

Deutsche Bundestag
Petitions Committee
Platz der Republik 1
11011 Berlin

Heidelberg, 06.05.2013
My ref.: 89-13

Petition
Impartiality of the Judiciary and State Prosecutor

Dear members of the Bundestag,

We petition the Bundestag to amend the Constitution, and thereby create the requirements for a genuinely impartial judiciary and State Prosecutor's Office. We are thus subscribing to the long-standing demands of the legal profession and the judiciary itself. Without wishing to become involved at the party-political level, we welcome the corresponding parliamentary initiative of the LINKEN and recommend that the Bundestag pass such a resolution (BT-Drs. 17/11701).

I. Merely formal vs. genuine impartiality of judges

The impartiality of judges is an essential pillar of the rule of law. It is a basic requirement for effective legal protection against executive and legislative encroachment on the basic rights of citizens. Partial judges do not serve the law, but rather the government: they do not pronounce on the law, but bend it. Without impartial judges, the citizen is defenceless. For this reason, the impartiality of judges is guaranteed in our Constitution (Art. 97 GG):

(1) Judges are impartial and subject only to the law.

The constitutionally guaranteed impartiality of judges is however insufficiently reflected in reality:

Although a judge may not be bound by instructions, the judicial administration itself is not independent, but forms part of the Executive. This means: The Justice or Interior Minister appoints and promotes the judges.

This incorporation of the judicial administration in the Executive restricts the theoretical judicial impartiality. Although judges are formally impartial, the Executive can de facto exert significant influence on the judiciary by means of appointments and promotions. Politically amenable judges give politically amenable verdicts, and thereby do not serve the law, but rather the government.

This connection between the Executive and the Judiciary is particularly striking in the area of financial and administrative jurisdiction. Anyone who wants to become a financial or

administrative judge must first pursue a career in (financial) administration. This means that the judge, before he can act impartially, is socialised in the administration and equipped with personal networks. We do not advocate in general the prohibition of a change from the administration to the court - but the fact that the normal career path necessarily requires longer employment in the administration, before being appointed as a judge is a structural undermining of the distribution of power.

The election procedure of constitutional judges, whose task is to impartially protect our Constitution, is also questionable: the constitutional judges are elected half by the Bundesrat and half by the Bundestag (Art. 94 GG). Even if the appointment of judges does not here lie alone in the hands of the Executive: the Executive is also heavily involved here via the Bundesrat - because the state governments are represented in the Bundesrat. Here too the judiciary has no voice, so that the door is wide open to party-political and tactical considerations. Politics chooses its own judges and recruits the judiciary, sometimes quite openly from its own ranks (currently Judge Peter Müller). Genuine impartiality is something quite different.

This constitutional reality does not satisfy the demands of our Constitution. It requires according to its spirit not only a formal but an actual independence of the judiciary. Genuine independence means that the judiciary itself must manage the judiciary, recruit judges itself and decide itself on promotions.

This incomplete arrangement does not satisfy the demands of our Constitution. In addition, it also falls short of international standards. The self-administration of the judiciary is a constitutional matter of course in countries such as France, Spain, Italy, Norway, Denmark and the Netherlands. In Germany there is not even the slightest approach to self-administration of the judiciary. For this reason the European Council has already urgently recommended the Federal Republic in 2009 to introduce the self-administration of the judiciary (Resolution 1685). Politics however took no action. We want to give an impetus that this should finally change.

II. Instructional duty of the State Prosecutor's Office

While the judges still enjoy at least formal independence, the public prosecutors are openly subject to the authority of politics. The Interior Ministers of the states and the Federal Government can at any time instruct public prosecutors to institute or discontinue investigations, or to steer them in a certain direction.

The total incorporation of the Public Prosecutor's Office into the Executive is contrary to any idea of separation of powers fundamental to the rule of law. Concentration of power, and excesses against the liberties of citizens should be prevented by the mutual control of such powers. The Public Prosecutor's Office in the hands of the Government causes a dangerous abundance of power: The Government can on the one hand prevent investigations against itself and its allies, and on the other hand it can - in cooperation with the media - initiate investigations against unwelcome critics of the Government ("execution by the media").

The Public Prosecutor's Office is not only an investigative authority such as the police, but acts as an organ of the administration of justice in criminal proceedings. The executive encroachment on the Public Prosecutor's Office therefore brings into question the complete independence of the judiciary in the area of administration of criminal law.

The instructional duty of the Public Prosecutor's Office in the Executive is a form of structural corruption. It is also denounced by Transparency International:

“Unlike judges, public prosecutors in Germany are bound by instructions. This means that cases of political corruption are not necessarily prosecuted with the required consistency. Ultimately, this undermines the legitimacy of the political process and leads to a loss of confidence in the judiciary” (<http://www.transparency.de/Strafverfolgung.57.0.html>).

In this context it must also not be forgotten that the Federal Republic of Germany is one of only few countries in the world which has still not signed the UN Convention against corruption. In the minds of the public, this creates the impression that politics wants to evade the required constitutional responsibility, in order to freely pursue corrupt interests.

On this point too, Germany comes off badly in the European comparison. The Public Prosecutor's Offices such as in Great Britain and in Italy are essentially independent. In Italy in particular, this is important in the light of structurally corrupt politics - otherwise, investigations of the mafia and Berlusconi would be unthinkable. The Italian mafia amongst others is extending its activities vigorously to Germany. With Public Prosecutors bound by instructions, Germany is institutionally quite unprepared in any way to combat the mafia infiltration of politics and the economy.

The European Council unambiguously recommends in its already quoted Resolution (No. 1685) the abolition of the instructional duty of the Public Prosecutor's Office and the guarantee of its independence. Here once again, politics has remained inactive. With our petition, we want to create an impetus to correct this situation.

This petition is submitted in the name of the undersigned. It is supported by the Alliance for Democracy. The Alliance for Democracy is a loose association of people committed to our democracy.

With kind regards

Simon G. Jakob
Lawyer