BULLETIN OF THE INSTITUTE
FOR WESTERN AFFAIRS

The European Commission's Report on the Rule of Law Situation in the Federal Republic of Germany – a critical commentary

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No. 30(450)/2020
30.10.2020

ISSN 2450-5080

On 30 September 2020 the European Commission published a *Report on the Rule of Law Situation in Germany*[1]. Of greatest interest in the Report are its shortcomings and omissions with regard to the operation of the German judicial system. This is yet another EU document, following e.g. the judgment of the CJEU of 9 July 2020[2], which perpetrates a state of illegality in two respects: 1. The legal basis for assessing respect for the rule of law in the Member States in general - there is no basis in the Treaties for EU institutions to take action in this area[3], and the content of the rule has not been clearly specified and can thus be freely shaped by the EU institutions, in particular by the European Commission. The Report in question is a model example of this statement 2. The assessment of respect for the rule of law in the operation of justice in Germany was carried out superficially, selectively and therefore unreliably.

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[1] COMMISSION STAFF WORKING DOCUMENT 2020 Rule of Law Report, Country Chapter on the rule of law situation in German. Brussels, 30.9.2020 SWD(2020) 304 final, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52020SC0304&from=EN

[2] CJEU judgment of 9 July 2020, C-272/19, VQ v. Land Hessen, ECLI:EU:C:2020:535.

[3] OPINION OF THE LEGAL SERVICE of the Council of the European Union of 27.05.2014, subject: Commission's Communication on a new EU Framework to strengthen the Rule of Law – compatibility with the Treaties.

In all probability, the Commission's proposals in this area are justified by neither the legal nor the factual state of affairs.

The European Commission's Report is fraught with significant shortcomings:

- Neither the legal status nor the practice of selecting, appointing, evaluating, and promoting judges in federal and state courts were reliably assessed;
- The demands of German judicial associations for the independence of the judiciary from the executive branch were disregarded;
- No reference was made to the questions referred to the CJEU by German judges, who explicitly expressed doubts about their own independence in these questions;
- The issue of allowable party affiliation of judges and the direct transition from the judiciary to politics and vice versa was not addressed;
- The question of the staff management system, critically assessed by judges, and Germany's failure to implement the CJEU judgment on guaranteeing the independence of prosecutors from the executive branch were not addressed.

Introduction

The evaluation of the operation of German justice system from the point of view of the rule of law takes only three pages in the 18-page Report. Furthermore, most of this section of the Report is dedicated to well-known issues.

The Commission defines, e.g. that the Federal Republic of Germany is a federal state and that the justice system is the competence of the federated states (German *Länder*). Regrettably, this well-known fact provokes no methodological, let alone substantive conclusions. Judicial independence, apart from sociological studies (the 2020 Eurobarometer survey), is to be safeguarded by two provisions of the Basic Law of the Federal Republic of Germany (Art. 33 (2) and Art. 97).

The problem is that in line with the principle of division of powers between the Federation (German *Bund*) and the *Länder*, common courts are the responsibility of the *Länder*. Therefore, the rules for the selection, appointment, professional evaluation, and promotion of judges have been regulated at the level of the *Länder* constitutions, laws and lower-level acts of the *Länder*, which were not examined by the European Commission at all.

A sound assessment of the legal situation in this area would require an analysis of the normative acts in force in at least several *Länder*, as well as the administration practice of federal and *Länder* courts.

1. Selective and unreliable evaluation of the procedure for the selection, appointment and promotion of judges in light of German law and practice

The Commission opines in the Report: *For the Federal Courts, a judges' selection committee (Richterwahlausschuss) selects judges for appointment by the executive and Councils of judges (Präsidialräte) of the relevant courts have to be consulted in this process* (p. 1 of the Report) [Author's emphasis]

The judges' selection committee is not a mandatory body in the selection of judges in Länder, while in light of the Basic Law of the Federal Republic of Germany, it is the minister of justice who has mandatory power in this respect. The selection of a judge without the participation of the minister of justice in is contravention of Art. 98 (4) of the Basic Law of the Federal Republic of Germany (hereinafter: FRG BL). Furthermore, Councils of judges do not make judicial appointments. In some procedures, the Councils of judges compile non-binding opinions on candidates and forward them to the judges' selection committee.

1.1. Procedure for the election and appointment of judges of federal courts

The procedure is regulated under Art. 95 (2) FRG BL:

The judges of each of these [federal – note M.B.] courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges [Author's emphasis], *consisting of the competent Land ministers and an equal number of members elected by the Bundestag.*

A case in point is the procedure of electing judges for the Federal Administrative Court (German Bundesverwaltungsgericht, BVerwG). The selection of judges of the Federal Administrative Court is made by the judges' selection committee (German Richterwahlausschuss), composed of Land ministers responsible for the administrative judiciary and an equal number of members elected by the Bundestag. The committee is chaired by the Federal Minister for Justice and Consumer Protection. The chairman and each member of the committee is entitled to propose candidates. For each candidacy, the opinion is issued by the presidium council of the Federal Administrative Court, yet the judges' selection committee is not bound by this opinion. The committee selects a judge by a simple majority. Subject to approval by the federal Minister of Justice, the selected candidate is appointed by the President of the Federal Republic of Germany[4]

The politicising of the selection of federal court judges is addressed in media. The following section discusses briefly the selection of judges of the Federal Supreme Court in March 2019 and the currently ongoing process of the selection of the president and vice-president of the Federal Financial Court. The latter procedure is of

[4] Wahl und Ernennung. Bundesverwaltungsgericht, http://www.bverwg.de/das-gericht/organisation/richter-und-senate (access 7.10.2020).

special interest as the judges of the Court themselves spoke in defence of respect of criteria of professional competence.

1.1.1. Controversy over the politically motivated election of judges to the Federal Supreme Court (BGH) – 03.2019

A procedure of selecting as many as 18 judges of the Federal Supreme Court (German Bundesgerichtshof, BGH) was taking place in March 2019 due to the creation of two additional adjudicating senates. Furthermore, an analogous procedure was applied to select 4 judges of the Federal Administrative Court and the Federal Financial Court.

In a comprehensive article (Süddeutsche Zeitung,11.02.2019) W. Janisch detailed the behind-the-scenes aspects of the selection of the BGH judges, observing that voting in the judges' selection committee is but a "democratic ritual", crowning the long procedure of over six months of deciding on lists of candidates between the CDU and the SPD, with a minimum involvement of the Greens and the FDP, which receive 1-2 seats. In the absence of a qualified majority, as in the case of the Federal Constitutional Court elections, the AfD did not have to be considered. The informal procedure for establishing the candidate rosters takes place inter alia with the participation of officials from ministries of justice, Land prime ministers, presidents of federal courts and higher courts of the Länder, who are also appointed in a politically-driven procedure. In addition to the "affiliation" or even membership of a political party of a federal judge candidate, the parity of the individual Länder and gender parity is taken into account. While these rosters include exclusively candidates of prime professional competence, what is problematic from the perspective of the democratic system is the narrowing down of the selection spectrum solely to judges linked to political parties.

1.1.2. Objection of judges of the Federal Finance Court (BFH) to the planned appointment of the Court's President and Vice-President – October 2020

The judges' association charged the current Federal Minister of Justice C. Lambrecht (SPD) with intending to appoint as President and Vice-President of the Federal Finance Court lawyers who have political backing yet no adjudicating experience. The candidates are: A. Morsch, President of the Saarland Finance Court, former SPD-backed secretary of state and H.-J. Thesling, affiliated to the CDU, an official of the Ministry of Justice of North Rhine-Westphalia, former President of the Finance Court in Düsseldorf.

M. Loose, a representative of the judges' association called these nominations a “blatant violation of the court’s operational capacity and of judicial independence” and moreover observed that in 2016 the Federal Ministry of Justice in agreement with the presidents of the Federal Finance Court established that the position of president and vice-president would be held exclusively by persons who had adjudicated for a few years in that Court. This criterion was now unilaterally lifted by the Federal Ministry of Justice. The Ministry did not reply to these allegations yet last

week the federal judges' selection committee selected the above persons as judges of the Federal Finance Court[5].

1.1.3. Politicisation of the election of judges to the German Federal Constitutional Court

Over the last decade, there is increasing politicising of the process of selecting judges for the Federal Constitutional Court (German *Bundesverfassungsgericht*), a case in point being a direct transfer from politics to the position of the vice-president and then president of the FCC. The incumbent FCC President, S. Harbarth immediately before assuming this position, was a partner in a large German legal office providing services for German concerns and an influential *CDU* politician[6]. The above concerns led to the filing of two constitutional complaints against the appointment of S. Harbarth as the FCC judge[7].

1.2. Procedure for the selection and appointment of judges of *Länder* courts

Evaluation of the procedure for the selection and appointment of judges of *Länder* courts must include the analysis of Art. 98 (3) and (4) FRG BL and of laws in force in the federated states[8]. The Commission failed to address the provision of the German federal constitution and those of any of the *Länder*.

Art. 98 of the Basic Law of the Federal Republic of Germany

(*3) The legal status of the judges in the Länder shall be regulated by special Land laws if item 27 of paragraph (1) of Article 74 does not otherwise provide.*

(4) The Länder may provide that Land judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges [Author's emphasis]

Art. 98 (4) FRG BL authorises the *Länder* to adopt a law on the selection of judges, envisaging the selection of a judge by the Land minister of justice along with the judges' selection committee. The selection of a judge solely by the committee or

[5] *BFH-Richterverein gegen BMJV: Kritik an geplanter Chefpostenbesetzung*, Legal Tribune Online, 09.10.2020, https://www.lto.de/persistent/a_id/43056/ (access 12.10.2020).
[6] https://www.bundesverfassungsgericht.de/EN/Richter/Erster-Senat/Praesident-Prof-Dr-Harbarth/praesident-prof-dr-harbarth_node.html (access 19.10.2020).
[7] J. Keuchel, V. Votsmeier Düsseldorf, Karlsruher Richter mit Vergangenheit. Stephan Harbarth wird wohl zum Präsidenten des Bundesverfassungsgerichts gewählt. Kritiker stellen seine Unabhängigkeit infrage und legen Verfassungsbeschwerde ein. Handelsblatt 5.03.2020, https://www.handelsblatt.com/politik/deutschland/designierter-praesident-stephan-harbarth-verfassungsrichter-mit-umstrittener-vergangenheit/25612434.html?ticket=ST-502313-DAHgXTBdqvNz33qWFljt-ap5 (access 28.10.2020).
[8] A review of legal provisions in force in the *Länder* in: M. Bainczyk, Wybrane aspekty prawne niezawisłości władzy sądowniczej w RFN/Selected Legal Aspects of Judicial Independence in the Federal Republic of Germany, IZ PP no. 30, p. 30 ff, https://www.iz.poznan.pl/plik,pobierz,3026,1cf079cc57256ac2eeaa534c581c132a/IZ%20Policy%20Papers%2030.pdf (access 28.10.2020).

without the consent of the competent minister is in contravention of the Basic Law. The above provision is optional, i.e. the *Länder* may use the model of appointing judges with the participation of a committee or may entrust this decision exclusively to the executive[9].

The following are examples from the State of Hesse which have been assessed by the Court of Justice of the EU but have not raised any doubts among the Luxembourg judges as to their compliance with the rule of law.

Law of the State of Hesse on the status of a judge[10]

§ 3 Judicial appointments
Judges are appointed by the Minister of Justice.

§ 19 Preparation of a decision
The Minister of Justice submits personal files to the judges' selection committee with a proposal [Author's emphasis] *and indicates one or more rapporteurs from among the judges' selection committee.*

§ 20 Participation of the judges' selection committee
1. A decision of appointment to the judiciary is made by the Minister of Justice along with the judges' selection committee (Art. 127 (2) and (3) of the Hessian Constitution). (…)

The communications of the Land chapter of the German Association of Judges (DRB) of 2017 define practical aspects of the judges' selection procedure is the State of Hesse:

- the Personnel Officer of the Hessian Ministry of Justice shall pre-select candidates on the basis of the documents submitted and forwards their opinion to courts of higher instance and to the General Prosecution Office;

- the higher courts of the judiciary specialised in labour law, social affairs, administration, and finance shall hold an initial interview with the candidates, since in the case of specialised courts, expertise in the relevant area of law is also required;

- this is followed by a job interview in the Hessian Ministry of Justice;

- a candidate who has been favourably assessed during the job interview in the Ministry has a job interview with a secretary of state in the Hessian Ministry of Justice;

- the Hessian Minister of Justice introduces the favourably assessed candidates to the judges' selection committee;

- subject to the committee's approval, a candidate is appointed to the office of the judge for a probationary period[11].

[9] G. Morgenthaler, GG Art. 98 [Rechtsstellung der Richter] in: V. Epping, Ch. Hillgruber, BeckOK Grundgesetz 44th ed., nb. 18-19.
[10] (German *Hessisches Richtergesetz*, HRiG) in the wording of 11 March 1991 (GVBl. I, p. 54), recently amended by the Law of 21 June 2018 (GVBl. p. 291).

Pursuant to Art. 3 of the law of the State of Hesse on the status of a judge, a judge is appointed by the Hessian Minister of Justice.

A thorough analysis of the federal and state laws leads to the conclusion that there is a strong link between the executive and the judiciary in Germany. The Minister of Justice at both Federation and Land level has a decisive impact on the selection and appointment of judges, and the Presidential Councils of the courts have no binding influence on the selection and appointment of judges. Therefore, the European Commission's Report in this regard is flawed.

1.3. Official evaluation of judges by the Minister of Justice

The Minister of Justice has a fundamental impact not only on the selection and appointment of a judge, but also on his or her further career, since it is the Minister of Justice who determines the criteria and the way in which the judge is assessed in the service and it is the Minister who decides on the judge's professional promotion.

A president of the court, also appointed by the Minister of Justice, is another major figure in the follow-up of the judge's evaluation. A strongly hierarchical system of administering courts with a dominant role of the Ministry of Justice, developed on the basis of the 19th-century Prussian official model, reflected in the Law on the Court System of 1877, in force until today[12].

Example of arrangements for the official assessment of judges of administrative courts in the State of Hesse:

Law of the State of Hesse on the status of a judge

§ 2b Official assessment
The assessment of the capacity, suitability and professional performance of judges is regulated by the Ministry of Justice in directives. [Author's emphasis]

Internal audit and audit of official activities for the Hessian Ministry of Justice's jurisdiction[13]

§ 3 Audit procedure
1. **Internal audit is carried out on the basis of catalogues of audits and tasks, agreed upon with the Hessian Ministry of Justice, separate for a given area of audited cases and categories, implemented by presidents of the highest instance of the General Prosecutor**. 2. (…). [Author's emphasis]

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[11] *Die Einstellungspraxis der hessischen Justiz*, an interview with Dr K. Burckhardt from the Hessian Ministry of Justice, Mitteilungen des Landesverbandes Hessen, no. 1/2017, https://www.richterbund-hessen.de/wp-content/uploads/2017/03/HeMi-Ausgabe-1-2017.pdf (access 15.10.2020), p. 7 ff.
[12] Law of 27 January 1877 on the system of courts (German *Gerichtsverfassungsordnung*, GVG) in the wording of 9 May 1975 (BGBl. I p. 1077), recently amended by the Law of 6 October 2020 (BGBl. I 2197).
[13] Circular of 15 November 2017 (*Innenrevision und Geschäftsprüfung für den Geschäftsbereich des Hessischen Ministeriums der Justiz*, Runderlass vom 15. November 2017, JMBl. 2018, p. 69).

A retired German judge W. Neśković believes that as long as court administration is in charge of the personnel policy of the courts, it will deliberately or otherwise strive to create a group of judges favourably disposed to the executive[14]. Judge C. Löbbert comes up with a stricter view: the system of evaluation and promotion acts as a bridle for the judges, the reins being held by the administration. It is true that it is the task of the judiciary to control the executive, but the executive itself determines whether the judiciary is doing well. In other words, the audited audits the auditor[15].

2. Failure to take into account the opinion of associations of German judges and prosecutors

The rules of the *Länder* also raise questions about the German judges themselves. These doubts are constantly being raised by associations of judges. While the European Commission's Report mentions that the Commission has consulted the German Association of Judges (German *Deutscher Richterbund*, DRB), there is no indication in the Report of the demands of this organisation, which are publicised in media. The DRB website reads: "The executive keeps courts and prosecutors' offices in a relationship of multiple dependence. The employment and promotion of judges and prosecutors in many *Länder* is the sole decision by the Minister of Justice. The human and material resources are allocated or limited by the Minister of Finance, depending on the budgetary situation"[16].

The New Association of Judges (German *Neue Richtervereinigung*, NRV), which was not listened to by the Commission, lobbies for the introduction of self-government in the administration of courts, drawing on the Polish example: "How can Germany reliably claim that Poland, for example, risks jeopardising the basis of its EU membership by implementing laws passed by the Sejm to reform the judiciary if it is enough for the governing party [in Poland – Author's note] to solely point to the constitution of the Federation to be able to prove inconsistent behaviour [of the German side – Author's note]"[17].

[14] W. Nešković, *Sine spe ac metu, Verfassungsrechtliche Fragen zur Selbstverwaltung der Justiz*, Vortrag während der Tagung „Ökonomisierung der Rechtspflege – Risiken und Nebenwirkungen" der Evangelischen Akademie in Bad Boll vom 17.-19. November 2010, p. 1, 4, https://www.ev-akademie-boll.de/fileadmin/res/otg/doku/520910-Ne_kovic.pdf (access 16.07.2018), p. 8.
[15] C . Löbbert, *Verfassungsrechtliche Fragen zur Selbstverwaltung der Justiz. Die Justiz im System der Gewaltenteilung*, Neue Richtersvereinigung-Info, Hessen, 6/2012, p. 20.
[16] https://www.drb.de/positionen/themen-des-richterbundes/selbstverwaltung-der-justiz (access 20.10.2020).
[17] https://www.neuerichter.de/fileadmin/user_upload/BuVo-2017-09_Berliner_Appell.pdf (access 20.10.2020).

3. Failure to take into account requests for preliminary rulings lodged by German courts and related to their own independence

3.1. Request for a preliminary ruling of March 2019 (C-272/19)

The dissatisfaction of German judges with the strong ties between the judiciary and the executive led to a significant breakthrough in this official model. On 28 March 2019, the Administrative Court in Wiesbaden (German *Verwaltungsgericht*, hereinafter VG) issued a decision on lodging an unprecedented request with the CJEU: *Is the referring court an independent and impartial tribunal within the meaning of Article 267 TFEU read in conjunction with Article 47 (2) of the Charter of Fundamental Rights of the European Union?*[18]

VG Wiesbaden observes that Land constitutional provisions safeguard only functional judicial independence yet guarantee no institutional independence of courts in Germany (Art. 126 (2) of the Constitution of the State of Hesse, Art. 97 (1) of the FRG BL). According to VG Wiesbaden, a testament to the lack of institutional independence of the courts is the fact that the judges, and thus the judge of the court submitting this legal question, were appointed by the Hessian Minister of Justice, who also decides on his professional advancement (§ 3 law of the State of Hesse on the status of a judge), the assessment of a judge is subject to regulation by the Hessian Ministry of Justice (§ 2b law of the State of Hesse on the status of a judge), while in the remainder scope, provisions of the law on the status of a civil servant apply to judges.

The external aspect of the independence of the court implies that it has full autonomy in the exercise of its functions, free from any hierarchical ties or subordination. However, the courts' ties with the Hessen Ministry of Justice prevents the court from exercising its functions in full autonomy, since it is hierarchically tied to the ministry and subordinate to it through the position of the president of the administrative court as the official supervision authority, who is therefore bound by the instructions of the minister.

In the above case, the CJEU issued a controversial judgment on 9 July 2020. The tenor of the judgement provides no answer to the request for a preliminary ruling. In the *ratio decidendi*, however, following a superficial and thus flawed analysis, without taking into account the demands of the main German judicial associations (see Section 2), which for years have been calling for independence of the courts from the executive, the CJEU has assumed that, despite the wording of the Hessian legislation, which explicitly provides for the competence of the Land minister of justice to decide on the appointment, evaluation and promotion of a judge (see Section 1.2), the independence of the German administrative court that has put the legal question is ensured.

[18] OJ EU of 3 June 2019, C 187, p. 52.

The flawed judgment of the Court of Justice of the European Union in the area of the evaluation of the operation of the German judiciary is exacerbated by a lack of confidence in the objectivity of EU institutions. This is a bad sign for the future in light of the consent that the EU institutions should assess respect for the rule of law by Member States in connection with the allocations from the EU budget. This bad omen has already materialised in the Report.

3.2. Request for a preliminary ruling of June 2020 (C-276/2020)

In June 2020, another request was referred to the CJEU by the *Landgericht* (a higher instance Land court) in Thuringia. It had a very similar content to the request of the administrative court in Hessen: *Is the court for reference an independent and impartial court within the meaning of Article 267 TFEU in conjunction with the third sentence of Article 19(1) TEU and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union?*

In this case, however, the CJEU should make an objective analysis of the provisions of the Land of Thuringia on the selection, appointment and official evaluation of judges. The position of the Erfurt Land court judge, Dr. Borowsky, is unequivocally negative with regard to the provisions in force in the Land of Thuringia.

"The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole. The organisation of the judiciary and the case-law of Thuringia do not meet the standards of judicial independence demanded under European constitutional law and by the European Court of Justice (see judgments of 19 November 2019, C-585/18, paragraph 121 et seq.; of 24 June 2019, C-619/18; and of 25 July 2018, C-216/18). More precisely:

aa) In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

bb) The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth

between ministries and courts and even between the status of judge and the status of civil servant"[19].

The preliminary rulings indicated above are of breakthrough character. In a country that is home to the concept of the rule of law and spends hundreds of millions of euros promoting this concept both internally and externally, judges are making serious allegations about the exercise of their judicial independence, not only in the public and in the communications media through the activities of judicial associations. German judges are already determined enough to bring requests for preliminary rulings to the CJEU.

These requests were not even mentioned in the EC Report and no wonder a thorough analysis of their legal basis was not made. This is further evidence of the European Commission's unreliability.

Importantly, judicial associations, in spite of the constantly raised demands to introduce judicial self-government and to limit the influence of the executive, which demands were left out of the Report, have not criticised the Commission's Report at all. German judicial associations do not oppose the Federal Republic of Germany in the international arena[20].

4. German judges as members of political parties

According to § 39 of the federal Judiciary Law, a judge in the exercise of his or her office and beyond, including in political activity, should behave in a manner which will not compromise confidence in his or her independence. The content of this provision is surprising as it combines two elements considered to be contradictory in other legal systems, i.e. political activity and judicial independence. In Germany, on the other hand, it is indisputablethat a judge may take part in political life, belong to political parties and hold politically prominent positions.

The judges in Germany may be members of political parties[21], which does not raise any concerns in the European Commission, which fails to raise this issue completely in its Report. The party affiliation of judges, combined with the decisive role of the Minister of Justice in the selection, appointment and promotion of a judge, raises legitimate doubts. In this context, the then President of the Federal Administrative Court, H. Sendler, formulated an interesting question in 1995: "How many federal supreme court judges who are party members and who (…) hold more than half of the judicial positions in these courts, have joined the party because of their actual

[19] Case C-276/2020. Request for a preliminary ruling, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=229881&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=6641904 (access 09.10.2020).
[20] https://www.drb.de/newsroom/presse-mediencenter/nachrichten-auf-einen-blick/nachricht/news/erster-rechtsstaatlichkeitsbericht-probleme-in-mehreren-eu-staaten (access 19.10.2020).
[21] J.F. Staats, Deutsches Richtergesetz, Baden-Baden 2012, DRiG § 39 Wahrung der Unabhängigkeit, nb. 12, cf. Schmidt-Jortzig: Aufgabe, Stellung und Funktion des Richters im demokratischen Rechtsstaat, Neue Juristische Woche 1991, p. 2382.

views rather than out of pure opportunism?"[22]. The above question applies to both federal judges and judges of *Länder* courts.

K. Barley's career is an example of combining positions in the judiciary with active party membership (an *SPD* member as of 1994), and a transfer from positions in the judiciary to the ministries and *Länder* parliaments and vice versa, indicated by Justice Borowsky[23].

5. Partial forms of self-government of judges and prosecutors

The Commission's Report indicates as follows: *Furthermore, the German justice system contains a number of elements of judicial self-administration* The Commission cites the report sent by the German Government as evidence of this claim.

Under the German system, the legally prescribed representative bodies of judges do not have any significant influence on the operation of courts, and in particular do not have significant powers of authority, either in the administration of courts themselves or in personnel decisions relating to individual judges. For this reason, Germany is not a member of the European Network of Councils for the Judiciary.

German associations of judges demand the introduction of judicial self-government; the DRB website features the motto "The justice system must administer itself"[24]. The website moreover includes the draft Land law about judicial self-government[25]; drafted as early as 2010, to date it has not been subject to legislative proceedings or discussed at the level of political parties.

6. PEBB§Y

The Commission's Report overlooks completely the contestable method of judicial staff management – PEBB§Y. The abbreviation stands for a "system of assessing staff demand" (German *Personalbedarfsberechnungssystem*). It was introduced in 2010 with respect to common courts and in 2014 in specialised courts, e.g. financial ones. Empirical studies carried out throughout the Federal Republic of Germany since 2004 helped to determine a mean time for the processing of a given case type by a justice system unit. In relation to common courts, one can speak e.g. about civil, criminal, family, mediation, and administrative cases. These data and data on the average number of cases filed help determine the requisite number of staff in Land courts and prosecution offices. In the opinion of the ministries of justice, this system fosters

[22]H. Sendler, *Unabhängigkeit als Mythos?* Neue Juristische Woche 1995, p. 2467.
[23] See K. Barley's CV, https://www.bundesregierung.de/breg-en/federal-government/cabinet/katarina-barley# (access 29.10.2020).

[24] https://www.drb.de/positionen/themen-des-richterbundes/selbstverwaltung-der-justiz
[25] https://www.drb.de/fileadmin/DRB/pdf/Selbstverwaltung/100325_DRB-Gesetzentwurf_Selbstverwaltung_der_Justiz.pd

the exercise of the right of access to courts, guarantees transparency and provides an objective basis for court administration[26]. Example:

Product (case type): car accident – court having jurisdiction: district court (German *Amtsgericht*)

Workload: 239 minutes (product RA 053)

Number of case types submitted to a given court: 500

Work time necessary to process the cases: 119 500 minutes

Work time of one judge: 99 900 minutes

Number of jobs in the court: 1.2[27]

The above system is criticised by all judicial associations e.g. due to: underestimation of the amount of time necessary to deal with a given type of case, unequal treatment of individual judicial instances, i.e. a greater burden on district courts (German *Amtsgericht*), a lesser burden on regional courts (German *Landgericht*), noncompliance of Land ministries of justice with the calculation of the system and therefore a shortage of staff in the courts and a permanent excessive burden on judges[28].

7. Problematic implementation by Germany of the CJEU judgment concerning the lack of independence of the German public prosecution service (C-508/18, C-82/19 PPU)

The Commission's Report observes: *"The overall effect is to ensure that any instructions in a specific case cannot in any event exceed the limits of the law. Moreover, both authorities and stakeholders explained that only in very rare cases this right of instruction is actually exercised. This practice, combined with the legal safeguards in place, appears to mitigate the risk of misuse of the right of instruction"* Note 15 *"Figure 55, 2020 EU Justice Scoreboard; e.g.* ***the Federal Ministry of Justice and the Government parties of Saxony issued commitments not to exercise their rights to give instructions. The ministry of Thuringia committed itself not to give instructions in individual cases, the ministry of North Rhine-Westphalia and the Government of Lower Saxony committed to give individual instructions only in exceptional cases"***. [Author's emphasis]

In the combined cases C-508/18, C-82/19 PPU, the Irish courts with respect to a proceeding concerning the handing over to the Federal Republic of Germany, under the EAW of persons from the Republic of Ireland, submitted requests for preliminary

[26]https://www.mj.niedersachsen.de/startseite/themen/personal_haushalt_organisation_sicherheit_it/pebb_y/pebby-10316.html (access 20.10.2020).
[27] https://amtsrichterverband.net/themen/pebbsy.html (access 20.10.2020).
[28] Idem; *Ausgewählte Inhalte betreffend Pebb§y*, https://www.neuerichter.de/inhalte/pebby.html (access 20.10.2020).

rulings on the subordination of the public prosecutor to the minister of justice in the FRG. According to Irish courts, in the FRG a public prosecutor subordinated to the minister of justice and may be subject, directly or indirectly, to individual instructions from that authority when deciding on the EAW.

The above concerns were substantiated by the CJEU in its ruling of 27.05.2019.[29] However, following the judgment of the CJEU, Germany has not amended its legal regulations on the provision of instructions to prosecutors. In a circular, the Federal Ministry of Justice only asked the *Länder* to change their practice of applying the rules, seeing no need to introduce any systemic changes. In May 2020, the Bundestag rejected draft laws submitted by the FDP and BÜNDNIS 90/DIE GRÜNEN, meant to strengthen the independence of prosecutors from the executive branch.

The European Commission accepts the non-implementation of the CJEU judgment and a failure to amend German legislation. In light of the Report, the Commission considers "practice" to be sufficient.

M. Ruffert asks whether the negligible changes enforced by the CJEU case law will suffice in the long term to claim that the German justice system operates in line with European standards[30]. This comment is echoed in opinions of German associations of judges. In its commentary to the CJEU judgment of 27.05.2019, the NRV observes that “The justice system structures on Germany, originating in the 19th c., do not meet the European standard. The German justice system must confront the untruths concerning its own organisation. The judgement makes it patently clear: the Germans may learn from Lithuania as to the justice system”[31].

Conclusion

There is no basis in the Treaties for the European Commission to assess Member States’ respect for the rule of law. Under Art. 5 (1) TEU, the Commission should act under and within Treaties. No Treaty provision defines the contents of the rule of law, let alone invests in the European Commission the powers to assess the respect of the rule of law in Member States.

The above activity of the Commission is therefore, an *ultra vires* act, exceeding its competences, i.e. unlawful. Secondly, it is a manifestation of growing federalisation of the EU, consisting in the EU deciding on its competences. In this way, the EU assumes the role of a state and, like a state, which is the primary subject of

[29] CJEU judgment of 27 May 2019, OG and PI, joined cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

[30] M. Ruffert, Europarecht: Europäischer Haftbefehl von deutscher Staatsanwaltschaft Deutschen Staatsanwaltschaften fehlt zur Ausstellung eines Europäischen Haftbefehls die hinreichende Unabhängigkeit, Juristische Schulung 2019, p. 920 ff.

[31] Es ist an der Zeit, über Justizstrukturen in Deutschland zu reden!, https://www.neuerichter.de/details/artikel/article/es-ist-an-der-zeit-ueber-justizstrukturen-in-deutschland-zu-reden-635.html (access 28.10.2020).

international law, decides on the limits of its competences (powers). This federalisation also manifests itself in the exercise of competences of a strictly political and systemic nature, such as *inter alia* the organisation and operation of the judiciary in Member States.

In addition, the competences taken over by the Commission are exercised selectively and unreliably, as exemplified in the Report on the situation of the rule of law in Germany discussed above. As regards the analysis of the judiciary, the Report is based on incomplete information. Therefore, the Commission's Report is an example of a blatantly unequal treatment of Member States, at variance with the principle of respect of the equality of Member States before the Treaties, enshrined under Art. 4 (2) TEU.

The German model of governance of the judiciary shows strong ties between the executive and the judiciary both when it comes to organisation, i.e. the power of the minister with respect to judges and courts, and in purely political terms, i.e. concerning judges' party membership[32]. The coexistence of these two elements demonstrates that the German judiciary is by no means in compliance with the standards promoted by the European Commission. German judges, both when formulating demands and submitting requests for preliminary rulings to the CJEU, point to the lack of institutional independence of German courts vis-à-vis the executive.

The views expressed in this publication belong solely to its author.

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[32] More in: M. Bainczyk, Wybrane aspekty prawne niezawisłości władzy sądowniczej w RFN/Selected Legal Aspects of Judicial Independence in the Federal Republic of Germany, IZ PP no. 30 https://www.iz.poznan.pl/plik,pobierz,3026,1cf079cc57256ac2eeaa534c581c132a/IZ%20Policy%20Papers%2030.pdf.