had been and are being the matter of the so-called *clausula bavarica* in § 8 of the EGGVG (Merzbacher, 1993, pp. 1, 11 and RGBl. 1911 p. 60).

³³ With view on the further development of the Bavarian Supreme Court and its jurisdiction see Merzbacher (1993, pp. 1, 11 et seq.).

³⁴ The appointment by *Reichspräsident* Paul von Hindenburg “legalized” the coup d’état-movement of the NSDAP. 10 years earlier, on November 8th/9th, 1923, a coup attempt orchestrated by Hitler failed in Munich in front of the Feldherrnhalle on Odeonsplatz. Two judges of the Bavarian Supreme Court, Ernst Pöhner and Theodor von der Pfordten, also took part in this attempt (Demharter, 2000, pp. 1154, 1156; Herbst, 1993, pp. 37–38 et seq.).

executive.³⁵ This "Reichification"³⁶ very soon started to affect the judiciary.³⁷ The Bavarian "reserve rights or prerogatives" from the time when the so-called *Reichsjustizgesetze* (Kruis, 2004, p. 640 et seq.) had entered into force in 1879 and gave rise to the fear among the National Socialists that the *Bavarian Supreme Court* and the *Prosecutor General's Office* assigned to it would resist the fascist spirit of the times (Biebl and Helgerth, 2004, p. 186; Herbst, 1993, pp. 37, 53; Ladyga, 2012, p. 63) and that they would represent a stronghold of federalism and the rule of law that they did not want. The judiciary was to be transformed into a controlled and politicized judiciary (Ladyga, 2012, p. 63). On January 1st, 1935, the *Bavarian State Ministry of Justice* fell victim to the Second (Reich) Law on the Transfer of the Administration of Justice to the Reich of December 5th, 1934.³⁸ The Ministry was demoted to a simple department of the *Reich Ministry of Justice*. The *Bavarian Supreme Court* and the *Prosecutor General's Office* assigned to it followed³⁹ - together with all other state judicial authorities - on April 1st, 1935. The Third (Reich) Law

³⁵ § 2 of the Ordinance for the Protection of the People and the State of 28 February 1933 (RGBl. 1933 I, p. 83): Assumption of the powers of the supreme state authorities of Bavaria by the Reich government and appointment of General Ritter von Epp as Reich Commissioner (Herbst, 1993, pp. 37, 46).

³⁶ The fascist "reichification", however, looked back on tendencies that, after the revolution of 1918, became recognisable in the Weimar Republic. They also involved a streamlining of the judiciary, but could not politically assert themselves before January 31st, 1933 (Herbst, 1993, pp. 37, 52; Ladyga, 2012, p. 64 et seq.). The plan to abolish the Bavarian Supreme Court in the course of a so-called "(National Socialist) simplification of state institutions" combined the abolition with the relocation of a senate of the *Reichsgericht* from Leipzig to Munich (proposal of the Nazi *Prime Minister* Ludwig Siebert of September 5th, 1933) was not taken up by Hitler's government. Siebert was offered the *Reichsregierung*, in the event of the relocation of a senate of the *Reichsgericht* to Munich, to dissolve the Bamberg Higher Regional Court in addition to the dissolution of the Bavarian Supreme Court (Herbst, 1993, pp. 37, 53; F. Hettler, 2004, pp. 33–34; Hirsch, 2006, p. 3255).

³⁷ Appointment of Hans Frank as Reich Commissioner for Justice on March 10th, 1933 and his appointment as Bavarian State Minister of Justice on March 16th, 1933 after the resignation of the last democratically elected state government under *Prime Minister* Heinrich Held on March 15th, 1933, which also laid the foundation for the purge of Jewish judges and public prosecutors from the Bavarian judiciary that was then beginning (Herbst, 1993, pp. 37, 46, 47). By Act of June 27th, 1933 (GVBl. 1933, p. 185) the Bavarian Parliament (*Landtag*) dissolved the State Court as the first Bavarian justice institution. Impressive is the justification given for this by Hans Frank as Minister of Justice on behalf of the Ministry as a whole, which reveals the National Socialist programme: "The revolution of national uprising has brought with it a profound and as yet incomplete upheaval of the constitutional foundations. The provisions on the State Court are no longer in harmony with the development that has occurred. The right of the *Landtag* to impeach ministers has lost its original value in view of the right of the Reich Governor to appoint and dismiss ministers. Incidentally, it has never been put into practice. The same applies to the decreased importance of the *Landtag* when it comes to the impeachment of its deputies. The likelihood of a constitutional dispute, namely between the *Landtag* and the *State Government*, has also receded strongly into the background with the advent of the new constitutional situation. The constitutional complaint at last, a peculiarity of Bavarian law, has developed in recent years predominantly into an abused legal remedy, from which often only the so-called grousers drew benefit. In addition, however, it is not appropriate to continue to refer constitutional questions to a supreme court as long as the new constitutional development has not yet been completed. Only when this is the case it will be necessary to examine whether and in what new form there is room again for the jurisdiction of a Bavarian State Court." (quoted from Rumschöttel, 1997, pp. 5, 26; Grau, 1997a, pp. 69, 75–77).

³⁸ RGBl. 1934 I, p. 1214.

³⁹ See the correspondence between the then Bavarian Prime Minister Ludwig Siebert and the Bavarian State Minister of Justice Hans Frank: Merzbacher (1993, pp. 1, 15). The letter of thanks from the Reich Minister of Justice, Franz Gürtner, dated March 28th, 1935 (*Deutsche Justiz* 1935, p. 544) reveals the fascist ideology: ... "If I nevertheless had to decide to abolish this highest Bavarian court, it was because there can no longer be any room for a supreme state court in the new united Germany and its unified Reich judiciary created by the takeover of the state judicial administrations. And it is precisely in the name of this judiciary, in whose sphere the dream of centuries for German unity was first fulfilled, that I therefore extend my warmest thanks to the Bavarian Supreme Regional Court ... in the past and in the present. The Reich Government thanks them for their excellent, self-sacrificing work for the benefit of the German as well as the Bavarian people at all times - also during the severe shocks in the post-war years."

on the Transfer of the Administration of Justice to the Reich of January 24th, 1935⁴⁰ "reichified" the courts and public prosecutor's offices of the Member States of the Reich; they became Reich institutions (Biebl and Helgerth, 2004, p. 187; Rumschöttel, 1997, pp. 5, 26 et seq.). The *Bavarian Supreme Court* (and the *Prosecutor General's Office* assigned to it) ceased to exist on April 1st, 1935, 56 years after their foundation.⁴¹ The law decree of the Reich Minister of Justice of March 19th, 1935⁴² on changes in the judiciary in Bavaria transferred some of its competences to the *Reichsgericht* and others to the Munich Higher Regional Court (Biebl and Helgerth, 2004, p. 187). The last President of the *Bavarian Supreme Court*, Dr Gustav Müller, was dismissed with effect from April 1st, 1935; the remaining posts of the dissolved court were transferred to the Munich Higher Regional Court (Herbst, 1993, pp. 37, 53). As far as the unpublished "heritage" of the *Bavarian Supreme Court* is concerned, the files and records are largely lost. The files of the abolished *Bavarian Supreme Court* were almost completely lost during one of the Allied air raids in 1945 (Herbst, 1993, pp. 37, 43).

6. THE RE-ESTABLISHMENT OF THE BAVARIAN SUPREME COURT

Proclamation No. 1, promulgated by the Allied Commander-in-Chief Dwight D. Eisenhower in March 1945, closed the German courts.⁴³ The *Reichsgericht* in Leipzig ceased to exist on April 19th, 1945 (Fischer, 2010, pp. 1077, 1086).⁴⁴ By further Proclamation No. 1 of the Allied Control Council of August 8th, 1945, the Allies took over the supreme power of government in Germany.⁴⁵ In rebuilding the judiciary, the Allied Military Governments and the State or *Länder* Governments that the Military Governments soon appointed to office in all occupation zones followed the traditional court structure according to the (Reich) Courts Constitution Act. In the area of ordinary jurisdiction, a three-instance court structure was finally (re-)established, beginning with the district courts, continuing with the regional courts, and ending with the higher regional courts (Biebl and Helgerth, 2004, p. 191; Herbst, 1993, p. 59).⁴⁶

The period immediately after 1945 was hence characterized by the disappearance of the (central) Reich legislature. The German *Länder* (in East and West), which came into being soon after the collapse and which were increasingly given political responsibility by the allied military governments, replaced the missing Reich legislator, also due to the consequences of the war and emergency situations. Without the

⁴⁰ RGBl. 1935 I, p. 68.

⁴¹ Bavarian Law of February 23rd, 1879 (GVBl. 1879, p. 272) and the Bavarian Law on the Implementation of the (Reich) Court Constitution Act of April 10th, 1878 (JMBl. 1879, p. 99) – to be found in Biebl and Helgerth (2004, p. 486 et seq.); Tillich (1996, pp. 107, 109); Kalkbrenner (1975, pp. 184, 191).

⁴² RGBl. 1935 I, p. 383.

⁴³ Para. III of the Proclamation – retrieved on March 13th, 2021 from [Datei:Proclamation Nr. 1-Zweisprachige Bekanntmachung des Obersten Befehlshabers der alliierten Streitkräfte Dwight D. Eisenhower \(deutschsprachiger Teil\).jpg](https://www.fda.gov/oc/foia/Proclamation%20Nr.%201-Zweisprachige%20Bekanntmachung%20des%20Obersten%20Befehlshabers%20der%20alliierten%20Streitkr%C3%A4fte%20Dwight%20D.%20Eisenhower%20(deutschsprachiger%20Teil).jpg) – Wikipedia

⁴⁴ Attempts to re-establish the *Reichsgericht* in Leipzig immediately after the collapse of Nazi Germany failed, among other reasons, as a result of the Allied decisions of the Potsdam Conference. This included the withdrawal of the US troops from Saxony and Central Germany. The territories came under Soviet military administration, which had no interest in re-establishing the *Reichsgericht*. Instead, the Soviets arrested those judges of the former *Reichsgericht* they could get hold of and imprisoned them in the Mühlberg concentration camp on the river Elbe, where most of them died (Fischer, 2010, pp. 1077, 1086).

⁴⁵ Amtsblatt des Alliierten Kontrollrats 1945, p. 4 – corrected p. 241.

⁴⁶ For the initial shortcomings see Merzbacher (1993, pp. 1, 17).

restrictions of the Weimar Reich Constitution,⁴⁷ which had become obsolete, the re-established and newly established Länder had access to regulatory matters that had been reserved for the Reich before May 8th, 1945. As a result, legal unity in Germany became increasingly fragmented. With the exception of the Supreme Court for the British Zone (Fischer, 2010, p. 1077,1086), it was not possible to establish an overarching court of appeal. Plans for this failed for various reasons.⁴⁸ Cooperation between the Allies dwindled with the Cold War. The French military government was very idiosyncratic in its occupation policy, especially with regard to the Saarland, a state located in the extreme southwest of Germany with rich coal deposits and a pronounced steel industry (Fischer, 2010, pp. 1077, 1086). The western state governments were nothing but satisfied with the state of affairs. With its three higher regional courts in Bamberg, Munich and Nuremberg, the Bavarian State Government found the problems resulting from the fragmentation of the law in Bavaria all the more pressing.

The preparatory work for the re-establishment of the *Supreme Court of Bavaria* began late in 1947. A draft law for the re-establishment of the *Supreme Court* was discussed in the Council of Ministers on September 12th, 1947⁴⁹ and submitted to the *Landtag*, the Bavarian Parliament, on September 19th, 1947, which passed it with marginal amendments only on October 31st, 1947 as Act no 124.⁵⁰ The *Bavarian Supreme Court* (including the General Public Prosecutor's Office assigned to it) was re-established on July 1st, 1948. Pursuant to § 4 of Act No. 124, its jurisdiction extended to appeals against

⁴⁷ Articles 6 to 11 of the Weimar Reich Constitution of August 11th, 1919 (RGBl. 1919 p. 1383) regulated the broad subjects of the exclusive, concurrent and frame work legislation of the Reich. With the exception of the exclusive legislative competence of the Reich under Article 6 of the Constitution, the Länder were only competent to legislate insofar as the Reich had not regulated the numerous legislative matters by Reich law (Article 12 paragraph 1 of the Reich Constitution). The Weimar Republic was thus far more centralised than the Federal Republic of Germany is today.

⁴⁸See Merzbacher (1993, pp. 1, 15 et seq.) for the discussion in the *Länderrat*, an overarching institution within the American occupation zone consisting of representatives of the five Länder of the zone, Bavaria, Bremen, Hesse, Württemberg-Baden, Württemberg-Hohenzollern, and with the authority to ensure harmonized policies between the Länder Governments concerned.

⁴⁹ Protocol No. 33 of the Council of Ministers of September 12th, 1947, p. 4 et seq. The main reasons considered by the Bavarian State Government were the following: legal unity in Bavaria, the disappearance of the *Reichsgericht* and increasing regulations under Land law that required uniform interpretation. The Bavarian State Minister of Justice at the time (re-establishment of the Ministry of Justice with the announcement of 5 December 1945 [JMBl. 1945, p. 2]) Wilhelm Hoegner, incidentally an outspoken federalist, also saw the Bavarian Supreme Court as an important milestone for a stronger autonomy of the Free State of Bavaria within a re-established German State as a whole (Biebl and Helgerth, 2004, p. 192). On the contrary, the idea of establishing the Bavarian Constitutional Court within the Supreme Court, as it had been the case until 1933 (cf. § 70 para. 1 of the Bavarian Constitution of 14 August 1919 [GVBl. 1919, p. 531]), was initially discussed in the political discussion at the time (Grau, 1997a, p. 69 et seq., 1997e, p. 78 et seq.; Gummer, 1993, pp. 359, 361; Ruf, 2015, p. 374 et seq.), but not pursued further. The Bavarian Constitution of December 2nd, 1946 (GVBl. 1946, p. 333) had instituted the Bavarian Constitutional Court as an autonomous constitutional body (Herbst, 1993, pp. 59, 61). The incorporation of the Constitutional Court into the Supreme Court would have required an amendment to the Constitution that had come into force a year earlier. The Bavarian state government did not want to go down this path, since in Bavaria constitutional amendments are subject to a referendum. Similarly, hopes of establishing the nucleus of the Supreme Court for the US occupation zone in the Bavarian Supreme Court were dashed, similar to the Supreme Court for the British zone in Cologne, which functioned between March 1948 and September 1950 (Biebl and Helgerth, 2004, p. 194 et seq.; Kalkbrenner, 1975, pp. 184, 191 et seq.).

⁵⁰ Act N. 124 (GVBl. 1948, p. 83) – see for the history of the re-establishment Merzbacher (1993, pp. 1, 15–17). In the parliamentary deliberations in the session of the Bavarian Parliament of October 31st, 1947, Thomas Dehler, a member of the Bavarian State Parliament and later Federal Minister of Justice, referred to the necessity of re-establishing the Supreme Court as an act of reparation for Nazi injustice inflicted on Bavaria (Herbst, 1993, pp. 59–60).

verdicts of the (lower) jury courts⁵¹ and to appeals in other criminal cases pursuant to § 5(1) of Act No. 124 only if the competent courts (Regional Court and Higher Regional Court) referred the matter to the *Supreme Court* for the purpose of clarifying fundamental questions or ensuring the uniformity of the case law.

This model of jurisdiction of the *Bavarian Supreme Court* did not last for long. After the founding of the Federal Republic of Germany on May 23rd, 1949, the Basic Law,⁵² the new German Constitution, redistributed legislative jurisdiction between the Federal State and its *Länder*.⁵³ The law of judicial proceedings and of the court structure within Germany became the subject of concurring federal legislation.⁵⁴ The (Federal) Law for the Restoration of Legal Unity in the Area of the Constitution of the Courts, the Administration of Justice in Civil Matters, Criminal Proceedings and the Law on Costs of 12 September 1950⁵⁵ made it necessary to re-design the jurisdiction of the *Bavarian Supreme Court*, also with view to the *Federal Supreme Court of Justice* (Biebl and Helgerth, 2004, p. 206 et seq.; Herbst, 1993, pp. 59, 62 et seq.), established on October 1st, 1950 in Karlsruhe. The re-design was carried out almost immediately (Biebl and Helgerth, 2004, p. 208 et seq.). The competences of the Bavarian Supreme Court, also in relation to the Federal Supreme Court, have remained essentially unchanged since the beginnings of the Federal Republic of Germany and were based on a division of labour. The Bavarian Supreme Court decided appeals on legal points in criminal cases that began in the district courts, and in (administrative) fine cases as well as in civil cases if the subject matter of the dispute was based rather exceptionally in Bavarian state law, and in matters of non-contentious jurisdiction, while the Federal Supreme Court decided criminal appeals that began in the first instance in the regional courts. The bulk of civil law appeals were and are based in federal law. They also fall under the jurisdiction of the Federal Supreme Court of Justice. State protection offences (such as high treason and treason against the state, treason against the peace, acts endangering the democratic constitutional state and the rule of law, espionage or terrorism) traditionally were allocated at the highest German criminal court with the consequence that there were no legal remedies against the verdicts of the Federal Supreme Court of Justice. With the transfer of first-instance jurisdiction from the Federal Supreme Court of Justice to the Higher Regional Courts of the *Länder*, the Bavarian Supreme Court in criminal cases also experienced an extension of first-instance jurisdiction. This distribution of jurisdiction remained⁵⁶ until the Bavarian Supreme Regional Court was abolished for the second time.

⁵¹ The background to the jury courts was that at that time legal remedies were considerably limited for reasons of scarcity of resources. In principle, there was only one legal remedy; a third instance was excluded (Strafgerichtsverfassungsgesetz 30 March 1946 [GVBl. 1946, p. 100]; Act No. 43 on Appeals in Contentious and Non-contentious Matters [Appeals Act] of 10 April 1946 [GVBl. 1946, p. 300]) (Biebl and Helgerth, 2004, p. 194). The jury courts were instituted by decree of the Bavarian State Ministry of Justice of July 14th, 1948 (GVBl. 1948, p. 243) (Biebl and Helgerth, 2004, p. 192 et seq.).

⁵² BGBl. 1949, p. 1

⁵³ Articles 70 et seq.

⁵⁴ On the fragmentation of law after 8 May 1945 see Biebl and Helgerth (2004, p. 205 et seq.). In this context, see Article 186 paragraph 2 of the Bavarian Constitution and Lindner, Möstl and Wolff (2017, Art. 187 recitals 8 et seq., as well as Articles 123 et seq. of the Basic Law).

⁵⁵ BGBl. 1950, p. 455.

⁵⁶ On the unsuccessful attempts to abolish the Bavarian Supreme Court until 2006 see Biebl and Helgerth (2004, p. 216 et seq.).

7. THE SECOND DISSOLUTION ON JUNE 30TH, 2006

Elections to the Bavarian Parliament were held in the fall of 2003. The Christian Social Union (CSU), which has been in government since 1946 with only a brief interruption, under its party chairman and *Prime Minister* Edmund Stoiber, emerged from the elections with more than 60 per cent of the votes and a two-thirds majority of seats in parliament. In order to further promote technological progress, Edmund Stoiber, the old and new head of government, combined this policy of modernizing the economy and society with an unprecedented fiscal austerity programme in order to generate the necessary financial resources within Bavaria – called “the project administration 21” (F. Hettler, 2004, p. 33). Streamlining the state apparatus was a guiding principle of the programme of the new Stoiber cabinet IV. This excessive austerity policy also hit the *Bavarian Supreme Court*, like a bolt from the blue.⁵⁷ Without consultation with, for example, the then *State Minister of Justice* Beate Merk, the head of government announced in his government declaration on November 9th, 2003, to a largely speechless Bavarian Diet and a no less speechless public the abolition of the *Supreme Court of Bavaria* for reasons of state austerity and of simplifying the public institutions (F. Hettler, 2004, p. 33).⁵⁸ With a two-thirds majority in parliament, Edmund Stoiber did not have to be worried about any opposition to this from the government majority.⁵⁹ Moreover, the *Bavarian state government* did not care about uprising public protests,⁶⁰ which were also voiced outside Bavaria in favour of the court’s continued existence. On October 25th, 2004, the Bavarian *Landtag* passed the Act on the Dissolution of the *Bavarian Supreme Court* and the *Public Prosecutor’s Office* at this Court.⁶¹

The Repeal Act was challenged before the *Bavarian Constitutional Court*.⁶² The chances of success of this constitutional complaint were low when realistically assessed.

⁵⁷ This lightning strike came all the more suddenly as all of Bavaria’s prime ministers since 1946 have unanimously emphasised the importance of the Supreme Court for Bavaria’s autonomy in Germany’s federal system, praised the quality of its jurisprudence in the highest terms and - including Prime Minister Edmund Stoiber - rejected far from their minds any thought of abolishing this special Bavarian feature in Germany (see F. Hettler, 2004, p. 33 et seq.). On the occasion of the change in the office of the President of the Supreme Court on July 26th, 2000, only four years prior to the announced abolition, Prime Minister Stoiber stated: “Significantly, the 375-year history of the Bavarian Supreme Court was only interrupted during the time of the Nazi regime. In 1935, the Bavarian Supreme Court was abolished in the course of the politics of Gleichschaltung (“bringing into line”). This not only destroyed a symbol of Bavaria’s statehood but also an important guarantor of an independent judiciary.” (quoted by F. Hettler, 2004, p. 33).

⁵⁸ Insofar as Prime Minister Edmund Stoiber spoke of “simplifying the state” to justify the abolition of the over 375-year-old court, he unintentionally and without a corresponding awareness of history repeated the language used by the National Socialists in the “Reichification” of the federal judicial institutions and in the abolition of the Bavarian Supreme Court in 1935. In political discourse in Germany, one must always be careful with buzzwords! In addition: By dividing the jurisdiction of the dissolved Supreme Court among the three Higher Regional Courts, a regionalisation of case law was to occur, according to the state government. What the constitutional advantage of such an atomisation of uniform case law is supposed to be, still remains to be clarified.

⁵⁹ The Supreme Court found no real defenders in the parliamentary opposition. With a rather fatalistic attitude, the leader of the SPD parliamentary group in the state parliament at the time, Franz Maget, commented on the abolition. Only a few voices of opposition were raised, claiming that a tried and tested institution was being sacrificed for the sake of money only (see F. H. Hettler, 2004b, pp. 35, 37 et seq.).

⁶⁰ Since 1993, the Prime Minister himself had repeatedly - most recently in July 2000 - emphasised the necessity of uniform jurisdiction for Bavaria by the Supreme Court as well as the trend-setting significance of the Court’s decisions for the whole of Germany, while at the same time condemning the elimination of the Court by the Nazi regime. According to the text of the government declaration of November 2003, the abolition was supposed to be about “pruning our legal state back to a lean rule- of-law state”. As for the protesting voices see Hettler (2004a, p. 38 et seq.).

⁶¹ Court Dissolution Act of 25 October 2004 (GVBl. 2004, p. 400).

⁶² File no Vf. 3-VII-05 and Vf. 7-VIII-05.

It was therefore hardly surprising that on September 29th, 2005 the *Constitutional Court* confirmed the constitutionality of the repeal of the *Supreme Court*.⁶³ The *Constitutional Court* ruled that it is primarily a prerogative of the *State Government* to push ahead with political reforms and that it is up to the democratic legislator to decide what form a state administration and court organization should take below the mandatory constitutional requirements. There is no provision in the Bavarian Constitution that deals with the organization of the courts in Bavaria. Only the *Constitutional Court* is named in the constitution as a special body alongside the *State Government* and the *Landtag*, and is endowed with its own competences. Opponents of the abolition of the *Supreme Court* might have hoped that the *Constitutional Court* would address the “streamlining” and cost-saving effects of the Act of Abolition. Politically, this discussion had and has long been held, and in the end, it was also seen that it bordered on arbitrariness or ignorance on the part of the *State Government* to back this horse. The *State Government* was not ready to row back. In judicial restraint and very wisely, however, the *Constitutional Court* did not go down this path⁶⁴ - incidentally, a value of constitutional jurisprudence in Bavaria that cannot be appreciated highly enough. With the verdict of the *Constitutional Court* that the dissolution of the *Supreme Court* was not constitutionally objectionable, it was clear to the disappointment of even the supporters of the court: times pass, even if the loss hurts.

8. THE ESTABLISHMENT OF THE BAVARIAN SUPREME COURT IN 2018

As of July 1st, 2006, the Higher Regional Courts in Munich, Nuremberg and Bamberg exercised the functions previously performed by the *Supreme Court*. By means of the Dissolution Act of 2004, the *Land* legislation had concentrated certain functions at the aforementioned courts so that they functioned as a kind of a tripartite supreme court; the special courts for medical professionals, for architects and for engineers, for example, were located at the Munich Higher Regional Court. All legal appeals in administrative offence cases were concentrated at the Bamberg Higher Regional Court. Nevertheless, it was a time of interim. Coordination between the Higher Regional Courts in the revision cases in criminal matters was not facilitated, if only because of the geographical distances. A central collection of judicial findings was lacking. Their publication in internet databases did not completely replace a legal uniformity that the *Supreme Court* would have to produce. Bavaria had to cope with the situation created in 2004 and became effective in 2006.

Similarly to the announcement of its dissolution came the announcement by Minister President Markus Söder in early 2018 that the *State Government* intended to establish the Supreme Court within Bavaria. Whether there was a link to the upcoming parliamentary elections in Bavaria in October 2018 remains speculation. The establishment of a (supreme) court *prima facie* does not seem likely to mobilize masses of voters. In any case, there was no recognizable external impetus for this step, so the *Prime Minister's* announcement came as a real surprise.

⁶³ VfGH 58, p. 212 et seq.

⁶⁴ Unfortunately, the Constitutional Court did not discuss the issue whether the Supreme Court, in its centuries of existence, represented a part of Bavaria's legal culture and whether it was in keeping with the Bavarian Constitution's understanding of a cultural state to sacrifice such a proven institution on the altar of reform for the sake of “filthy lucre”. In case of doubt, the Constitutional Court would have exercised restraint and left this sacrifice to the ultimate democratic responsibility of Parliament.

The *Bavarian Supreme Court* was established on September 15th, 2018, on the basis of the Act of July 11th, 2018. The first sentence of Article 1 of this Act simply states: "There shall be a *Bavarian Supreme Court* with its seat in Munich." The official explanations of the said law do not say a single word about the *Bavarian Supreme Court*, abolished on June 30th, 2006. Had this been done, it might have become necessary to address the reasons for the 2006 dissolution and then to explain why in 2018 the reasons given in 2004 no longer applied. Markus Söder obviously wanted to avoid this discussion with one of his predecessors in the office of the prime minister. Such a discussion would have been anything but pleasant or fruitful and would have led nowhere. The *State Government's* explanatory reasons for the proposed act of legislation also do not assume a "re-establishment" of the *Bavarian Supreme Court*,⁶⁵ but explicitly assume a new establishment. In the first reading of the government bill in the *Bavarian Landtag*, the then *State Minister of Justice*, Professor Dr Winfried Bausback, spoke of the "new Bavarian Supreme Court" as the "new flagship of the Bavarian judiciary", which "takes up a great tradition of the Bavarian Supreme Court". Nevertheless, the *State Government* did not fully return to the *status quo ante*. The *Office of the Public Prosecutor General* (at the *Supreme Court*) was, for example, not re-established. For reasons of economy or of money; moreover, the tasks of the Public Prosecutor vis-à-vis the *Supreme Court* were concentrated at and conducted by the Munich Office of the Public Prosecutor General (at the Munich High Regional Court) for the entire territory of Bavaria.

After 2006, federal legislators in particular did not hold their breath. Whereas in matters of non-contentious jurisdiction the Bavarian Supreme Court became the leading civil law institution recognized throughout Germany and exercising a predominant influence on this area of law, federal law brought about a change through the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction of December 17th, 2008 (FamFG), which entered into force on September 1st, 2009.⁶⁶ This Federal Act allocated respective final appeal jurisdiction to the *Federal Supreme Court of Justice*.⁶⁷ For the Supreme Court of Bavaria, the legal domain of non-contentious matters was thus definitely lost.⁶⁸

8.1 The Current Jurisdiction in Civil Matters

In civil matters, the new *Supreme Court of Bavaria* has jurisdiction: 1. to decide on appeals, leap-frog appeals and appeals on points of law, as well as complaints and applications pursuant to § 7(2) sentence 2 of the Introductory Act to the Code of Civil Procedure (EGZPO)⁶⁹ in civil disputes, also insofar as the provisions of the Code of Civil Procedure (ZPO) do not apply to them, 2. to determine the competent court pursuant to

⁶⁵ Indeed, the choice of words for a re-establishment in 2018 would have been reminiscent of the circumstances surrounding the first re-establishment of the Supreme Court. Whereas in 1947/1948 it was a matter of a new beginning after a lost war, of rebuilding the rule of law destroyed by the Nazis and of redressing the injustice inflicted by the Nazis on Bavaria's more than 1,000 years of statehood, in 2004 it was a matter of a penny-pinching reform policy by the state government, which may be considered wrong but must not be compared with the Nazi methods of 1935.

⁶⁶ BGBl. 2008 I p. 2586, 2587.

⁶⁷ § 70 et seq. of the FamFG.

⁶⁸ § 133 of the Courts Constitution Act also allocates the final appeal jurisdiction on care and mandatory treatment matters with the Federal Supreme Court of Justice.

⁶⁹ Act concerning the introduction of the Code of Civil Procedure of January 30th, 1877, in the purified version published in the BGBl. III, systematic No. 310-2, which was last amended by article 1 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3328).

§ 36 ZPO, 3. to decide on applications pursuant to § 23(1) EGGVG⁷⁰ in civil matters, 4. to decide on arbitration matters pursuant to § 1062 of the ZPO, 5. to decide matters pursuant to § 6(1) sentence 1 of the Capital Investor Model Case Act,⁷¹ 6. to hear and decide on cases pursuant to model determination proceedings pursuant to Book 6 of the ZPO, 7. to decide on appeals pursuant to § 99(3) sentence 2 of the Stock Corporation Act,⁷² 8. to decide on appeals pursuant to § 27 of the Introductory Act to the Stock Corporation Act⁷³ in conjunction with § 99(3) sentence 2 of the Stock Corporation Act, 9. to decide on appeals pursuant to § 189(3) 1st sentence of the Act on the Supervision of Insurance Corporations⁷⁴ in conjunction with § 99(3) 2nd sentence and § 132(3) 1st sentence of the Stock Corporation Act, 10. to decide on appeals pursuant to § 260(3) 1st sentence of the Stock Corporation Act in conjunction with § 99(3) 2nd sentence of the Stock Corporation Act, 11. to decide on appeals pursuant to § 12(1) of the Act on the Settlement Proceeding under Company Law,⁷⁵ 12. to decide on appeals pursuant to § 51b 1st sentence of the Limited Liability Companies Act⁷⁶ in conjunction with § 132(3) sentence 1 and § 99(3) 2nd sentence of the Stock Corporation Act, 13. to decide on appeals pursuant to § 10(3) of the Transformation Act⁷⁷ and pursuant to § 10(1) 3rd sentence of the Transformation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code,⁷⁸ each in conjunction with § 30(2) 2nd sentence, § 36(1) 1st sentence, § 44 1st sentence, §§ 60, 81(2), § 100 1st sentence and § 125 of the Transformation Act, 14. to decide on appeals pursuant to § 10(4) of the Transformation Act in conjunction with § 293c(1) 1st sentence and § 320(3) of the Stock Corporation Act, as well as pursuant to 293(1) 5th sentence and § 320(3) 3rd sentence of the Stock Corporation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code, 15. to decide on appeals pursuant § 10(4) of the Transformation Act in conjunction with § 293c(2) and § 320(3) of the Stock Corporation Act as well as pursuant to § 293c(1) 5th sentence and § 320(3) 3rd sentence of the Stock Corporation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code, 16. to decide on appeals according to § 10(4) of the Transformation Act in conjunction with § 327c(2) 3rd and 4th sentences and § 293c(2) of the Stock Corporation Act and according to § 327c(2) 4th sentence in conjunction with § 293c(1) 5th sentence of the Stock Corporation Act, as well as according to § 318(5) 3rd sentence of the Commercial Code, and finally 17. to decide on appeals pursuant to § 5(5) of the Introductory Act to the Stock Corporation Act in conjunction with § 12(1) of the Act on the Settlement Proceeding under Company Law. In addition to these matters, the

⁷⁰ Introductory Act to the Court Constitution Act of January 27th, 1877, in the amended version published in the BGBl. III, subdivision No. 300-1, as published, which was last amended by article 4 of the Act of December 12th, 2019 (BGBl. 2019 I p. 2633).

⁷¹ Capital Investor Model Case Act of October 19th, 2012 (BGBl. 2012 I p. 2182), as last amended by article 1 of the Act of October 16th, 2020 (BGBl. 2020 I p. 2186).

⁷² of January 30th, 1937 (RGBl. 1937 I p. 107) in the version of September 6th, 1965 (BGBl. 1965 I p. 1089) as last amended by article 1 of the Act of December 12th, 2019 (BGBl. 2019 I p. 2637).

⁷³ Introductory Act to the Stock Corporation Act of September 6th, 1965 (BGBl. 1965 I p. 1185), as last amended by article 2 of the Act of December 12th, 2019 (BGBl. 2019 I p. 2637).

⁷⁴ Insurance Supervision Act of April 1st, 2015 (BGBl. 2015 I p. 434), as last amended by article 6 of the Act of December 9th, 2020 (BGBl. 2020 I p. 2773)*.

⁷⁵ of June 12th, 2003 (BGBl. 2003 I p. 838) as last amended by article 16 of the Act of July 23rd, 2020 (BGBl. 2020 I p. 2586).

⁷⁶ Law on Limited Liability Companies as published in BGBl. Part III, systematic no 4123-1, as last amended by article 16 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3256).

⁷⁷ Transformation Act of October 28th, 1994 (BGBl. 1994 I p. 3210; 1995 I p. 428), as last amended by article 1 of the Act of December 19th, 2018 (BGBl. 2018 I p. 2694).

⁷⁸ Commercial Code in the adjusted version published in BGBl. III, subdivision number 4100-1, as last amended by article 14 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3256).

legislator has assigned public procurement cases to the *Supreme Court* pursuant to § 171(1) and (2) of the Act against Restraints of Competition and cartel cases pursuant to §§ 7(2), 63(4); 83; 85 and 86 of the Act against Restraints of Competition,⁷⁹ which are dealt with by special panels of the Court.

These predominantly corporate and competition law related matters require expertise in order to be dealt with (promptly, because it is frequently urgent), which is allocated to two civil divisions (Zivilsenate) of the *Supreme Court*. Those senates consist of one presiding and four co-judges each; one of the presiding judges is the Court President himself. More responsibilities are to be expected in the future because the court is a young institution. The Bavarian Police Authorities Act (Polizeiaufgabengesetz [PAG]), for example, currently in parliamentary consultation, provides that the decision of legal appeals against deprivations of liberty by the Police (article 99 of the government draft) will be concentrated at the Bavarian Supreme Court. The adoption of this law can be expected in the course of summer of 2021.

It is an undeniable constitutional fact. The most important matters of human coexistence in Germany form the subjects of federal (or European) legislation; the competence of the Länder in legislation is limited, roughly speaking, to religious matters and to the cultural sphere, to public education and public safety and order. In the future, it will be up to the skills of the Bavarian State Government in the German Bundesrat⁸⁰ and the attentiveness of the Bavarian Members of Parliament in the German Bundestag to provide new federal laws or laws to be amended with a "*clausula bavarica*", which will allow Bavarian state law to concentrate further matters of jurisdiction in the Supreme Court. The tenacity of the former state governments in the Kingdom of Bavaria in defending their Supreme Court against all centralist efforts at the Reich level may serve as a guideline for future legislators.

8.2 The Current Jurisdiction on Criminal Matters

In the area of criminal jurisdiction, the new *Supreme Court* has jurisdiction to decide on appeals on the point of law pursuant to the CPC, the Economic Offences Act 1954⁸¹, the Administrative Offences Act⁸² (OWiG), the Act on International Mutual Legal Assistance in Criminal Matters⁸³ (IRG), or any other provision referring to the provisions of these laws with regard to the procedure, to decide on applications pursuant to § 23(1) EGGVG, insofar as they matter of the administration of criminal justice or law enforcement, to decide on appeals against decisions of the penitentiary execution chambers under §§ 50(5), 116, 138(3) of the Act on the Execution of Criminal Sanctions⁸⁴ (StVollzG) and against decisions of the juvenile chambers under § 92(2) of the Juvenile

⁷⁹ Act against Restraints of Competition in the version published on June 26th, 2013 (BGBl. 2013 I p. 1750, p. 3245), as last amended by article 8 of the Act of February 22nd, 2021 (BGBl. 2021 I p. 266).

⁸⁰ Article 50 of the Basic Law reads: The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union. According to article 51 para. 1 of the Basic Law the *Bundesrat* consists of the *Länder Governments*.

⁸¹ Economic Offences Act 1954 in the version promulgated on June 3rd, 1975 (BGBl. 1954 I p. 1313), as last amended by article 2 of the Act of December 21st, 2019 (BGBl. 2019 I p. 2911).

⁸² Administrative Offences Act in the version published on February 19th, 1987 (BGBl. 1987 I p. 602), as last amended by article 3 of the Act of November 30th, 2020 (BGBl. 2020 I p. 2600).

⁸³ Law on International Mutual Assistance in Criminal Matters in the version promulgated on June 27th, 1994 (BGBl. 1994 I p. 1537), as last amended by article 1 of the Act of November 23rd, 2020 (BGBl. 2020 I p. 2474).

⁸⁴ Act on the Execution of Criminal Sanctions of March 16th, 1976 (BGBl. 1976 I pp. 581, 2088; BGBl. 1977 I p. 436), as last amended by Article 7 of the Act of December 9th, 2019 (BGBl. 2019 I p. 2146).

Court Act⁸⁵ (JGG). These appeals are handled by a total of seven criminal divisions (Strafsenate), each staffed by a presiding judge and two associate judges. The Supreme Court, which was dissolved in 2006, was concentrated in the State capital of Munich. The Court Establishment Act of 2018 has taken into account the government's programme of strengthening Bavarian regions, which includes the relocation of central institutions of Bavaria therein. Accordingly, the Court Establishment Act has created external senates of the Supreme Court, namely two criminal senates in Nuremberg and two criminal senates in Bamberg. The criminal senates in Nuremberg additionally function as separate state courts for the medical professions,⁸⁶ architects and engineers,⁸⁷ in Munich, the 7th criminal senate performs the separate function of a disciplinary court for notaries⁸⁸ and of a senate for tax advisor and tax agent matters.⁸⁹ The special feature of these special courts in Nuremberg and Munich is that, in addition to the three professional judges, honorary or lay judges from the respective professions also participate in the hearings and decisions. The Nuremberg courts act as courts of last instance; in Munich, the disciplinary court for notaries is a first instance, the senate for tax advisor and tax agent a second instance court so that appeals are admissible and dealt with by the Federal Supreme Court of Justice.

With the Court Establishment Act of July 11th, 2018, as stated above, the legislature did not completely return to the "status quo ante" prior to June 30th, 2006. The "old" Supreme Court was assigned first-instance jurisdiction on security-related criminal cases. During the interim period, the Munich Higher Regional Court had jurisdiction to hear and decide such cases. With the Act of July 11th, 2018 the Bavarian legislature left it at that. Thus, unfortunately, it has not currently given the Supreme Court the opportunity to position itself in this increasingly important area of criminal law. The state government's explanatory memorandum to the Establishment Act is silent on the reasons why it has refrained from this option, leaving the observer to speculate. The opportunity, however, has not been lost; the Court Constitution Act still permits the transfer of this jurisdiction from the Munich Higher Regional Court to the Supreme Court. As an institution, the Supreme Court is young; it has to establish itself in the areas of competence so far assigned to it. In this respect, it remains to be hoped, perhaps even expected: "Time will tell!"

9. PROSPECTUS

The Supreme Court was established in Bavaria after parliamentarians in the Landtag endorsed its establishment almost unanimously, although the opposition side recalled with some satisfaction the statements of the government and the member of the government party in the Bavarian parliament at the time on the Court's dissolution in 2006. However, the Court's case law is tied to the legacy and already continues the sound jurisprudence to which Bavaria and Germany have accustomed to from the Bavarian

⁸⁵ Juvenile Courts Act in the version promulgated on December 11th, 1974 (BGBl. 1974 I p. 3427), which was last amended by article 1 of the Act of December 9th, 2019 (BGBl. 2019 I p. 2146).

⁸⁶ Bavarian Health Professionals Chamber Act in the version published on February 6th, 2002 (GVBl. 2002 p. 42, BayRS 2122-3-G), as last amended by § 3 of the Act of December 23rd, 2020 (GVBl. 2020 p. 678).

⁸⁷ Bavarian Construction Professionals Chamber Act of May 9th, 2007 (GVBl. p. 308, BayRS 2133-1-B), as last amended by § 2 of the Act of December 23rd, 2020 (GVBl. 2020 p. 678).

⁸⁸ Federal Code of Notaries in the corrected version published in BGBl. III, subdivision number 303-1, as last amended by article 12 of the Act of November 30th, 2019 (BGBl. 2019 I p. 1942).

⁸⁹ Federal Tax Consultancy Act in the version published on November 4th, 1975 (BGBl. 1975 I p. 2735), as last amended by Article 37 of the Act of December 21st, 2020 (BGBl. 2020 I p. 3096).

Supreme Court. In this respect, the signs are good. After the institution's troubled history, it is highly unlikely that a new state legislature will lay a hand on the court again. These are also good signs. The debates at the federal level on changing German court constitutional law in the sense of streamlining it have come to a standstill for some time. In view of many branches of the courts in Germany, which the Basic Law with the federal supreme courts as set forth by article 95(1) has prescribed in firm constitutional terms, and with view on the different procedural codes that are applied within those branches of the courts, simplifying the organization of the courts in Germany is a mammoth task that cannot be accomplished in a four-year legislative period in the German Bundestag. Unfortunately, very few politicians think beyond four their years term of parliament. The era of the great codifications that emerged at the end of the 19th century, which were also intensively discussed with the scholarly community, are hardly conceivable today. Despite the bitter taint, it can therefore be stated that Bavaria's Supreme Court is currently not under serious threat from federal politics either. The European Union is on the fringes. Community law regards it as a *domaine réservé* of the Member States of how they organize themselves. This applies in particular to the organization of domestic courts.

The look has a negative inflection. As the State Government has emphasized in its explanatory memorandum to the law and as it has also been taken up in parliament, the unique character of the Bavarian Supreme Court in Germany may have an effect not only on the landscape of courts. This may be linked to the expectation that in those areas of law, which have been transferred to the jurisdiction of the Supreme Court, the court will once again play a formative role in German jurisprudence alongside and in addition to the Federal Supreme Court of Justice. Insofar as it is within the power of the court, it will pursue the expectation. However, this is only one side of two medals. The State Government as well as the Bavarian Parliament, if they accomplish the cultural mandate from Article 3(1), 1st sentence of the Constitution, have to fulfil their task to make this possible for the court. As already stated above, culture includes legal culture and not only the cultivation of fine arts or the preservation of monuments. Not without reason did the constitutional legislator list the cultural state immediately after the legal state in its enumeration of state programmes and goals. The constitution is aware of their proximity and interdependence. The measures required in this regard certainly comprise the court's material and personnel resources; its competences must also be cultivated in accordance with the mandate and, wherever possible, expanded. The statements of the Bavarian Constitution on the cultural state are not exhausted in Art. 3(1), 1st sentence. According to Art. 140, for example, the Free State of Bavaria is also required to promote science and the arts. Science is not limited to the (state) universities, but can also take place in other institutions that are no less worthy of support. The scientific/scholarly mode of operation of a supreme court in its decision-making at least suggests the creation of a relationship that brings together the fields concerned. In this respect, there are clearly no limits to the political ingenuity of the responsible authorities and, of course, of the Court.

With the establishment of the Supreme Court, the state government has set its sights on strengthening Bavaria's autonomy within the federal structure of the Federal Republic of Germany. Courts accomplish federal landmarks only through their jurisprudence; they do not engage in the political struggle for state rights and federal prerogatives. Since the *Reichsjustizgesetze* of 1879, none of the German federal states, neither states of the Empire, nor the *Reichsländer* and or any other federal state of the Federal Republic of Germany has followed the example of setting up a supreme court, although the prerequisites are met by North Rhine-Westphalia, Baden-Württemberg, Rhineland-Palatinate and Lower Saxony. In future times the existence of a supreme court

in one *Bundesland* will not be sufficient to counteract the dwindling competences of the *Länder*. Crisis situations, such as the one triggered by the Covid 19 pandemic, show, however, that if the *Länder* act symphonically and not cacophonously, German federalism is quite capable of taming such catastrophes. A non-political body like the Supreme Court, nevertheless, is of little help in this regard. Politically speaking, however, the existence of a supreme court is a Bavarian trademark, after all other Bavarian prerogatives perished with the empire. As Wilhelm Hoegner, Bavaria's only SPD prime minister, once put it, the court is the last visible remnant of an autonomous Bavaria.

The law of the European Union creates room for maneuvering of individual regions of the member states. This is an expression of the principle of subsidiarity, which the treaties identify as one of the essential ways in which the Union functions. It would be presumptuous to expect all federally organized member states to follow the Bavarian flag. The Republic of Austria as a whole has fewer inhabitants than neighbouring Bavaria, and this can be broken down to the Austrian *Bundesländer*. Nevertheless, "a Europe of the regions" is an area in which a state institution can grow and where, within the network of national courts, such an institution as the Supreme Court can evolve to the best of the country but also to the best of the Union. Perhaps it was a failure of the former Supreme Court, which was abolished in 2006, not to have pursued this more actively. In the supranational setting, the Supreme Court's conceptuality is challenged, for one thing. On the other hand, when judicial ideas are expressed by the Court, politicians may be well advised not to grab a spoke in the wheel of the realization of such ideas.

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