Articles

German Judicial Self-Government – Institutions and Constraints

By Fabian Wittreck[*]

Abstract

Typically, Germany is portrayed as a *persistent objector* to Judicial Self-Government in any form. The present paper will demonstrate that this position is untenable: Actually, the German judiciary disposes of a differentiated system of institutions of self-government. The effects of these institutional settings on core values like independence and accountability proves to be mixed at best, however. Furthermore, there are practically no proponents of a stronger version of self-government to be reckoned with. Indeed, the Italian-style model of self-government or the visions of the CCJE are basically contrary to the prevailing German understanding of democratic legitimacy and separation of powers; moreover, the long lasting recruiting pattern of the German judiciary will act as a powerful obstacle. Ultimately, even the introduction of a strong self-government via constitutional amendment remains an open question.

[*] The author is director of the Institute for Public Law and Politics and principle investigator of the Cluster of Excellency "Religion and Politics" at the University of Münster (fwitt_01@uni-muenster.de). The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCH-ERC-2015-STG). Moreover, the author is grateful to his research assistants *Saskia Michel* and *Clara Scharfenstein* for accurate proofreading and helpful critical comments.

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A. Institutions of Judicial Self-Government

Comparative accounts of national systems of court administration tend to portray Germany as kind of counter-pole to the "Italian Model" of Judicial Self-Government.[1] While it is true that the German judiciary does not have a powerful "Judicial Council" at its command, the prevailing view is too short-sighted in terms of the German reality. In fact, the German legal system knows quite a couple of institutions or mechanisms securing a sufficient influence of judges on court administration (especially in personnel matters).[2] Altogether, eight institutions or legal mechanisms merit to be mentioned.[3]

I. Presidia (Präsidien)

The presidia are closely connected with the peculiar German understanding of the "legal" or "ordinary" judge. According to this principle (enshrined in Article 101 para. 1 cl. 2 of the *Grundgesetz* or Basic Law),[4] everyone has the fundamental right to be judged by the judge prescribed by the law. As a matter of fact, this means that at any German court regulations have to be enacted determining the responsible judge for any case in advance. Normally, this system of "blind" allocation leads to a distribution of cases on the basis of the name of plaintiff (civil matters) or defendant (criminal matters). So, at the start of each year it is perfectly clear that judge A for example will have jurisdiction to hear all cases filed by claimants with names starting with the letters D-G.[5]

Even more important is the fact that this allocation is not enacted by the Ministry of Justice or the presidents of the courts but by a committee of judges elected by their judge members (one has to add that the president of the court is a legal member of the panel).[6]

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[1] *See* C. Frank, *Judicial Self-governance: A Role Model for Germany, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 97, 99-100 (P.-A. Albrecht & J. Thomas eds., 2009).

[2] Instructive N. Garoupa & T. Ginsburg*, Guarding the guardians. Judicial councils and judicial independence,* 57 AM. J. COMP. L. 103 (2009); the authors also cover German institutions.

[3] Essential German reading on court administration in Germany: F. WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT (2006); M. MINKNER, DIE GERICHTSVERWALTUNG IN DEUTSCHLAND UND ITALIEN 25 et seq. (2015); L. C. FAISSNER, DIE GERICHTSVERWALTUNG DER ORDENTLICHEN GERICHTSBARKEIT IN FRANKREICH UND DEUTSCHLAND 251 et seq. (2018). – Recent overviews in English by A. Seibert-Fohr*, Judicial Independence in Germany, in* JUDICIAL INDEPENDENCE IN TRANSITION 447, 453 et seq. (A. Seibert-Fohr ed., 2012); P. LANGBROEK & M. WESTENBERG, COURT ADMINISTRATION AND QUALITY WORK IN JUDICIARIES IN FOUR EUROPEAN COUNTRIES 59 et seq. (2018).

[4] English version available at https://www.gesetze-im-internet.de/englisch_gg/index.html.

[5] *See* P. Dyrchs, W. Frey, P. Metzen, R. Napierala & H. Rausch, *Case assignment in German courts: North-Rhine Westphalia, in* THE RIGHT JUDGE FOR EACH CASE. A STUDY OF CASE ASSIGNMENT AND IMPARTIALITY IN SIX EUROPEAN JUDICIARIES 215 (P. Langbroek & M. Fabri eds., 2007).

[6] According to section 21a para. 2 the presidium consists of the president of the court and four to ten judges (depending on the size of the court). These members are elected by their fellow judges in a direct and secret vote (section 21b para. 3).

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Moreover, the members of the presidia (German: Präsidium [sing.] or Präsidien [pl.]) enjoy judicial independence while allocating the caseload.[7] The relevant regulation is to be found in sections 21a-21j of the Courts Constitution Act (*Gerichtsverfassungsgesetz*).[8]

II. Councils of Judges (Richterräte)

As the concept of employee participation or "Mitbestimmung" is very strong in Germany,[9] also judges enjoy some form of influence on their working environment. To picture this is quite complicated, as there are two types of participation bodies, and each *Bundesland* or federal state has different rules on the exact competences of these panels (the same is true for the *Bund* or federal level).[10] According to this, the following is only a very broad overview. Basically, the judges elect two types of councils (see sections 49-60 of the German Judiciary Act or *Deutsches Richtergesetz*).[11] As a rule of thumb, the councils of judicial appointment or *Präsidialräte* are competent only in the limited field of appointment and advancement. The (general) councils of judges (*Richterräte*) participate in all other questions which may be relevant for the professional live of judges. As the German *Länder* have different traditions of participation (generally, states with a Social Democratic tradition will have stronger participation mechanisms than those with a tradition of Christian Democratic government), the catalogues of matters open to judges' participation vary greatly. Moreover (to further complicate things once again), one has to distinguish matters of mere involvement and matters of real participation (see section 52 of the Judiciary Act that refers to the Federal Personnel Representation Act). While in the first case the judges only have the possibility to voice their opinion, in the second case they can practically veto a measure of the court administration. A much-debated current issue is the digitization of the judiciary (e.g. the electronic file or docket, and other measures).[12] As it will profoundly change the working-place of judges, it is usually a matter of participation. The exact extent or veto position depends on each *Land*; while the judges in

[7] *Bundesverfassungsgericht* [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT 910 (2008); H. D. JARASS & B. PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR (15th ed. 2018), Article 97 note 3.

[8] English version: https://www.gesetze-im-internet.de/englisch_gvg/index.html.

[9] First overview: Seibert-Fohr, *supra* note 3, at 459-60; M. Weiss*, Labor Law, in* AN INTRODUCTION TO GERMAN LAW 299, 310 et seq. (M. Reimann & J. Zekoll eds., 2nd ed. 2005). – *See Bundesverfassungsgericht* [Federal Constitutional Court], 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 36, 69.

[10] As far as can be seen, there is no more English literature on the topic. Even the German literature is scarce, as the topic is deemed to be uninspiring due to its love for the details. *See* Wittreck, *supra* note 3, at 275 et seq., 372 et seq.; and Minkner, *supra* note 3, at 249-50, 278 et seq.

[11] Available in English: https://www.gesetze-im-internet.de/englisch_drig/index.html.

[12] *See* U. Berlit, *eJustice, eAkte und Richterschaft*, 121 BETRIFFT JUSTIZ 15 (2015).

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North Rhine-Westphalia have a strong position,[13] the judges in most other states will not be able to stop "Justice 4.0".

III. Councils of Judicial Appointment (Präsidialräte)

Once again, there are seventeen different councils of judicial appointment in Germany (see sections 49, 54 to 59 of the Judiciary Act for the councils of the federal courts; each *Land* has its own rules which must abide to sections 74 and 75 of the [Federal] Judiciary Act).[14] According to those basic rules, the councils shall be composed of a president of the court, who acts as chairman, and of judges, of whom at least one half are to be elected by the other judges (section 74 para. 2). The council shall be asked to participate in the appointment of a judge to an office with a final basic salary that is higher than the final basic salary of an initial office.[15] It shall deliver a written opinion, with reasons, on the judge's personal and professional aptitude (section 75 para. 1). Due to the chairmanship of a president, the councils of judicial appointment may not count as "genuine" institutions of self-government (in fact, many councils are dominated by strong presidents). The effective influence of the *Präsidialräte* on the process of promotion varies greatly; the most influential council is those in the southern state of Baden-Württemberg: If a consensus on a personnel measure is not to be found, the decision is devolved to the *Richterwahlausschuss* or judicial selection committee which is in this case dominated by judges elected by their peers (*see infra* A.VII.).[16]

IV. Service Courts (Richterdienstgerichte)

By far the most important institutions of judicial self-government in Germany are the service courts or *Richterdienstgerichte*.[17] Basically, they function as guardians of judicial independence. According to section 26 para. 3 of the Judiciary act, "[w]here a judge contends that a supervisory measure detracts from his independence a court shall, on application being made by the judge, give a ruling in compliance with this Act." Moreover, the service courts have the last word whenever a judge is removed from office, transferred

[13] According to section 41 para. 3 of the North-Rhine Westphalian State Act on Judges and Prosecutors, the councils of judges have to participate in matters of technology (in detail *see* No. 1-6).

[14] *See* Wittreck, *supra* note 3, at 292 et seq., 361 et seq.; Seibert-Fohr, *supra* note 3, at 460-1; Minkner, *supra* note 3, at 247-8, 274 et seq.

[15] This is the quite awkward circumscription of "promotion" in the Judiciary Act.

[16] *See* sections 46 et seq. of the State Act concerning judges and prosecutors (especially section 43 para. 6 and section 58). According to many critics, the composition of this committee is not in accordance with the German understanding of democratic legitimacy (*see* below B.II.): Wittreck, *supra* note 3, at 400.

[17] *See* Wittreck, *supra* note 3, at 300-1, 389 et seq.; Seibert-Fohr, *supra* note 3, at 491-2; Minkner, *supra* note 3, at 250, 283-4.

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to another court against his will or is disciplined in any other way (section 62 para. 1 No. 1-4 of the Judiciary Act). Thus, virtually any measure of court administration that could pose a threat to judicial independence may be reviewed by the service courts with the last word remaining in the hands of (fellow) judges. The service courts themselves are staffed by the presidia *(supra* A.I.) of the courts (see section 61 para. 3 of the Judiciary Act) and are therefore practically free of any influence of the court administration. The judicature of the service courts is prone to criticism from academia, as it is deemed to be partisan or biased vis-à-vis the vested interests of the judiciary.[18] Two examples: According to judgments of the service courts, German judges are not bound to obligatory office hours,[19] and they are entitled to get a personal key to enter the courthouse at any time if they wish[20] – both measures obviously make sense, but it is not in the same way obvious that they are mandatory in terms of judicial independence.[21]

A recent case punctuates the limits of this mechanism of judicial group solidarity.[22] A judge of a Higher regional court (*Oberlandesgericht*)[23] had been censured because of an improper mode of executing his official duties (combined with urging proper and prompt attention to those duties; see section 26 para. 2 of the Judiciary Act) by his court's president. The main allegation was that the number of cases decided by him was well below the average number concluded by his colleagues at the respective court. He

[18] *See* Wittreck, *supra* note 3, at 177-8 and H. Schulze-Fielitz, *Article 97*, *in* 3 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2018), note 35.

[19] *Bundesgerichtshof* [Federal Court of Justice], 113 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 36, 40-1; *Bundesverwaltungsgericht* [Federal Administrative Court], 78 Entscheidungen des Bundesverwaltungsgerichts [BVERWGE] 211, 213-4.

[20] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 282, 283 (2003).

[21] *See* F. Wittreck, *Dritte Gewalt im Wandel,* 74 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 115, 137 (2015).

[22] Last Decision: *Bundesgerichtshof* [Federal Court of Justice] (as Federal Service Court), NEUE JURISTISCHE WOCHENSCHRIFT 158 (2018); upheld by *Bundesverfassungsgericht* [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT 1532 (2018). – As far as can be seen, there are no English publications on the case. From the German literature, *see* F. Wittreck, *Durchschnitt als Dienstpflicht?*, NEUE JURISTISCHE WOCHENSCHRIFT 3287 (2012); F. Wittreck, *Erledigungszahlen unter (Dienst-)Aufsicht?*, DEUTSCHE RICHTERZEITUNG 132 (2013); C. Schütz, *Durchschnitt soll doch Dienstpflicht sein*, 112 BETRIFFT JUSTIZ 378 (2012); A. Thiele, *Die Unabhängigkeit des Richters – Grenzenlose Freiheit?* 52 DER STAAT 415 (2013); C. Schütz, *Die Richtgeschwindigkeit der Justiz*, FRANKFURTER ALLGEMEINE ZEITUNG – EINSPRUCH (Nov 29, 2017).

[23] For a general outline of the German court structure *see* K. M. Holland, *The Courts in the Federal Republic of Germany, in* THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 83 (J. L. Waltman & K. M. Holland eds., 1988) and J. BELL, JUDICIARIES WITHIN EUROPE. A COMPARATIVE REVIEW 110 et seq. (2006); G. ROBBERS, INTRODUCTION TO GERMAN LAW (6th ed. 2017), notes 37 et seq.; recently S. Machura, *Understanding the German Mixed Tribunal,* 36 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 273 (2016). – German Reading: C. Degenhart, *Gerichtsorganisation, in* 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 114 (J. Isensee & P. Kirchhof eds., 3rd ed. 2007) (leading handbook on German constitutional law).

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contended that this supervisory measure undermined his independence and brought an action against the court administration to the service courts. His main allegation was that this censure had the ill-disguised intention to change his application of the law (which is the very heart of judicial independence). As a matter of fact, the service courts had rejected any supervisory measures that attempted to change the way in which the judge had previously chosen to reach a decision (e.g. by urging more sessions per week or a "firmer" conduct of proceedings).[24] In the case of the censored judge, the service courts ignored this issue and concluded that a detraction of his independence would only occur if he would be obliged to handle a caseload too heavy to be duly decided by an average judge.[25] Thus, they simply ignored the relevant question: Who is competent to decide how much time is to be devoted to a single case? Implicitly, the service courts have ruled that this is to be done by the court administration, not by the competent judge/judges.

V. Criminal Courts (Judicature on "Rechtsbeugung" or Penal Liability)

Technically, the German criminal courts are not part of the court administration system. Nevertheless, they belong to a system in which only judges decide in matters of other judges (one may speak of *functional* service courts [*supra* A.IV.]). According to German criminal law, a judge may be held liable for perverting the course of justice (or "Rechtsbeugung", section 339 of the German Penal Code or *Strafgesetzbuch*).[26] Due to the minimum penalty of one year's imprisonment, the offence is considered a crime or felony (section 12 para. 1 of the German Penal Code). Thus, according to section 24 no. 1 of the Judiciary Act, a judge convicted for an act of *Rechtsbeugung* will lose his position without a further judicial proceeding.

However, the threshold is high: A judge will only be held liable of perverting the cause of justice in the case of a serious and intentional infringement of the law. Basically, the judge has to write down in the grounds that he knows that the law orders A whereas deliberately ordering B. Even blatant errors in the application of the law do not count as *Rechtsbeugung* if the judge does not act deliberately. Due to this interpretation, convictions are truly exceptional. In particular, the German judiciary was very reluctant (to put it mildly) to convict fellow judges for blatant breaches of the law during the Nazi

[24] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 421, 423 (1988); *Bundesverwaltungsrecht* [Federal Administrative Court] 46 BVERWGE 69, 71; *see* Schulze-Fielitz, *supra* note 18, note 30-1.

[25] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 158 (2018) (head note 2).

[26] English version: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html. Section 339 reads as follows: "A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable to imprisonment from one to five years." General outline of the German criminal law system: Robbers, *supra* note 23, notes 246 et seq.

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dictatorship[27] (as they did not count as "colleagues", the judges of the former German Democratic Republic were another matter after re-unification in 1990).[28] Two recent cases may highlight the threshold which a judge has to exceed in order to become unbearable for his fellow judges: In 2009, a judge responsible for guardianship cases was condemned because he had routinely ordered enthrallment measures for bedridden elderly people without hearing them (in fact, he even forged the details of the hearings).[29] And recently (2017), a young judge has been convicted who coerced an exhibitionist to confess and to consent to a therapy by putting him in a detention cell for a few minutes.[30]

VI. Civil Courts (Judicature on Amtshaftung or Civil Liability)

In contrast to many jurisdictions worldwide,[31] the German judiciary is not protected by an immunity clause. Nevertheless, the rules on *Amtshaftung* or civil liability fulfill the same function.[32] Section 839 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*) holds an official liable for compensation if he "intentionally or negligently breaches the official duty incumbent upon him in relation to a third party".[33] However, this general rule is partly revoked with reference to the judiciary. Section 839 para. 2 of the Civil Code (the so-called "judicial privilege" or "Richterspruchprivileg") reads as follows:

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[27] *See* R. Wittmann, *Tainted Law: the West German Judiciary and the prosecution of Nazi War Criminals, in* ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 211 (P. Herberer & J. Matthäus eds., 2008); essential German reading: H. WROBEL, VERURTEILT ZUR DEMOKRATIE. JUSTIZ UND JUSTIZPOLITIK 1945-1949 (1989) and J. REQUATE, DER KAMPF UM DIE DEMOKRATISIERUNG DER JUSTIZ (2008).

[28] *See* M. Bohlander, *"United We Stand …" – The Judiciary in East Germany after the Unification,* 21 ANGLO-AMERICAN LAW REVIEW 415 (1992). German reading: U. HOHOFF, AN DEN GRENZEN DES RECHTSBEUGUNGSTATBESTANDES: EINE STUDIE ZU DEN STRAFVERFAHREN GEGEN DDR-JURISTEN (2001); H. C. Schaefer, *Überzogenes Richterprivileg,* NEUE JURISTISCHE WOCHENSCHRIFT 734, 735 (2002); J. Lehmann, *Der Rechtsbeugungsvorsatz nach den neueren Entscheidungen des BGH,* NEUE ZEITSCHRIFT FÜR STRAFRECHT 127, 129 (2006).

[29] *Bundesgerichtshof* [Federal Court of Justice], NEUE ZEITSCHRIFT FÜR STRAFRECHT 92-3 (2010).

[30] *Bundesgerichtshof* [Federal Court of Justice], NEUE ZEITSCHRIFT FÜR STRAFRECHT 106 (2013); *Landgericht Kassel* [District Court Kassel], judgment of June 27, 2017 – 11 KLs 3600 Js 37702/09; *see* the comment by B. Hecker, JURISTISCHE SCHULUNG 1042 (2012) as well as the critical note on the further proceedings by G. Kirchhoff*, Kein-Urteil-Schelte,* 118 BETRIFFT JUSTIZ 102 (2014). Highly sceptical also G. Kirchhoff & C. Schütz, *Böswillige Vernichtung einer Existenz,* 113 BETRIFFT JUSTIZ 40-1 (2018 [BETRIFFT JUSTIZ – literally "Concerning the judiciary" – is a left-leaning journal with strong ties to the "Neue Richtervereinigung", *see infra* C.II.]).

[31] *See* A. A. OLOWOFOYEKU, SUING JUDGES. A STUDY OF JUDICIAL IMMUNITY (1993).

[32] *See* J. P. Terhechte, *Judicial accountability and public liability. The German „judges privilege" under the influence of European and international law,* 13 GER. L. J. 313 (2012); Seibert-Fohr, *supra* note 3, at 494-5. – German reading: Wittreck, *supra* note 3, at 150 et seq.; M. BREUER, STAATSHAFTUNG FÜR JUDIKATIVES UNRECHT. EINE UNTERSUCHUNG ZUM DEUTSCHEN RECHT, ZUM EUROPA- UND VÖLKERRECHT (2011). *See* also Robbers, *supra* note 23, at notes 267 et seq.

[33] English version: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

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> If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function.

The most important term is 'criminal offence'. A German judge is only liable if his breach of duty relates to *Rechtsbeugung* – as we have already seen, the courts will only assume this in cases of outright and evident failure (*supra* A.V.). Practically, German judges are therefore financially unaccountable. Recently, some breaches have been blown into this armor by the European Court of Justice who holds at least the member states of the Union liable for violations of the Union law committed by member states courts.[34]

VII. Committees for the Selection of Judges (Richterwahlausschüsse)

According to the *Grundgesetz*, the judges of the highest Federal courts are to be elected by a joint decision of the competent minister and a selection committee consisting of 16 members of parliament and the 16 competent state ministers (Article 95 para. 2 Basic Law).[35] As Article 98 para. 4 Basic Law states, the *Länder* may establish similar committees (again deciding jointly with the minister of justice).[36] While the Federal committee sits without judges and therefore may not be regarded as an institution of *judicial* self-government, more than half of the German states (Baden-Württemberg, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Rheinland-Pfalz, Schleswig-Holstein, and Thüringen) have decided to install *Richterwahlausschüsse*. Once again, the diversity is astonishing. Typically, these committees consist of a majority of members of parliament and a minority of judges either elected by their fellow judges or sitting *ex officio* (typically as presidents of the highest courts);[37] some states also involve a lawyer who likewise is elected by his peers. The committees' powers are also diverse; some decide only in the

[34] *See* European Court of Justice, Case C-224/01, Köbler, judgment of Sept. 30, 2003, ECLI:EU:C:2003:513; Wittreck, *supra* note 3, at 154 et seq.; B. J. HARTMANN, ÖFFENTLICHES HAFTUNGSRECHT 216 et seq., 247 et seq. (2013).

[35] *See* D. ten Brinke, *Judges appointed by Parliament: Germany, in* JUDGES IN THE SERVICE OF THE STATE? PROCEDURES, CRITERIA AND POLITICAL INFLUENCE ON NATIONAL SELECTION OF JUDGES FOR THE HIGHEST JUDICIAL OFFICES AND THEIR POSSIBLE INFLUENCE ON THE INTERNATIONAL CRIME COURT 39 (D. ten Brinke & H.-M. Deml eds., 2002); Seibert-Fohr, *supra* note 3, at 461; German literature: Wittreck, *supra* note 3, at 305-6; H. Schulze-Fielitz, *Artikel 95, in* 3 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2018), note 24 et seq. – *See Bundesverfassungsgericht* [Federal Constitutional Court] , 143 BVERFGE 22.

[36] *See* Wittreck, *supra* note 3, at 396 et seq.; T. E. DIETRICH, RICHTERWAHLAUSSCHÜSSE UND DEMOKRATISCHE LEGITIMATION (2007); K. F. Gärditz, *Richterwahlausschüsse für Richter im Landesdienst. Funktion, Organisation, Verfahren und Rechtsschutz,* ZEITSCHRIFT FÜR BEAMTENRECHT 109 (2011); H.-J. Graefen, *Probleme der Richterwahl, in* VOLKSSOUVERÄNITÄT, WAHLRECHT UND DIREKTE DEMOKRATIE 127 (H.-H. v. Arnim ed., 2014).

[37] This was the case in Hessen; *see* W. Priepke, *Zusammensetzung des Richterwahlausschusses,* DEUTSCHE RICHTERZEITUNG 11 (1972).

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case of the first appointment, some also in the case of promotions. The committee in Baden-Württemberg is very peculiar: It comprises a majority of judges elected by the judiciary (eight judges, one lawyer, six members of parliament; see section 46 of the State law on judges and prosecutors), but is only competent to decide if the minister of justice and the *Präsidialrat* (*supra* A.III.) do not come to terms with the appointment or promotion of an individual judge (section 43 para. 6 of the aforementioned State law).[38]

The German experience with the *Richterwahlausschüsse* is mixed at best. First, the judicial review of their findings is difficult as they combine the principle of merit selection with the element of a political election.[39] Second, the committees tend to increase the influence of party politics on the selection process. According to scholarly findings as well as practitioners' reports, the judicial members do not act as an antidote, but tend to participate in these "joint solutions" by forming *de facto*-coalitions of judges' associations and political parties.[40]

VIII. Executive Judges

Perhaps the most important mechanism of judicial self-government in Germany is the simple fact that court administration is basically carried out by judges. The powerful presidents of the courts (especially the higher regional courts) are judges, and a closer look at the ministries of justice will expose that most of the responsible officers are either deputized judges (in most states) or civil servants that frequently exchange between the judicial and the executive office (so-called Bavarian model). It can now be argued that all these officers may be judges (or at least part-time judges) by training, but do not act under the cover of judicial independence in their administrative office. That is technically correct – the president of a court acts under the supervision of a higher president or the ministry of justice when he does not actually act as a judge.[41] Nevertheless, the objection misses the reality of present-day German court administration. Basically, both the German

[38] *See* Wittreck, *supra* note 3, at 400; A. TSCHENTSCHER, DEMOKRATISCHE LEGITIMATION DER DRITTEN GEWALT 361 (2006).

[39] *See Bundesverfassungsgericht* [Federal Constitutional Court], 143 BVERFGE 22; K. F. Gärditz, *Anmerkung zum Beschluss des Zweiten Senats des BVerfG vom 20.9.2016 – 2 BvR 2453/15,* NEUE JURISTISCHE WOCHENSCHRIFT 3429 (2016); M. Sachs, *Bedeutung der Bestenauslese nach Art. 33 II GG für die Richterwahl nach Art. 95 II GG,* JURISTISCHE SCHULUNG 89 (2017).

[40] *See* I. Hurlin, *Wer wird RichterIn [sic] in Schleswig-Holstein?, in* MITWIRKUNG – MITBESTIMMUNG 49, 50 (Neue Richtervereinigung ed., 1992); U. Vultejus, *Der Zugang zum Richterberuf, in* ARBEIT UND RECHT 251, 254 (1995). In Hessen, Social Democrats proposed a reform of the *Richterwahlausschuss* alluding to the fact that the members belonging to the judiciary were deemed conservative and close to the rival Christian Democrats; the judges were simple coined "political opponents": T. Rasehorn, *Der Richterwahlausschuß als gesellschaftspolitisches Problem der Justiz, in* LIBER AMICORUM RUDOLF WASSERMANN, 401, 410 (C. Broda et al. eds., 1985); Wittreck, *supra* note 21, at 146-7.

[41] *See* Schulze-Fielitz, *supra* note 18, at note 32; *cf.* Seibert-Fohr, *supra* note 3, at 455 et seq.

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judiciary and the German court administration are "closed shops" managed by officials raised and socialized as judges. As this socialization (which starts at a very young age; see *infra* B.I.) takes accurate aim at closemouthed and highly assimilated judges, even those who rise through the ranks to the position of president or for some time change to the executive bench will act with a high degree of consideration of the interests and opinions of their "peers". On the other hand, the head of a ministry of justice has only limited control over the day-to-day work of the judiciary or even the distinct mechanisms of promotion. The ministry may appoint the higher-ranking judges (and will do so with due regard to party affiliation), but is simply unable to reach the rank and file of the judiciary.

Perhaps the most significant example is the judicial appointment process in the state of Nordrhein-Westfalen (with almost 18 million inhabitants, it is the most populous German *Land*).[42] According to the state constitution (Article 58 para. 1), the officials (including judges without mentioning them explicitly) are appointed by the State government as a corporate body. As detailed in Article 58 para. 2, this power may be delegated. This has been done; for many years, the responsibility to appoint judges rested with the ministry of justice. In recent years, it has been sub-delegated to the presidents of the higher regional courts (*Oberlandesgerichte*) and the presidents of the higher specialized courts (e.g. the *Oberverwaltungsgericht*).[43] As a matter of fact, new judges are simply selected by a panel of sitting judges (based on the results of a one-day assessment center). Basically, this is the much-dreaded cooptation.

B. Impact of Judicial Self-Government on Core Values

Once again, one has to underline that in Germany "judicial self-government" may only be read as "elements of judicial self-government" and has to be analyzed with the competing/conflicting powers of the executive court administration in mind. Thus, the evaluation of the impact on the pre-selected "core values" will have to be double-tracked, starting with judicial independence (I.). Accountability (II.), legitimacy (III.), transparency (IV.), and confidence (V.) will follow suit.

I. Independence

Elements of self-government as such do not promote (or endanger) judicial independence.[44] The ability of a judge to infringe on the independence of another judge

[42] *See* P. J. Tettinger, *Artikel 58, in* KOMMENTAR ZUR VERFASSUNG DES LANDES NORDRHEIN-WESTFALEN (W. Löwer & P. J. Tettinger eds., 2002), notes 9 and 16.

[43] *See* G. Debusmann, *Drum prüfe, wer sich ewig bindet: Einstellungsverfahren für junge Richter im Bezirk des OLG Hamm,* DEUTSCHE RICHTERZEITUNG 263 (2003).

[44] *See* Wittreck, *supra* note 21, at 156.

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does not depend on the dependence or independence of the infringing judge: German presidia (elected by fellow judges and acting under the guarantee of independence, see *supra* A.I.) have in some cases infringed on the rights of individual judges[45] as well as judges acting as court presidents (appointed by the ministry of justice and acting dependently, see *supra* A.VIII.).[46] The mechanisms of self-government merely shift the dangers for individual judicial independence by shifting power. Thus, an analysis of the impact of judicial self-government on judicial independence has to scrutinize the sources of menaces for judicial independence.

In Germany, these threats do not originate from "politics" or the political level of parliament and executive.[47] Cases of politicians (especially ministers of justice) trying to influence individual judges or proceedings are extremely rare and turn out to be highly dissuasive: All offenders invariably lost their office.[48] The crucial or focal point is the advancement process.[49] As long as any selection takes place, those exerting the power to select may induce those undergoing scrutiny to ask whether some kind of professional behavior would be more or less "helpful" in the eyes of the powerful (e.g. becoming member of the same political party or judges' association …). As the *Richterwahlausschüsse* amply demonstrate *(supra* A.VII.), elements of self-government are no safeguard against this risk. The radical solution would be the abolishment of the advancement system or the judicial hierarchy respectively (see *infra* C.II.). Otherwise, the service courts act as a (mostly) effective guardian of individual judicial independence in the event of an infringement (see *supra* A.IV.).

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[45] *See Bundesverfassungsgericht* [Federal Constitutional Court], 17 BVERFGE 252, 262; *Bundesverfassungsgericht* [Federal Constitutional Court], 3rd Chamber of the Second Senate, DEUTSCHE RICHTERZEITUNG 100 (1991); *Bundesverwaltungsgericht* [Federal Administrative Court], 50 BVERWGE 11, 13 et seq.; 67 BVERWGE 222, 225; *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 425 (1991); *Dienstgerichtshof* [Regional Service Court] Frankfurt a. M., DER ÖFFENTLICHE DIENST 220 (1988); *Verwaltungsgericht* [Administrative Court] Frankfurt a. M., ZEITSCHRIFT FÜR LANDES- UND KOMMUNALRECHT HESSEN, RHEINLAND-PFALZ UND SAARLAND (LKRZ) 378 (2014). *See* Wittreck, *supra* note 3, at 185, 357-8.

[46] *See* Wittreck, *supra* note 3, at 183 et seq.; Schulze-Fielitz, *supra* note 18, at notes 41 et seq. (each with further references to case law); *see* also Seibert-Fohr, *supra* note 3, at 505-6.

[47] *See* P. Schlosser & W. Habscheid, *Federal Republic of Germany, in* JUDICIAL INDEPENDENCE. THE CONTEMPORARY DEBATE 78 (S. Shetreet & J. Deschênes eds., 1985); Y. WANG, THE INDEPENDENCE OF JUDGES IN CHINA AND GERMANY 110, 129 et seq., 174 et seq. (2011); Seibert-Fohr, *supra note* 3, at 447.

[48] Last example: The minister of justice of the eastern state of Saxony (himself a former judge and president of the *Richterbund*) had to resign after using his official mail account to ask a court in another German state after the further duration of a private lawsuit filed by the minister.

[49] *See* Wang, *supra* note 47, at 180 et seq.; Seibert-Fohr, *supra* note 3, at 473 et seq. Cf. L. Jünemann, *Richterliche Unabhängigkeit und Leistungsbeurteilung – Ein Beitrag aus deutscher Sicht, in* RICHTERLICHE UNABHÄNGIGKEIT UND LEISTUNGSBEURTEILUNG 55 (T. Stadelmann, S. Gass & R. McCombe eds., 2015).

II. Accountability

The "value" of accountability as such is basically alien to German law.[50] The term *Verantwortung* (lit. responsibility) may come close to the concept.[51] In German literature on court administration, it typically appears as some kind of sub-element of democratic legitimacy/legitimization (see the next point).[52]

As we have seen, German judges may be held responsible for shortcomings or demerits only by the vote of their peers or fellow judges (see above for the service, penal and civil courts; A.IV.–VI.). This provides strong protection and ensures that only those judges will be held liable who have overtly and seriously transgressed borders being considered indispensable by their fellow judges. Having this in mind, one may conclude that the accountability of the German judiciary is generally low due to elements of self-government. But such conclusion would suppress a powerful mechanism of *informal* control: It may be coined the power of numbers. The court administration has access to the "Erledigungszahlen" (lit. accomplishment data) of any judge and will invariably base the personnel review or evaluation on these numbers.[53] As a rule of thumb, the vast majority of German judges simply accept this as some kind of fact and act accordingly, thus developing a culture of compliance according to numbers (see once again the case of the below-the-average-judge *supra* A.IV.).

III. Legitimacy

If one equates "legitimacy" with the German concept of democratic legitimization (*infra* D.II.), the German judiciary as a whole does not pose serious problem of legitimacy.[54] The Third power as such and at least the Federal courts are explicitly acknowledged by the constitution (Article 92, 93, and 95 para. 1 Basic Law); the same applies to their independence (Article 97 Basic Law; so-called *institutional* legitimization). The judges are either appointed by the ministries of justice (or deputies of these) or the *Richterwahlausschüsse* (*supra* A.VII.). Both organs are responsible to the parliament elected by the sovereign people (*personal* legitimization). Finally, the judges are bound to

[50] But *see* D. S. Clark, *The Selection and Accountability of Judges in West Germany. Implementation of a Rechtsstaat,* 61 SOUTH. CAL. L. REV. 1795, 1832 (1988).

[51] *See* H. Dreier, *Verantwortung im demokratischen Verfassungsstaat, in* VERANTWORTUNG IN RECHT UND MORAL 9 (U. Neumann et al. eds., 2000); D. Ehlers, *Verantwortung im öffentlichen Recht,* 46 DIE VERWALTUNG 467 (2013).

[52] *See* Wittreck, *supra* note 3, at 140 et seq.; Seibert-Fohr, *supra* note 3, at 484 et seq.

[53] *See* J. Riedel, *Individual Evaluation of Judges in Germany,* 4 ONATI SOCIO-LEGAL SERIES 974 (2014).

[54] *See* A. Voßkuhle & G. Sydow, *Die demokratische Legitimation des Richters,* JURISTENZEITUNG 673 (2002); A. TSCHENTSCHER, DEMOKRATISCHE LEGITIMATION DER DRITTEN GEWALT (2006); Wittreck, *supra* note 3, at 114 et seq.; Minkner, *supra* note 3, at 48 et seq.

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the laws enacted by parliament (Article 20 para. 3, Article 97 para. 1 Basic Law; *material* legitimization). The last thread of legitimization is weakened to some degree, as the power of supervision is limited due to judicial independence.[55]

What is the effect of the abovementioned mechanisms? The independence of the presidia as well as the "blind allocation" must be seen as strengthening factors (A.I.). The participation mechanisms of the *Richterräte* and *Präsidialräte* are technically impairments, but rather weak ones (A.II. and A.III.). The record of the service courts is mixed at best, as they may tend to serve interests of the judiciary as an in-group (A.IV.). The same is true for the criminal and civil courts if fellow judges are concerned (A.V. and A.VI.). The *Richterwahlausschüsse* were intended as bulwarks of democratic legitimacy, but practically ended up as instruments of party politicization (A.VII.). Finally, the involvement of executive judges is janiform at best (A.VIII.): As they know the judiciary from within, they can be effective administrators. On the other hand, their socialization as judges may lead to reluctance to address troublesome developments.

IV. Transparency

The German judiciary and transparency are not connected by a close friendship – to put it mildly.[56] A recent case may underline the dilemma. An attorney sued to get access to the direct dial numbers of a court under the Freedom of Information Act. He lost the case because the Higher Administrative Court of North Rine-Westphalia came to the conclusion that this direct access to the single judge would impair the functioning of the court.[57] The judgment is quite typical of how the German judicature deals with the public. While courts routinely maintain websites and appoint judges as press relations officers, they still tend to misunderstand, or at least to underestimate, the necessity to "translate" their language as well as their specific world view.

At the same time, the aforementioned mechanisms of self-government have only a marginal effect on the (lacking) transparency of the judiciary. To put it plainly, all of them are simply too technical to be understood by the broad public. Just two examples: German courts typically publish the "Geschäftsverteilungsplan" (lit. roster of the allocation of duties) enacted by the presidia *(supra* A.I.) on their homepage, but do not try to make clear that it has been concluded under the guarantee of judicial independence. The case of the

[55] *See* H. Dreier, *Artikel 20 (Demokratie), in* 2 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2015), note 140.

[56] German reading: Wittreck, *supra* note 3, at 163 et seq.; C. v. COELLN, ZUR MEDIENÖFFENTLICHKEIT DER DRITTEN GEWALT (2005); C. VISMANN, MEDIEN DER RECHTSPRECHUNG (2011). *See* M. Wolf, *The Press and the Courts in Germany, in*: JUDICIAL INDEPENDENCE. THE CONTEMPORARY DEBATE 117 (S. Shetreet & J. Deschênes eds., 1985).

[57] *Oberverwaltungsgericht* [Higher Administrative Court] Münster, DEUTSCHES VERWALTUNGSBLATT 1133 (2015); short remark on this judgment by J. M. Schmittmann, ZEITSCHRIFT FÜR DATENSCHUTZ 392 (2015).

below-the-average-judge *(supra* A.IV.) has been covered mainly in professional and local journals, but did not reach national headlines.

V. Confidence

According to recent surveys, the trust of the German public or society in the judiciary is generally quite high.[58] This is especially true for the Federal Constitutional Court, who ranks among the most trusted institutions in Germany.[59] On closer inspection, the amiable picture gets some dark stains or blots: According to a recent Bavarian survey, those citizens who had contact with the judicial system had less confidence than those who lacked this real experience.[60]

Once again: To which extent do the mechanisms of self-government influence the confidence or trust of the public in the German judiciary? The answer is quite obvious: As they are not known by or to the public, their impact is rather limited. There are indeed cases that disturb the confidence of the German public, but these are cases of malfunction of the dispensation and not the administration of justice. One recent case may act as an example: Bavarian courts condemned members of a farmers' family (all were mentally handicapped) to prison sentences for murdering the farmer and feeding his body to the pigs. Years later, the corpse of the farmer was found in a nearby river – certainly not eaten. Nevertheless, in the revision of the trial another court upheld the conviction – only to be corrected by the Federal Supreme Court.[61]

C. Proponents of Judicial Self-Government

In Germany, judicial self-government is basically a project of the organized judiciary (I. and II.). Jurisprudence (III.) and politics (IV.) in contrast are reluctant at least.

[58] *See* R. Köcher, *Im Namen des Volkes,* FRANKFURTER ALLGEMEINE ZEITUNG 8 (Aug. 28, 2014): 66% of those interviewed have trust in the courts. More recent data: https://de.statista.com/statistik/daten/studie/153813/umfrage/allgemeines-vertrauen-in-die-justiz-und-das-rechtssystem/ (22.7.2018); *see* also the older study of R. Kniffka, *Das Ansehen der Justiz in der Öffentlichkeit,* 2 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 225 (1981).

[59] *See* https://de.statista.com/statistik/daten/studie/176867/umfrage/vertrauen-in-das-bundesverfassungsgericht/ (22.7.2018); cf. HERZKAMMERN DER REPUBLIK. DIE DEUTSCHEN UND DAS BUNDESVERFASSUNGSGERICHT (M. Stolleis ed., 2011).

[60] Still not published.

[61] *See* T. DARNSTÄDT, DER RICHTER UND SEIN OPFER 94 et seq. (2013); H. Bubrowski, *Die Leiche war doch nicht zerstückelt,* FRANKFURTER ALLGEMEINE ZEITUNG 8 (June 28, 2014).

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I. German Association of Judges (Deutscher Richterbund)

The traditional German Association of Judges unites 16.000 of the roundabout 25.000 members of the German judiciary (comprising judges as well as prosecutors).[62] Although typically aligned with the Christian Democrats of the CDU/CSU (who more than once chose secretaries of justice out of the higher ranks of the association), the *Richterbund* has decided to propose a two-pillar-model of judicial self-government some years ago.[63] It stipulates two bodies of self-government: On one hand, a judicial selection committee ("Justizwahlausschuss") is composed of a majority of members elected by the *Land* parliament (nine MPs and its President) and a minority of judges elected by their peers (also nine); it is responsible only for the selection of members of the second body, the judicial administrative council ("Justizverwaltungsrat"), consisting of a president of the judiciary ("Justizpräsident") and four more members. It will completely replace the old-fashioned ministry of justice (which is basically reduced to the administration of prisons) and shall be responsible for the appointment, promotion, and discipline of judges. It may be recalled by the *Justizwahlausschuss*, which is itself answerable to the parliament (which may remove members with a supermajority of two thirds of its members).

II. New Association of Judges (Neue Richtervereinigung)

The leftist "New Association of Judges" is much smaller than the *Richterbund*, comprising about 550 members. Nevertheless (or consequently), it has proposed a much more radical model of self-government.[64] The main difference is the abandonment of any system of advancement: While the *Richterbund* plans to leave the judiciary basically unchanged by simply exchanging the ministries of justice for new structures of self-government (see *supra* C.I.), the *Richtervereinigung* aims at a much more radical reform. After its implementation, all German judges would be just (equal) "judges", regardless of the court they are sitting in. Moreover, any position as court president would only be transferred for a limited time (with the incumbent stepping back into the rank and file after his or her term). The association hopes to be able to remove any dangers for judicial independence

[62] *See* S. M. BOYNE, THE GERMAN PROSECUTION SERVICE. GUARDIANS OF THE LAW? (2014).

[63] *See* Frank, *supra* note 1, at 97 et seq. (the author was chairman of the *Richterbund* at the time of the publication). German material: http://www.drb.de/cms/index.php?id=552; there also the pdf of the draft of a "Landesgesetz zur Selbstverwaltung der Justiz (Landesjustizselbstverwaltungsgesetz – LJSvG)". Compare C. Frank, *Selbstverwaltung der Justiz: Ein Modell auch für Deutschland,* 91 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 405 (2008); H. Weber-Grellet, *Selbstverwaltung der Justiz – Zwei-Säulen-Modell des Deutschen Richterbundes,* ZEITSCHRIFT FÜR RECHTSPOLITIK 153 (2007); H. Weber-Grellet, *Weitere Schritte auf dem Weg zur Selbstverwaltung der Justiz,* DEUTSCHE RICHTERZEITUNG 2, 46 et seq. (2012); Seibert-Fohr, *supra* note 3, at 461 et seq.

[64] *See* M. CEBULLA & W. K. KANNENBERG, SELBSTVERWALTUNG DER JUDIKATIVE. DIE GESETZENTWÜRFE DER NEUEN RICHTERVEREINIGUNG (2012); English reading: H. Haeuser, *Self-governance within the Courts: vertical versus horizontal, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 103 (P.-A. Albrecht & J. Thomas eds., 2009).

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through this move (the *rationale* is that even in a system of self-government, a junior judge can speculate about the worldview of those senior judges responsible for deciding on his promotion – the system of self-government will just replace the potentially dangerous decision-makers by other potentially dangerous decision-makers).

Bearing this in mind, the New Association of Judges stipulates for the following model of judicial self-government (it would be applicable for the Federal as well as the State level): A judicial selection committee ("Richterwahlausschuss") consisting of a two-third-majority of members elected by parliament and a minority elected by members of the judiciary and the Bar Association shall be responsible for the appointment of judges. A judicial administrative council ("Justizverwaltungsrat") consisting of 20 members elected by their peers from the judiciary and ten members elected by parliament will basically replace the ministry of justice in all day-to-day-affairs of the judiciary. Moreover, the powers of the presidia (*supra* A.I.) shall be upgraded.

It has to be pointed out that, in particular, according to the traditional German understanding of democracy, the Justizverwaltungsrat is quite clearly unconstitutional (see *infra* D.II.).[65] The members elected by their fellow judges and prosecutors are not able to trace back their *administrative* mandate to the German people (their *judicial* mandate is another matter).

III. Jurisprudence

In German legal academia, the demand for judicial self-government is weak at least.[66] Basically, the judiciary or questions of court administration in particular are addressed only by a couple of scholars at all. Amongst these, only a tiny minority act as advocates of judicial self-government.[67] One has to add a couple of practitioners.[68] One reason may be the rather rigid subdivision of German jurisprudence into Civil and Public law: While the constitutional rules on judicial independence (Article 97 of the Basic Law) are typically

[65] *See* Minkner, *supra* note 3, at 267, 275; *Wittreck, supra* note 21, at 155-6.

[66] *See* Wittreck, *supra* note 3, at 642 et seq., 655 et seq.; Wittreck, *supra* note 21, at 152 et seq. (with further German readings).

[67] *See* namely T. Groß, *German constitutional Expectations, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 38 (P.-A. Albrecht & J. Thomas eds., 2009) (*Groß* is a Public Law teacher from Osnabrück); P.-A. Albrecht, *Safety mechanisms for the autonomy and independence of the judiciary. Insights from the third power in Europe in discussion between the CCJE-Working-Group and the German Commission "Judicial System" in Berlin (June 23rd 2014),* 97 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 420 (2014) (*Albrecht* held a chair for criminology at Frankfurt a. M.).

[68] *See* H.-E. Boettcher, *Away from Napoleonic and Wilhelminian Models, to a democratic Organisation of the Courts in Germany, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 111 (P.-A. Albrecht & J. Thomas eds., 2009); or Weber-Grellet, *Weitere Schritte*, *supra* note 63, at 2 et seq., 46 et seq.

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covered by public law teachers, the statutory legislation on court administration is mainly dealt with by judges and other practitioners with a Civil (or Criminal) law background. Practically, these are separate discourses.

IV. Politics

As far as can be seen, the chance of judicial self-government being discussed in German politics is void. There have been two attempts to put it into action. On the state level, the short-lived coalition of the Green Party and the Christian Democrats in Hamburg aired a proposal in 2008,[69] which disappeared alongside with the coalition. On the federal level, the leftist party "Die Linke" basically adopted the proposal of the "Neue Richtervereinigung" (*supra* C.II.) in the penultimate legislation period; the motion foundered in the legal committee of the *Bundestag*.[70]

D. Impediments to Judicial Self-Government

If there are institutions of self-government and associations fighting for this model, why has Germany refrained of any step in the direction of the Italian model until now? There are (at least) three important obstacles, one of them factual, the other two legal: Germany has a long tradition of recruiting judges who are not inclined to take their professional lives into their own hands (I.), and the prevailing understanding of the democratic principle effectively acts as a ban on judicial self-government models comprising bodies with a majority of judges (II.). The weak interpretation of the concept of the separation of powers does not act as a potential counter-weight (III.).

I. Recruitment Patterns of the German Judiciary

Generally, Germany has a typical career judiciary of the continental type.[71] The study of law and its curriculum are regulated in the German Judiciary Act; in fact, German law

[69] *See Reformpläne in Schleswig-Holstein und Hamburg,* 95 BETRIFFT JUSTIZ 330 (2008); drawing near (senator of justice) T. Steffen, *Autonomie für die Dritte Gewalt – Erwartungen aus der Politik,* 91 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 354 (2008); *see* G. Mackenroth, *Selbstverwaltung der Justiz – Zwischenbilanz in Frageform,* DEUTSCHE RICHTERZEITUNG 79, 81 et seq. (2009).

[70] Entwurf eines … Gesetzes zur Änderung des Grundgesetzes – Herstellung der institutionellen Unabhängigkeit der Justiz, BT-Drs. 17/11701; Entwurf eines Gesetzes zur Herstellung der institutionellen Unabhängigkeit der Justiz, BT-Drs. 17/11703 ("BT-Drs." stands for printed matters of the German parliament [Bundestag]); *see* the expert votes: http://www.bundestag.de/bundestag/ausschuesse18/a06/anhoerungen/Archiv; *see* also E. Kreth, *Steter Tropfen höhlt den Stein,* DEUTSCHE RICHTERZEITUNG 236 (2013).

[71] *See* Clark, *supra* note 50, at 1802 et seq., 1816 et seq.; M. Gressmann, *Germany, in* PROCESS OF THE APPOINTMENT AND TRAINING OF JUDGES 153 (International Association of Judges ed., 1999); J. Riedel, *Recruitment, Professional Evolution, and Career of Judges and Prosecutors in Germany, in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN 69 (G. Di Federico ed.,

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students do not study to become "lawyers", but to attain the "qualification to act as judges". This requires a four-year university study (terminated by a first state examination) and a two-year internship or *Referendariat* (terminated by a second state examination).[72] As a rule of thumb, judges and prosecutors are recruited directly from the best ten percent of the graduates of this second state examination. The recruitment of older applicants or of lawyers with some job experience is not prohibited by law, but highly unusual. Basically, German judges thus enter the judiciary quite young. Furthermore, as scholars of legal sociology have pointed out, those students of the law applying for the status of judge or prosecutor are of a typical mold:[73] As they could earn much more in a law firm (the more prestigious ones try to recruit from the same pool of the best ten percent), they strive for the security of a public service position which is basically free of any administrative responsibilities. In fact, German judges have bitterly opposed the transfer of disciplinary responsibility for the so-called "service units" (i.e. court typists or clerks) from special management officers to themselves.[74] Having this in mind, even those judges who propose judicial self-government tacitly concede that the German judiciary has recruited judges who are not suitable for or at least not fond of the job of self-government.[75]

II. Distinct German Appreciation of the Democratic Principle

While this is a factual obstacle, the most powerful argument is the distinct German understanding of democracy as a principle of Public Law. Though every European lawyer would probably admit that democracy should mean some kind of influence of the people on the exercise of power,[76] German jurisprudence and judicature have developed a highly formalistic model of democratic legitimacy.[77] It was basically invented to confine employee participation in the public service or to curb the power of the public service unions.

2005); J. Riedel, *Training and Recruitment of Judges in Germany,* 5 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 42 (2013).

[72] *See* S. Korioth, *Legal Education in Germany Today,* 24 WISCONSIN INT'L. L. J. 85 (2006); *see* also the contributions in LEGAL EDUCATION AND JUDICIAL TRAINING IN EUROPE (D. Piana et al. eds., 2013).

[73] *See* E. Lange & N. Luhmann, *Juristen – Berufswahl und Karrieren,* 65 VERWALTUNGSARCHIV 113 (1974).

[74] *See* the highly sceptical view of W. Viefhues & K.-H. Volesky, *Neue Konzepte zur Gerichts- und Arbeitsorganisation in Verbindung mit dem Einsatz moderner Informationstechnik in der ordentlichen Gerichtsbarkeit,* DEUTSCHE RICHTERZEITUNG 13, 19 (1996); and Wittreck, *supra* note 3, at 477-8.

[75] Wittreck, *supra* note 21, at 157; Minkner, *supra* note 3, at 660-1.

[76] *See* D. Zacharias, *Terminologie und Begrifflichkeit, in* 2 HANDBUCH IUS PUBLICUM EUROPAEUM § 40 (A. v. Bogdandy, P. Cruz Villalón & P. M. Huber eds., 2008), notes 14 et seq.

[77] *See* Robbers, *supra* note 23, at notes 144 et seq. German reading: Wittreck, *supra* note 3, at 114 et seq.; Dreier, *supra* note 55, at notes 109 et seq.; Minkner, *supra* note 3, at 48 et seq.

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This model distinguishes three modes of democratic legitimation: While the *institutional* or functional legitimation is guaranteed if an institution or state function is mentioned in the constitution (e.g. Article 92 of the Basic Law mentions the judiciary as such), the *personal* legitimation is established by an unbroken chain of acts of appointment linked to parliament: The German people elect the members of the *Bundestag*, the *Bundestag* elects the Chancellor, the Chancellor appoints the Federal ministers, and the ministers appoint the civil servants of their department. Lastly, the *material* legitimation is secured by the commitment to the law and the accompanying supervision of the civil servants. This sounds quite innocent, but has dire consequences for the judicial self-government. Contrariwise, the model excludes any significant influence from groups that are unable to trace back their legitimation to parliament (or the people as a whole). According to the predominant German understanding, an institution with a majority of members without adequate personal legitimation is unconstitutional as it contravenes the democracy principle. This clearly excludes any judicial council with a majority of its members elected by members of the judiciary, as the CCJE has proposed in a couple of documents.[78] Furthermore, this should make clear why the German proposals are rather closemouthed and tentative – the associations know the model all too well …

III. Distinct German Appreciation of the Separation of Powers

Now one might ask whether this model stands alone or could be counter-balanced by the notion or idea of the separation of powers.[79] This is, of course, known in Germany and enshrined in the *Grundgesetz* (Article 1 sec. 3, Article 20 sec. 2 and 3 Basic Law). According to the dominant interpretation, this should not be misunderstood as a strict separation. The typical explanation goes as follows: The German constitution stipulates for a system of mutual control of the different powers (commonly called interdigitating or interlacing of powers, German "Gewaltenverschränkung"). According to this understanding, the Federal Constitutional Court or *Bundesverfassungsgericht* is able to exercise control vis-a-vis the *Bundestag* by rejecting laws as unconstitutional, while the parliament is able to exercise control in the other direction by selecting the judges of the court or changing the legal frame of the institution. And the traditional power of the executive to appoint and promote judges acts as a counterbalance to the judicial review conducted by these judges. Therefore, the notion of an institutional independence of the Third Power that has to be safeguarded against parliament and the executive is practically unknown and cannot at least act as an argument to free the judiciary from the chains of democratic legitimation (which as a matter of fact proves to be the stronger principle).

[78] *See* STANDARDS ON JUDICIAL INDEPENDENCE 279 et seq. (S. Gass, R. Kiener & T. Stadelmann eds., 2012); sceptical J. Terhechte, *Judicial Ethics for a Global Judiciary – How Judicial Networks Create their own Codes of Conduct,* 10 GER. L. J. 501 (2009); and Wittreck, *supra* note 3, at 222 et seq.

[79] *See* C. MÖLLERS, THE THREE BRANCHES. A COMPARATIVE MODEL OF THE SEPARATION OF POWERS (2015); *see* also A. W. HERINGA & P. KIIVER, CONSTITUTIONS COMPARED 22 et seq. (3rd ed. 2012).

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E. Conclusion: German Resistance to Judicial Self-Government and the "Eternity Clause" of the Basic Law

Are these results set in stone? The answer may be a tentative "yes". According to Article 79 para. 3 of the Basic Law (the so-called eternity clause), constitutional amendments are ruled out that would "touch" the fundamental principles of Article 20 of the German Constitution.[80] Although the Federal Constitutional Court has not explicitly determined that any alteration of the model of democratic legitimization is prohibited,[81] it has underlined its immediate derivation from the principle of democracy enshrined in Article 20 paras. 1 and 2 of the Basic Law. An amendment of the *Grundgesetz* which according to the Italian or CCJE model seeks a full-fledged institutional independence of the third power would thus be at least a hazard.[82]

[80] *See* K. Hailbronner & M. Kau, *Constitutional Law, in* AN INTRODUCTION TO GERMAN LAW 53, 81 (M. Reimann & J. Zekoll eds., 2nd ed. 2005); R. Dixon, *Constitutional amendment rules: a comparative perspective, in* COMPARATIVE CONSTITUTIONAL LAW 96, 104 (T. Ginsburg & R. Dixon eds., 2011). Best German coverage: H. Dreier, *Article 79 III, in* 2 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2015), notes 14 et seq.

[81] Leading cases: *Bundesverfassungsgericht* [Federal Constitutional Court] 93 BVERFGE 37; 107 BVERFGE 59.

[82] There is consensus that the requirement of democratic legitimization as such is "änderungsfest" (lit. amendment-proof), while many constitutional lawyers point out that the details of the model may be altered. *See* only Dreier, *supra* note 80, at note 37; K.-E. Hain, *Article 79, in* 2 v. MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ (P. M. Huber & A. Voßkuhle eds., 7th ed. 2018), notes 83-4.

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