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Summary
of the seminar conducted on 13 May 2019 in Berlin
(Transcript based on notes)

1. Functions of the supreme administrative courts (SAC):

The SACs universally perform the following three functions: An enhanced guarantee of correctness in the respective individual case (so-called ‘individual case justice’); the preservation or creation of uniformity and consistency of the dispensation of justice; the further development of the dispensation of justice. If the SAC simultaneously plays the role of the court of first resort and the court of last resort, the individual case justice has priority. If it plays the role of an appellate court (in particular, a final appellate court), the other two functions have priority. However, the SAC always performs the other functions as well.

2. Filter systems:

The purpose of the existence of filter systems in situations in which the SAC is accessed in the form of an appellate court is to focus the SAC on the task of exercising its case-spanning functions that are associated with either the preservation or creation of the uniformity and consistency of the dispensation of justice, or the further development of the same; towards this end, it should be relieved of all procedures that have nothing to do with these functions. Sometimes, the SAC is accessed as an appellate court in addition to the correcting of serious procedural errors; such a course of action serves the purpose of individual case justice, but it is limited to serious cases.

Such filter systems establish tangible approval criteria, which are used to signify the purpose of the legal remedy: The criterion of divergence signifies the legal-remedy-purpose associated with the preservation of the uniformity of the dispensation of justice, and the criterion of a 'fundamental significance of the legal matter' signifies the purpose of (possible) further development of the dispensation of justice. The latter criterion can be subdivided into two components, i.e. a qualitative component and a quantitative component: From the qualitative point of view, the legal dispute must raise a point of law that has not yet been clarified (and which is also not associated with the 'acte clair' doctrine with regard to the ECJ). From the quantitative point of view, the point of law must, in addition to the individual case in question, also be expected (forecast!) to be identical or similar in numerous other cases as well [to be denied in situations involving (for example) an expiring law; this quantitative criterion is not present in the ECJ's preliminary ruling procedure]. The situation becomes problematic if it involves cases in which the approval criteria have not been fulfilled, but the appealed decision of the court of lower instance is obviously incorrect. Actually, the legal remedy should not be approved in such cases; nevertheless, the situation would hardly be tolerable if the incorrect verdict delivered by the court of instance is allowed to become legally binding. Some SACs 'help out' by treating the approval criteria generously in such cases; Ireland recognises the (subsidiary) approval reason associated with the 'interest of justice', which also permits approval for reasons related to better individual case justice.

From a formal point of view, filter systems require (as a rule) the appellant to produce a (written) explanation of why the legal remedy should be approved, i.e. an explanation of the extent to which one of the approval reasons is supposed to exist. These formal obstacles are often complicated, and they are also handled with varying degrees of strictness; they make it possible to

exert a certain amount of control over the load of the SAC's dealings. Precisely because of these formal requirements, formal filter systems involve the risk of overcontrol; this applies to situations in which the load of an SAC's dealings is reduced too much. For example, this is the case in Germany, which provides two filters for three instances: The first one relates to the second instance, and the second one relates to the third instance.

Nevertheless, other SACs that do not have a formal filter system are often associated with a type of internal filter, on the basis of which legal remedies that are clearly futile can be discarded (*a limine*) within the framework of a simplified procedure and a small formation (sometimes by just the chairman) – Conversely, proceedings that are particularly important are referred to a special formation (enlarged senate; unified senates) within the framework of a special procedure. The criterion for such a transfer often resembles the described approval criteria (e.g. a modification of the previous case law corresponds to the further development of the case law, and the *overruling* of a *stare decisis* corresponds to the divergence-related approval). Such an internal level system may also be in line with provisions in certain national constitutions that make it possible for a citizen to raise a claim pertaining to access to the SAC.

3. Binding effect:

The fact that the SAC's decision is, with regard to the specific case in question, binding for both the court of instance (in case of a back-referral) and (if applicable) the SAC itself is an unproblematic feature of general procedural law. The substantive legal force (i.e. the binding nature, for the parties involved with the specific dispute, of the decision regarding the specific subject of the dispute) is also unproblematic.

What is problematic is the issue of whether the SAC's decisions and the supporting reasons for the same are also binding in other (similar) cases. This issue affects two conflicting principles: On the one hand, a consideration of the uniformity and predictability of the dispensation of justice argues in favour of a broad effect of decisions made by the Supreme Court, which in turn leads to the conclusion that such a consideration would also argue that other courts of instance should be bound by the SAC's precedents; on the other hand, this would be opposed by a consideration of judicial independence [according to which the judge is only bound by the law, and not (for example) by other verdicts] and a consideration of the division of powers (according to which the judge is not allowed to make laws). The principle of due process of law would also be compromised if the courts and, as a result, the parties were to be bound by a case law that emerged without allowing them to express an opinion. Various national legal systems solve this problem in different ways. A rough classification makes it possible to distinguish between three models:

A particular emphasis ends up being placed on judicial independence if verdicts of the Supreme Court do not exert any normative binding effect across and beyond the specific case in question. In such a scenario, the SAC's case law would only have an effect on a de facto basis, on the basis of the persuasiveness of its objective arguments. It is important that the SAC's verdicts be explained in detail, so that the verdicts will be able to exhibit such persuasiveness.

Although several national legal systems do not provide for a substantive (normative) binding effect, the SAC's judicature does exert a procedural effect: Each court of instance may deviate (= no substantive dependence), but it must provide more detailed reasons for its differing point of view; above all, the legal remedy must be approved (= procedural obligation) with regard to the SAC (due to divergence).

In other national legal systems, the subsequent judge, as well as the SAC itself, is substantively bound by the SAC's previous judicature. However, such a scenario regularly calls for a precise parallelism or consistency of the dispute-deciding point of law, so that the previous judicature would be prejudicial for the case in question. Such precedents can be overridden, but this can only be done within the framework of special procedures (*overruling* by special formations in the SAC). In practice, it occasionally becomes apparent that there is a tendency to avoid this special procedure (*'horror pleni'*). For example, this could be done on the basis of *'distinguishing'*, in which it is shown that there is no binding effect, since there are differences between the specific case and the precedent.

In Austria, certain mass procedures (e.g. tax law, social security law) exert a normative broad effect by operation of law. In this respect, court decisions exert a legally binding effect; this is doctrinally in line with the tradition of Hans Kelsen's legal teachings.