

Keynote speech

Judicial appointments: Between politics, independence and professionalism – An impulse for discussion

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Ladies and Gentlemen,

The title of my presentation, “Judicial appointments: Between politics, independence and professionalism”, attempts to highlight the tensions that judicial appointments encounter. I do not want to showcase a particular national legal system or the European view. Instead, I would like to take a step back and formulate some general theses on what should be considered if one wants to legislate on this challenging topic. The following six theses are intended to inspire reflection and discussion.

1 Personnel issues are power issues

The first thesis is a mere factual one, but to me it is the most important one. Personnel issues are power issues; personnel decisions are therefore political decisions. They cannot be “depoliticized”. In particular, they cannot be depoliticized by removing them from the political process. On the contrary, it is likely that any body to which the competence for personnel decisions is assigned will be overtly or covertly politicized. This also applies to the appointment and promotion of judges.

Therefore, I believe it is misplaced to try to depoliticize judicial personnel decisions by entrusting them to the judiciary itself. This will lead to a situation in which these judges, the representatives of the magistrates, the judiciary, which is to make the personnel decisions, will politicize itself and organize itself along party lines systematically. There will be judges’ representative bodies that will be Christian Democratic, Social Democratic, green, right-wing, left-wing or otherwise coloured. Thus, personnel issues cannot be depoliticized.

Naturally, the higher the judicial office in question, the more interested politicians become. Politicians are not yet interested in the recruitment of

a very young judge. However, the interest of the partisan politics is considerable for presiding positions, especially for presidencies of the highest courts.

2 Personnel decisions must be subject to democratic legitimation

My second thesis is: political decisions, including personnel decisions, in a democracy must be democratically legitimized. In a parliamentary democracy, they must be referable back to parliament. This also applies to the appointment and promotion of judges. Furthermore, judges are supposed to represent the law. The law is not a mere instrument of rule by the respective parliamentary majority, but the basis for the coexistence of society as a whole. For this reason, personnel decisions regarding judges should also not be made in a unilateral-party manner; instead, they should be made based on the broadest possible consensus.

When I advocate that personnel decisions for judges should be referred back to a parliamentary decision, this does not mean that they must be referred back to the respective parliamentary majority. On the contrary, they should be based on rules according to which the parliament is involved in judicial personnel decisions to the greatest possible extent. Be it by raising the quorum for an election to two-thirds or three-fifths of the parliament, be it by limiting the elections to a certain proportion of judges and then allowing the next parliament to decide on the next set of judges so that the judiciary can be as plural as possible.

3 When assuming office, judges are dependent

My third thesis: at the moment of their appointment or promotion, judges are, of course, dependent. They depend on those who appoint or promote them, which is absolutely unavoidable. However, it is essential to ensure the independence of judges during the time before and after their appointment.

This requires, first and foremost, high-quality regulations on the status of judges, in particular on their objective and personal independence, including disciplinary law with exceptionally high substantive and procedural standards. It must not be possible to misuse disciplinary law to drive politically disfavoured judges out of office. However, the regulations on the status of judges only apply to the period after a judge has been appointed. They

also only secure the external independence, not the judge's personal beliefs and habitus.

For this reason, rules for strengthening the internal independence of a judge must be added, above all for strengthening the independence vis-à-vis so-called "party friends", both before the appointment as a judge and afterwards. A highly esteemed colleague of mine, a former judge at the Federal Constitutional Court, once told me: "At the moment of appointment as a Federal Constitutional Court judge, you are, of course, dependent on the political constellation that is to appoint you. But afterwards, one becomes independent in the judge's office, and the political parties are often surprised how independent the judge can then be concerning their requests." That is all well and good if that is the case. Nevertheless, I am convinced that one should not rely on this. One should think about what precautions can be taken to ensure that the judge is also internally independent and remains independent.

4 Complex legal systems require professionally excellent judges

Fourthly, we live in highly complex industrialized countries. And these highly complex industrialized countries need and produce highly complex legal systems. As a result, there is a need for highly competent judges. This makes the professional excellence of a judge an indispensable eligibility criterion for the office of judge. Because it is a substantive criterion, and thus one that is far away from politics, it simultaneously safeguards judicial independence.

There is another advantage to the criterion of professional excellence. At least in principle, regardless of an unavoidable vagueness, it is also justiciable, i.e. it can be reviewed by a supervisory court. It hence provides the basis for judicial review of personnel decisions. A personnel decision between several applicants can be reviewed by a court to determine whether it is based on the criterion of professional excellence.

A system of scrutiny by the judiciary guided by the professional suitability of candidates for judicial office and exclusively by this has proved to be the most effective way of safeguarding judicial independence. For this reason, I consider this to be the essential element of our arrangement of rules for judicial appointments in Germany. Unsuccessful competitors can appeal to an administrative court with a competitor's lawsuit and demand that the

administrative court review this personnel decision judicially, solely for the criterion of professional excellence.

5 The judges' representative bodies ensure professional excellence

Fifthly, the participation of judiciary representatives in judicial personnel decisions provides further emphasis to the criterion of professionalism. However, the participation of representatives of the judiciary should only be given the status of co-decision-making and a significant weight if the representatives of the judiciary are democratically legitimized, i.e. if parliament has elected them.

I have pointed out that judicial appointments, personnel decisions, are political decisions that require democratic legitimization by parliament. Nevertheless, suppose judiciary representatives are to be allowed to participate in this personnel decision with decisive weight. In that case, this presupposes that the judiciary does not elect these judges' representatives itself. The consequence of this would be that the judiciary would risk becoming politicized, which would devalue their professional opinion. Even if it is only in the sense of a perhaps well-founded, perhaps unfounded suspicion that the co-deciding voice of the judiciary is not professionally but party-politically motivated.

6 Proper selection of judges requires ethics of responsibility

My last, sixth thesis is as important to me as the first. Both theses frame the issue as a whole. The sixth thesis is: any system for the appointment or promotion of judges can only achieve its goals of independence and professional excellence to the extent that the decisive persons or bodies feel personally committed to these goals. A good set of legal rules can stabilize the respective system and counteract weaknesses and abuse. However, it will never be able to prevent all abuses. Even a good legal system of rules is not completely immune to abuse. It always depends on the fact that the decisive persons and bodies, in our case political decision makers, consider the independence of the judiciary to be an important asset and want to defend and promote it to the best of their ability.

These are the six theses on the basis of which, in my view, the rules on the appointment and promotion of judges must align. As you can see, this is

a very complex topic and I am therefore looking forward to any discussion on this. Thank you.

