

**International Association of Judges
First Study Commission – Annual Meeting in Abidjan (October 28-31,2002)**

Germany

The role and function of the High Council of Justice or analogous bodies in the organisation and management of the national judicial system

On 1. and 2.:

In Germany no Superior Council for the Judiciary or an analogous body exist.

In the 16 Bundesländer (federal states), the ministers of justice are in charge of the administration of federal courts and public prosecution authorities. The National Minister of Justice is responsible for the administration of national courts / attorney general. The Bundesverfassungsgericht (Federal Constitutional Court) administers (only) itself.

The appointment of judges does not take place in a uniform manner. In most federal states, judges are selected, appointed and promoted by the Minister of Justice. In other federal states and on national level, judges are elected by the Richterwahlausschuss (committee for the election of judges), partly with judicial participation, but without the participation of judges on the national level.

In all federal states and on the national level, the budgetary responsibility lies with the ministers of justice.

On 3. and 4.:

3.2. A reform of the administration of justice is currently being discussed in Germany. On this issue, the Deutsche Richterbund (German Association of Judges) has worked out the following paper.

“It is an urgent task of the third power in a state founded on the rule of law and the separation of powers to take decisive action against possible influences and any kind of control over the Judiciary from the outside and at the same time secure a high quality of jurisprudence. Increasing attempts to exploit justice cause demands for a structural change with the aim to grant more autonomy to the German Judiciary. Such development is noticed in many countries of the European Union: In Italy, France and Spain, for example, most of the Judiciary has been released into self-administration, Denmark, the Netherlands and Belgium have set course into that direction.

There is a corresponding process getting under way in Germany as well, caused by new means of controlling, as for example budgeting, self-responsibility for the budget and delegation, respectively decentralisation. So far, nevertheless, there has only been a rather theoretical discussion about a self-administration of the Judiciary in Germany. The constitutional task of keeping the Judiciary independent, respectively of granting judiciary independence mainly from the two other powers of the state, requires some reflection upon whether and how precisely the best possible performance of judicial duties can be organisationally ensured in the future.

Against this background, the Deutsche Richterbund (German Association of Judges) puts up for discussion the following model of an organisational fortification of Justice.

1. Structure of the future Judiciary

a. Components

The Judiciary cannot do without all of the so-called ordinary jurisdiction (Civil and Criminal Jurisdiction), the specialised jurisdiction (administrative, labour, social and financial jurisdiction) and the public prosecution authorities. Any attempt to merge these parts of the Judiciary (which for good reasons are mostly independent) or to remove single parts from the Judiciary contradict the history of German judicial tradition. Namely the public prosecution authorities are an indispensable and integral component also of an organisationally changed justice.

b. Management of the Judiciary

At present, the Executive – the ministries of justice and the government – are at the head of judicial organisation. With respect to the other law systems mentioned above, this solution is by no means absolute - it even contradicts the fundamental idea of a separation of powers: to prevent the abuse of power by means of a system of checks and balances. Therefore, the management of the Judiciary can be properly entrusted to an independent constitutional body, modelled on the national and federal boards of audit. Thus, the creation of a separate, independent authority (High Council of Justice) is determined.

c. Budget Responsibility

Necessarily, a Judiciary which is independent in such a manner needs its own budgetary responsibility. The budgetary needs of the third power have to be put forward to the Executive (Minister of Finance / Senator of Finance), who themselves have to introduce a complete draft into Parliament. In case the High Council of Justice and the Government cannot agree on the budget, the draft has to be immediately forwarded to Parliament. This has to be interconnected with a right of speech of the president / speaker of the High Council of Justice in front of the Parliament and the budget committee.

The rationing of the budget is incumbent on the individual courts or judicial authorities. The aim is a mostly decentralised responsibility for resources. The head of the court or authority is in charge of cost-oriented and strategic control of their particular area of business, including, if necessary, the subordinate courts and authorities.

d. Tasks

The current responsibilities of the ministries and senators of justice will make up the tasks of the High Council of Justice. They are – in addition to the budgetary responsibilities mentioned under c. –

- distribution of means
- participation in personnel matters, selection of staff, suggesting fillings of jobs, dismissal, transfer (and also retirement)
- evaluations (establishing formal judicial criteria for assessment guidelines)
- supervision of all members of the Judiciary
- controlling, quality assurance and management
- training and further education also of the Referendare (candidates for higher judicial posts who have passed the first state examination and are undergoing in-service training)
- management of the examination offices of the Judiciary

e. Capacities for the new Tasks, Costs

In order to fulfil new tasks, the Judiciary has to develop the necessary competencies. In many ways, it has already taken over part of these tasks by way of decentralisation. The necessary personnel and material capacities have to be placed at disposal. A shift of the resources currently needed in the ministries of justice will facilitate this. With the loss of this hierarchical level (Ministry of Justice), synergy and economising effects will appear – the suggested model will by all means be cost neutral.

2. The High Council of Justice

a. Preliminary Remark: In the discussion at issue about implementing the suggestions mentioned above, much room ought to be given to the formation of this self-administrative judicial body, and it ought to be one of the politically most controversial topics. Here, the German Association of Judges sees room for discussion and decision making processes, particularly since there is a variety of imaginable possibilities and – in the case of realising them in the Federal Republic – there also has to be room for differing samples. However, the basic structure of the High Councils of Justice has to be identical.

b. In principle, the High Council of Justice has to be embellished as an administrative authority. The committee has to take over the current executive functions of the ministries of justice and the senators of justice. It therefore should be composed (see chart 1 enclosed) of the presidents of the Obere Landesgerichte (higher regional courts, appellate courts) and the regional public prosecutors, who today are already responsible for a major part of judicial administration. Supporting the High Council of Justice – and as a member without the right to vote – it has to be headed by a manager (Generalsekretär/in – secretary general) who is in charge of the authority. Its outstanding position requires a personality with experience in the area of organisation and administration of courts and public prosecution authorities, and with the qualification for being a judge. In the larger federal states, it will be necessary to consider whether and how (selection / rotating system) a limitation of membership in the high councils appears to be sensible.

c. In correspondence with the institutions of local self-administration, there has to be created a central organisational authority for courts and public prosecutions on the national level (zentrale Organisationsstelle für Gerichte und Staatsanwaltschaften, „ZOGS“), taking over or at least preparing the common tasks of all administrative councils of the judiciary (EDP, management, training and further education etc.) For the common good, a fragmentation of German Justice – as it has been noticed for example in having different EDP-systems – can thus be averted.

d. Neither a counting of votes according to the headcount of judges in the various branches of jurisdiction, for example, nor the protection of minorities in small branches of jurisdiction will be necessary. Given the common responsibility for the Judiciary and the necessary effectiveness of work, such weighting within the committee will be pointless.

e. Every decision on job fillings has to be aligned with the quality criteria in Art. 33 section 2 of the German Grundgesetz. In line with newly developed scientific procedures (Assessment - Center), selective judicial appointments have to become more professional. A new appointment procedure has to make possible not only a reduction of the influence of political parties upon appointments and promotions within the Judiciary – as it has been observed so far. There also have to be found practicable solutions for the larger federal states, where up to 200 engagements and promotions of personnel take place each year.

The study commission has been discussing mostly on two different models for decisions on job fillings:

Model A: Judges and civil servants, including the presidents of the middle range courts and the public prosecutors, will be appointed by the presidents of the Landtag (state parliament) on the advice of the High Council of Justice, who will need the approval of the council of the bench respectively the council of the public prosecution service. If no agreement is reached among the committees and the High Council and the president of the Landtag, the appointment will be made by a committee established with the president of the state parliament. This committee – headed by the president of the Landtag – consists of members of the Judiciary and the public prosecution service, who are elected by the whole of the judiciary bench and the public prosecutors, and a corresponding number of members of the state parliament, who will be elected by the state parliament with a 2/3 (two-third) majority (see chart 2 enclosed). This committee also elects with simple majority the presidents of the Obere Landesgerichte (higher regional appellate courts) and the general attorneys, as well as the secretary general (member of the High Council of Justice by virtue of office). The Präsidentialrat does not have any specific tasks in this model – it has to be dissolved. This will lead to a - desired – simplification of the regulations valid for judges and public prosecutors.

Model B: All judges and civil servants, including the heads of all courts and public prosecution authorities as well as the secretary general, will be elected by the Committee for the Election of Judges under the chairmanship of the president of the state parliament, consisting of the members of the High Council

of Justice and a corresponding number of members of the state parliaments elected by the state parliament itself with a two-third majority (see chart 3 enclosed).

By the majority, the study commission favours model A.

3. The Position of Public Prosecution in a structurally changed Judiciary

a. Within the third power, the position of public prosecutors has to be recognised as being similar to that of judges: This corresponds to the historical origins of the development of the public prosecution service, and to its self-conception within the Federal Republic of Germany, which has been growing as a consequence of its significance and its area of responsibility. In fact, their decisions are not part of jurisdiction. Exercising control over the administration of justice, however, the public prosecution authorities are of equal rank and related to the third power of the state. In criminal law, it is their duty – together with the courts – to grant a fair trial.

This statement is not aimed at providing the public prosecution services with judicial independence. The judicial system of chairmanship is irreconcilable with the demands of an effective and powerful criminal prosecution. However, public prosecution has to be kept free from any kind of unlawful influence, especially of political parties or of issues unrelated to the Judiciary. On the one hand, the following suggested changes will therefore strengthen the position of a public prosecution as part of the Judiciary on the joint of Executive and Judiciary, and its reputation in public. On the other hand, they will from the very start prevent judicial administration from being under suspicion for politically exploiting public prosecution.

b. The status of general attorneys in some federal states, who can, as so-called political civil servants, be temporarily retired at any time, is incompatible with these principles. The reasons given – that in the office they hold they continuously have to act in accordance with the basic political opinions and aims of the government – ignore the fact that public prosecution has to represent only the judicial, not the political will of the state.

c. The so-called external Weisungsrecht of the ministries / senators of justice (right of the Executive to issue instructions to the public prosecution service) is a stranger to this kind of an organisationally changed Judiciary. The authority to give general instructions (for example as in the RiStBV, RiJGG, RiVAST, MiStra) will nevertheless remain untouched. Basic criminal policy questions should however democratically be settled by parliament by way of legislation. Guidelines should be enacted not by way of writ, but on a legislative basis by way of ordinance.

The first rank civil servants of the public prosecution services are in charge of further executive writs.

d. The internal Weisungsrecht (right to issue instructions within the hierarchy of the public prosecution service) of the superior civil servants (§ 147 Nr. 3 GVG) is a consequence of the monarchical and hierarchical structure of the public prosecution service and of the responsibilities resulting from it. With respect to

the principle of legality safeguarded by criminal law, this right does of course not exist without restrictions, and moreover, keeping it is indispensable for securing the duty of public prosecution to concentrate on a uniform application of the law and an equally just prosecution.

4. Punctual Consequences for the Present Structure of the Judiciary

a. The principles of fair trial and of judicial independence will not be touched by the institution of an High Council of Justice. On the contrary, these principles will be strengthened by uncoupling from the government.

b. The High Council of Justice is the highest civil service authority of judges and civil servants in its area of business. It is in charge of supervising judges, public prosecutors and servants from outside the Judiciary. The president of the state parliament is superior to the members of the High Council of Justice, and so far initiative authority for requests (Einleitungsbehörde).

c. Members of the office courts of the Judiciary (so far: Richterdienstgerichte = judicial office courts) will be elected by judges and public prosecutors by direct suffrage. These courts will in the future also be competent to deal with public prosecutors. Their composition has to be discussed in detail.

d. The judicial committees / chairmen will keep their allocated tasks. The competencies of the participating committees (personal representation of judges and public prosecutors) will not change as well.

e. The ministries / senators of justice will remain responsible for judicial policy and criminal execution as well as pleas for clemency; they will also remain legal advisors of the government / the Senate.

f. There has to be created a common conference of the High Councils of Justice.

5. In realising these suggestions, the German Association of Judges hopes for:

- a reduction of the current conflicts among Judiciary, Executive and Legislature by a clear separation of competencies and tasks
- a significant optimisation of judicial work by strengthening self-responsibility and deregulation
- synergy effects
- a preparation of the German legal system for the range of European law
- more transparency and acceptance of appointment procedures within the Judiciary
- and thus a societal fortification of the third power of the state."

On 5.:

1. Judges` participation in decisions of the judicial administration.

2. Which possibilities do exist for judges to reduce the time of work (take up part-time work), to obtain leave of absence for a certain period or to retire early?
3. The appointment / election of judges