

International Association of Judges (IAJ/UIM)
4th Study Commission – 2022
Topic: Judicial Workplace and Judicial Independence

Germany

Questionnaire :

What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision making, governance, assignments, fund and other resources)?

Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.

Nomination, appointment and promotion:

The process of appointment or promotion of judges can interfere with the principle of judicial independence the more the process of appointment or promotion is based on other factors than professional merit.

In Germany, the process for the appointment and promotion of judges differs significantly between the federal and the state (Land) level on the one hand, and slightly even between the different states (Länder).

Within the German **states**, judges are usually **selected and appointed** by the competent State Minister. In some of the states that competence is delegated to the Presidentes of the Higher Regional Courts. In several states, an additional Committee for the Election of Judges (Richterwahlausschuss) – a committee usually composed of several members of the state’s parliament, of government, judges and lawyers – is also involved in the appointment process; in a few states that Committee is exclusively competent for the selection of judges and the appointment by a minister is only a formality. In contrast to that, in some of the states, the Minister of Justice – or the respective minister competent for other judicial branches – decides on the recruitment and appointment of judges. Legally, however, the initial appointment of judges is fundamentally based on the principle of merit. The initial selection and appointment of judges – within the states – is decisively based on the results of the so-called state examinations which are the same exams for all the law graduates of a state.

The appointment process of **federal judges** is different. The Federal Minister of Justice and a Committee for the Election of Judges consisting of the competent state ministers and an equal number of members elected by the German parliament (Bundestag) decide who is appointed and promoted as a federal judge.

Both procedures at the state and the federal level are sometimes criticised, but especially the election procedure of federal judges is subject to constant criticism in light of the principle of judicial independence. The criticism is, among others, based on the assumption that besides merit, the political orientation of candidates does play a certain role for nominations of judges to the federal courts. The

current Federal Government of Germany has thus envisaged in its coalition contract to review and reform the rules for the election of federal judges in accordance with European standards.

Once appointed, the competences and abilities of judges are **evaluated** regularly in a written way. The results in those regular evaluations are an essential basis for promotion within a state, but also relevant for applications of state judges to become a federal judge.

In general, the principle of regular evaluation of all judges is not negative in light of the principle of judicial independence as it increases comparability and leaves less scope for abuse. The procedure of evaluation can interfere with judicial independence, however, if the individual judge depends on a good evaluation by the chairman or chairwoman of her or his own collegial body, or the head of her or his department. Furthermore, productivity as the main requirement for receiving a good evaluation result can be problematic in light of judicial independence; a very productive judge is not necessarily always a “good judge” in terms of due diligence, her or his legal expertise, conduct towards the public and her or his judicial ethics.

Promotion decisions are made in very different ways within the German states. While in some of the German states so-called Presidency Councils (Präsidentialräte) – bodies composed by judges elected by their peers – have a strong position within the promotion process, in some of the states promotion decisions heavily rely on the Higher Regional Courts or even the government of the state, depending on the post that is to be filled. Very generally speaking, the more the other state powers can influence or even make decisions on the promotion of judges, the higher the risks for judicial independence of judges can be. However, the promotion of a competitor can be subjected to judicial review. Within such a review, the evaluations of the candidates in question will be checked in order to decide whether or not the principle of merit has been sufficiently followed by the promotion decision.

Independence in decision making, governance:

Art. 97 of the German Constitution (Grundgesetz) states that judges are not bound by any instructions in their interpretation of the law. **Independence** extends to the overall jurisdiction.

In Germany, the principle of judicial independence is not only constitutionally and legally protected to a large extent, but is also actually lived in the courts due to a culture of judicial independence.

The German Judges Act expressly states that judges are subject to **supervision** only as far as their independence is not compromised (section 26 Deutsches Richtergesetz, DRiG). In fact, supervision of service takes place only rarely and with restraint. Official courts are established as a legal safeguard.

Furthermore, the German Judges Act foresees that all courts be staffed with judges for life unless otherwise provided by a federal statute. It is furthermore guaranteed by statute law that judges may only be seconded with their consent. The principle of **appointment for a lifetime** guarantees a high level of personal independence of each judge, and thus fosters judicial independence as judges cannot be dismissed unless for severe reasons that can be subject to disciplinary proceedings.

Nevertheless, the **general working conditions** can have an impact on judicial independence. In order not to undermine the independence of judges with decisions regarding the workplace, a Council of Judges (Richterrat) – a body consisting of judges elected by their peers – must be established at each court. The

Council of Judges must be participated in all personnel measures, social and other internal and organizational measures. This provides additional control to ensure that any instructions concerning the judges' workplace do not exceed the limits of the law and have a negative impact on judicial independence at the judges' workplace.

Assignments, fund and other resources:

Both the funding of courts, and the personal remuneration of judges are highly relevant to guarantee judicial independence.

The allocation of **funds for the judiciary** in many parts of Germany is in need of improvement. There are severe differences between the states regarding personal and technical resources, i. e. the availability of qualified service staff, or the equipment with laptops and adequate software that ensures flexible and efficient working.

Especially due to vacancies, the **workload** of judges in Germany can be very high. An excessive workload on judges can at some stage have a negative impact on their judicial independence, as they could feel compelled to decide as many cases as possible at the expense of diligence.

Adequate **remuneration** of judges is an essential element to ensure the economic independence of each individual judge. As such, adequate remuneration of judges – including an adequate pension – is necessary to guarantee judicial independence.

In its judgment of 5 May 2015 - 2 BvL 17/09 et al. -, the Federal Constitutional Court has once again ruled that judicial independence must also be assured by the remuneration of judges. It stated: "The manner in which remuneration and benefits of judges are regulated is of great significance for the inner relationship between the judges and their office and for the impartiality with which they maintain their judicial independence. Setting the remuneration at an appropriate amount ensures that judges are able to make independent decisions in accordance with the law and their conscience". This subsistence must correspond to general economic and financial developments as well as to developments of the standard of living.

In its judgement, the Federal Constitutional Court defined the criteria for assessing whether the salary of judges complies with the principle of appropriate remuneration. In the years following that decision, the salary in many states appeared to be set just above the limit of unconstitutionality.

Although inflation has significantly risen especially in 2022, the overall remuneration has not yet been adjusted. Therefore, in light of judicial independence there is cause for concern in Germany.

The European Commission shares this view. In its 2022 Rule of Law Report of 13 July 2022, the European Commission recommended to the German government to "continue efforts to provide adequate resources for the justice system as part of the new pact of the rule of law, including on the level of salaries for judges, taking into account European standards on resources and remuneration for the justice system".