Peter-Alexis Albrecht / Sir John Thomas (eds.)

Strengthen the Judiciary's Independence in Europe!

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– International Recommendations
for an Independent Judicial Power –

In Cooperation with:
European Network of Councils for the Judiciary (ENCJ)
European Association of Judges (EAJ)
European Judges for Democracy and Liberty (MEDEL)
German Judges Association (DRB)
New Association of Judges (NRV)
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Foreword

The Consultative Council of European Judges at the Council of Europe (CCJE) rightly characterized judicial autonomy, that is, the independence and impartiality of the third state power, as a "structural requirement of a state governed by the rule of law" (cf. position no. 8 from no. 10/2007 in the appendix). To do justice to the principle of the separation of powers as an accomplishment of the European Enlightenment, the autonomy of the third power must be subject to uniform regulations throughout Europe as the European Union draws closer together. Before this happens, a standardization of the systems of norms makes little sense.

Judicial autonomy does not only aim to make the justice system independent, however. Just as important is the independence of the individual judges, that is, the internal independence. Especially in a society marked by globalization and mutual dependency, the third power in Europe needs judges who are undaunted, courageous, and free from external influences – including those of evaluations and differences in salaries and promotions. Only then can the judiciary make up a necessary counterbalance to an ever more directionless legislative and an usurping executive.

An academic compliment and great thanks go to the European and national unions of judges who came together at the Goethe University in Frankfurt on the Main in November of 2008 in order to exchange experiences. This will be documented in this book in addition to other contributions. Reforms of the judicial *system* are always only a first, albeit important, step. The guarantee and implementation of judges' internal independence must be cultivated and supported through legal-political discussions, such as those in Frankfurt, as a second step. One must never forget: Comprehensive judicial independence is not only a *conditio sine qua non* of a rule-of-law state, but also an essential element of European Enlightenment, a heritage that was fought for over centuries and should be protected and promoted.

I would like to thank *Kelly Neudorfer* who translated the very particular legal texts into a form that is just as precise as it is linguistically appealing. This will help the cause of spreading these texts across Europe. I would also like to thank my academic assistants *Mareike Jeschke, Katharina Schermuly*, *Charlotte Schultz* and *Marc Fornauf*. They were not only responsible for the international conference in terms of contents and logistics, but were also important and devoted academic assistants for the publication. The contributions to the conference in this book were first published in German in the *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (Critical Quarterly for Law-making and Legal Studies) in No. 4/2008 (NOMOS-Verlag Baden-Baden).

Frankfurt on the Main in July 2009 Peter-Alexis Albrecht

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Peter-Alexis Albrecht

Introduction

Strengthen judicial Independence in Europe! – Experiences, Conclusions and Appeals from European Jurists –

Europe is moving slowly. In this process, the European judiciary is comparable to a snail that is quickly being passed by the European executive power and is even in danger of being run over. The judicial power in Europe needs support from all sides. The German judges' associations (German Judges Association, DRB, New Association of Judges, NRV, and ver.di Judges) along with the European Network of Councils for the Judiciary (ENCJ), European Association of Judges (EAJ) and the European Judges for Democracy and Liberty (MEDEL) are ready to take on this responsibility. On November 7th and 8th of 2008, an international symposium to strengthen judicial independence in Europe took place in the assembly hall of the Goethe University in Frankfurt/Main. Separated into six main topics, primarily practitioners of the judiciary from eleven countries discussed their experiences with judicial independence. Out of the 27 states of the European Union, only three states – Germany, Austria, and the Czech Republic – leave the possibility for the executive to access the judiciary. In general, the Council of Europe states in a recent opinion (CCJE No. 10/2007)[1] that an independent judiciary is "an essential element in a state governed by the rule of law to achieve a balance between the legislature, the executive and the judiciary."

Working from the background of a general European development of law from which Germany will not be able to isolate itself in the long run, the speakers from England, France, Italy, Portugal, and Spain gave impetuses for the symposium debates. It was not about schematic recommendations for adopting other models of independent judiciaries; instead, the participants wanted to gain insights out of practical experiences from other European Union countries. Suggestions for application and implementation first need a critical expert discussion. At the same time, however, the intent is, on the one hand, to strengthen the independence of those member states which are still governed by the executive. On the other hand, the functionality and effectiveness of already existing independent judiciaries are to be critically questioned based on the variety of European experiences in this area. Solely expanding the power of the judiciary

1 Cf. Appendix, S. 191ff.

might have institutional advantages, but whether the external and internal independence of judges or public prosecutors could actually be strengthened by this is the primary question of all participants. Their experiences, conclusions and appeals should be laid down in the following six chapters.

In a **first chapter**, hopes for the formation of a self-governing judiciary are the central topic. This is only a problem for three European countries given their institutional backgrounds. In terms of self-governance, however, it is expected that there will also be a necessary and *positive revaluation of the separation and control of powers* that are to provide a legal stabilization in light of the increasing failure to be able to steer the legislative and executive power. The erosion of fundamental European legal principles is most clearly visible using the example of criminal law (*Albrecht*). The results in other fields tend to be the same, even if they do not so clearly erode basic rights. From a constitutional perspective, there are no real qualms about the intention to strengthen institutional independence in the Federal Republic of Germany (*Groß*). Legal policy even encourages a prompt reform of the judicial power. In Hamburg, the "black-green" ruling coalition began an "open-results discussion process" on the introduction of a self-governing judiciary which might lead to a strengthening of the judicative branch (Steffen). Farther-reaching independence is thus already on Germany's political agenda. Hopes of an independent judiciary have a chance at being realized.

In a **second chapter**, *European trends and constitutional guidelines for judicial self-governance* are discussed in light of the Italian, French, and Portuguese experiences. There are self-governing judicial organs in these three countries. The speakers *Alt, Salvi,* and *Afonso* make no secret of their primarily positive experiences with independent self-governing organs. But already through these speeches it becomes clear that the mere institutionalization of self-governance is not enough to automatically solve the central problem of the judicial power. *Eric Alt*, Judge in Paris and Vice-President of MEDEL, objects to a greater "culture of doubt" as a collective body of thought in the judiciary, for which the creation of a code of conduct for judges should be helpful. At the same time, he calls for the introduction of European-wide, fair standards for assessing the job performance of judges and rubs salt in the wound of governments' political interference in legal proceedings. He considers independent judicial councils to elect judges and the autonomy of court administration to be important barriers to inappropriate external influence. *Giovanni Salvi*, Public Prosecutor in Rome, reports similar findings: the permanent position of the Consiglio Superiore della Magistratura (CSM) for the securing of democratic functions and those of checks and balances developed out of the Italian fascist experience. Italy sees its CSM as a strong counterweight to usurping power entanglements in the legislative and executive branches. Effective countering of mafia, terrorism, and corruption are, according to *Salvi*, unimaginable without an independent CSM. Nonetheless, this appraisal does not mean that judicial reforms are at an end, but it marks the beginning of a series of efforts to optimize competencies, tasks, conditions for functionality, and the composition of the

CSM. However, the assignment of competencies for steering the judiciary is not the solution of all judicial problems in Italy, either. The efficacy and legitimacy of a central, independent organ is established only through actual handling of internal judicial structures (workload, evaluation, assignment of functions, etc); only then does an understanding begin to develop of "autonomous administration as a cycle that starts from the bottom." *Orlando Afonso*, Portuguese appeals court judge and Vice-president of the CCJE, documents the democratic-stabilization function of an independent judiciary using the example of Portugal's recent history. Neutrality, impartiality, and independence must be unassailable bastions of the judicial power. As important as administration, management, and disciplinary functions are for this, in the Portuguese experience, the judicial functions and tasks are constantly discussed in regards to the role of the judiciary in a democratic system. Portugal has also witnessed a growing mistrust in the population towards its judges. Independence of the judges can only be seen and understood by the population if judicial decisions are made professionally and in an appropriate period of time. Otherwise, according to *Afonso*, there is a danger that the "specter of a state of judges" becomes a danger to democracy – despite or perhaps because of institutional independence.

The **third chapter** deals with the concrete *models of judicial self-governance*. With English pragmatism, *Sir John Thomas*, Lord Justice of His Majesty, delivers perspectives for Councils for the Judiciary, which have only existed in England for a few years. Even from the home country of democracy, it is recommended that an independent controlling committee as the embodiment of the state's judiciary takes responsibility for self-governance. Variables in Europe could be the questions of judicial participation, the methods of appointing the members of the committee, the role of the public in the appointments, and the coordination of the judicial hierarchy. The accountability to the sovereign, in other words the voters, is also an open question but one that strictly must be answered. Specific tasks of the Councils for the Judiciary that are named include the appointment, promotion, and evaluation (assessment) of judges, conduct rules, disciplinary law, training of judges, administration and management of courts, and, finally, the protection of the judiciary's reputation. Structured in this sense, the English Councils for the Judiciary understands itself to be the leadership and representation of the judiciary. *Joaquin Bayo-Delgado*, appeals court judge in Barcelona, speaks on the independent structures and self-governance elements of the Spanish justice system. The Autonomous Assembly of Judges is the foundation of self-governance in Spain as well, and it is separated into the general assembly, the sectoral assemblies for each region, and the governing chamber. The independence of the judicial power seems to be consolidated to such an extent that the Spanish judges cannot even begin to imagine being appointed, promoted, or supported by the executive organs. With the background of the depicted sovereign European experiences, *Christoph Frank*, Chairman of the German Judges Association, is able to bring up the call from his organization to implement a judicial election committee, which in turn would elect councils for the judiciary made up only of judges, as a German model for self-gover-

nance. In a first step, structural independence on the way to autonomous self-governance will be called for. *Horst Haeuser*, Representative of the New Association of Judges, is given the task of propagating a further model not only of vertical but also horizontal self-governance of the courts. The New Association of Judges and the ver. di judges demand even more than the German Judges Association, including Councils for the judiciary in addition to independence; they are not to deal with promotions but only with assigning competencies to judges. Autonomous court steering committees as leadership organs with a court president for a limited term would ensure that the adaptation mechanisms judges are previously forced to acquire due to the system would no longer be necessary. Institutional self-governance is thus not only a first step. An essential, comprehensive strengthening of judges' responsibility for themselves is what the New Association of Judges and ver.di believe will come only after the judiciary has gone through a clear de-hierarchization.

Of course these calls for reform in terms of the judges brought up some controversial reactions in the course of the symposium. However, it would be a misunderstanding if one were to equate structural critique of the German judicial system with critique of the job performance and results of individual judges. In a greeting speech, the German Justice Minister, *Brigitte Zypries*, rightly described the German judicial system in international comparison as "effective, of high quality, and having integrity." Still, it would be a misjudgment of justified demands for institutional independence if this independence is measured solely on the equipment and capabilities of the courts which ensure their performance and on the optimal training and further education of members of the judicial system. It is not only about structural change and safeguarding of resources, but about the democratization of a judge's job and the putting a halt to an opportunistic focus on career. Only through a de-hierarchization do some unions believe that judges can truly begin to take responsibility for themselves, a process through which judges could resist continual attempts by the executive and legislative branches to influence them or place excessive or unreasonable demands on them. The debate on this is only just beginning and should be openly and objectively discussed on a wide basis. *Hans-Ernst Boettcher*, President of the State Court in Lubeck, agrees with these goals as expressed in his call "towards a democratic judicial constitution in Germany, too!" and believes that the organizational changes in the German judicial landscape is at a democracy-appropriate starting point and on a good path towards a judiciary that in the future will be primarily self-governed. Preliminary stages of a self-governing judiciary include – amongst other things – the already existing court steering committees, judges' participation, disciplinary courts for judges, parliamentary committees to elect judges, and the possibility for judges to decide to refer according to Article 100 of the German Constitution (Grundgesetz, GG). Nonetheless, he demands that competition be aroused, at the end of which a mature and comprehensive model of an autonomous judicial power will have been developed.

The **fourth chapter** concerns the *organizational form of judicial self-governance: Selection, evaluation (assessment), and promotion. Giovanni Salvi*, from Rome, reports

on the Italian practice of evaluating judges and public prosecutors. As convincing as the CSM's independence is in Italy, there are often tough battles concerning the details of this independence. Even autonomously-structured career paths have their perils, as the Italian example demonstrates. There are competencies specifically given to the judges and public prosecutors which are not promotions, and there are standardized salaries according to age. But this does not completely take care of the problems that come with evaluating the job performance of judges and public prosecutors; on the contrary, the problems begin here. Criteria for evaluating judges and public prosecutors, for example, are so standardized that they dwarf the German "Neue Steuerungsmodelle" (new models of regulation, NSM) (cf. fn 5 in *Salvi*'s contribution in the 4th chapter). The system of "open roles" in a diffused – that means not hierarchical – judicial power leads to a rigid disciplinary and sanctions system. *Salvi* reports that the CSM had brought 900 judges and public prosecutors into disciplinary proceedings in the past few years, which represents around 10% of all Italian judges and public prosecutors. It must first be shown that this could lead to what *Carsten Loebbert*, Vice-president of the municipal court of Lubeck, calls a judicial self-governance and self-conception "without fear or hope" in Germany. His analysis, however, which deals critically with the discrepancy of normative guidelines and the reality of judges' jobs, with the media of controlling and the incompatibility of promotion systems and judges' independence, gives a depressing perspective on the reality of the independence of German judges. *Edgar Isermann*, President of the Higher Regional Court in Braunschweig, is more optimistic. Although he also sees a great potential for reform in the de-hierarchization of the German justice system, he believes that there is already good judicial policy being carried out not just in his district but in many places in Germany.

The **fifth chapter** takes on the topic of *the role of public prosecutors in a self-governing judiciary*. *António Cluny,* Chief Public Prosecutor in Lisbon, outlines the independence of the public prosecutor as indispensable in the context of an independent judicial power. The most recent history of Portugal makes this very clear. As understandable as this position of external independence is, new structures of dependency resulting from hierarchies internal to the public prosecutors are worrying. These are now less connected with political parties, but they still require strict internal adaptability. *Klaus Pfoertner,* Chief Public Prosecutor in Frankfurt/Main, calls vehemently not only for external, but especially for internal independence for the German public prosecutors. Hierarchies inside of the Public Prosecutor's Office should only be appealable instances and no longer have supervisory functions. Principles of dual control and regulated oversight by a committee in the Public Prosecutor's Office would prevent people from going it alone and make it possible for the public prosecutor to apply law as independently from party politics as a judge would do. *Gerhard Altvater*, Federal Public Prosecutor for the Federal Public Prosecutor General's Office, views this more moderately, but also believes strictly in a greater independence for the public prosecutor. There are no constitutional indications that the instructions from public prosecu-

tors in a higher position in the hierarchy must be binding for those in lower positions. Looking past the European horizon clearly shows that Germany is lagging behind in regards to the emancipation of the public prosecutor. No one at the symposium openly contradicted this.

The **sixth chapter** debates *judges' ethics as a limitation on the growth of judicial power.* In light of a critical public, support for an increase in the autonomy of the judicial power can apparently only be garnered if provisions for greater internal responsibility and control mechanisms are created simultaneously. This dualism had already become the subtitle of the symposium: models of self-governance and responsibility! *Ion Copoeru*, a legal scholar from Romania, presents the coordination of a model for introducing a discourse of ethics amongst judges and public prosecutors. The result of this empirical project, which accompanied the development of a rule-of-law judicial system, was that judges' ethics and responsibility should be linked. Ethical regulations are not a personal matter of the judge but should be influenced – especially during the development of rule-of-law structures – by the individual output of the organizational environment of judicial action, in other words the judicial system as a whole. *Elisabeth Kreth*, judge at the Finance Court in Hamburg, tells of the intended mutual dependence of the public's trust in court decisions and the acceptance of those decisions. For the judges as constitutionally entrusted custodians of the law, there is no one outside of the stages of appeal or disciplinary proceedings who can tell them what to do or make rules for them. This is something only the judges themselves can do. There must therefore be a consensus on starting points, requirements, and consequences for a codification of standards of behavior for judges (codes of conduct), not in the sense of imperatives or proscriptions, but as guidelines. *Ulrich Baltzer*, former jury court chairman, finds this to be the "specter of judicial ethics." For him, these kinds of guidelines are already part of judges' jobs and firmly grounded in the normative positions of the Constitution and judicial laws. Commitment and responsibility for oneself are not new concepts needed by judges, and they are not a "new moral." Instead, the judges only need to go back to the ethical principles they swore to follow in their judges' oath. Nonetheless: an increase in institutional and personal independence in the judicial power will result in growing demands from the citizens for a stronger control on judges (even if it is self-control) and responsibility for them (even if the judges take responsibility for themselves). Convincing answers must be found, otherwise the strengthening of the judicial power will not be found legitimate in the public's eyes.

The result of the legal discussion is for the time provisional. Broad European experiences encourage us to set up a judicial power institutionally independent of the executive power. There is still much persuading to be done by the pro-side for independence in whole Europe. Institutional independence alone will not be worth it, as complete and true independence is what is due to the judicial power.

And in fact: independence only becomes sovereign, impartial, and able to maintain law and order if judges have nothing to fear from an administration, the executive, col-

leagues, or other societal institutions. However, because they have no incentives from outside if they are independent, judges would need a great amount of reflection and commitment to carry out their jobs responsibly. These kinds of people cannot be found by only looking at their bar exam scores. Education and selection may be important prerequisites for an intrinsic motivation, but this can only develop over time under conditions of *sine spe ac metu* (without hope or fear). Only on the basis of self-confident, responsible, and sovereign motivation for an external and internal independence of judges can the judicial power grow to meet the challenges of the globalized society we are becoming. That is what is hoped for, anyway.

There are demands, however. Legal scholars call for explanations from the practice and experience of all European legal systems as to the functions of a self-governing judicial system for judicial independence as guarantor of freedom and justice. It is likely too late for any European country to continue on the old path of a judiciary in the grips of the executive. In order to achieve a common European legal development, we need a common starting point. There is no market for truth and justice, no competition for finding these goods, instead there is only a common basis for searching them out. *Stefan Braum* from the University of Luxemburg makes a case for a European perspective on strengthening the judicial power while at the same time creating the legal basis for a European appeal: Strengthen judicial independence in Europe![2] The only effective basis for the judiciary's search for truth and justice is comprehensive independence. In this regard, the independence of all national judicial systems is the prerequisite for a nascent European judicial power. This is not only a hope, but a demand from the perspective of basic societal research.

2 For this, cf. the appeal "Give the judiciary more independence!" from Orlando Afonso (Consultative Council of European Judges), Eric Alt (European Judges for Democracy and Liberty) and Sir John Thomas (European Network of Council for the Judiciary). This appeal was made to the public and press at a press conference in the Hanseatic representation building in Berlin on 20 Feb 2009. Cf. the public reaction in several press articles in the appendix.

Chapter 1: Expectations to strengthen judicial Independence

Peter-Alexis Albrecht

Could an independent Judiciary be a Counterbalance to the Erosion of European Principles of Criminal Law?[1]

I. The lost Legacy: The Erosion of European Principles of Criminal Law

At the beginning of the development of European criminal law were, at least in theory, the principles of liberty, human dignity, and universal human rights. These are the central characteristics of the social contract as a fixed idea of the Enlightenment. Criminal law is not a panacea for state security interests but protects those subjugated to the law from abuses of their freedoms and dignity – in a state and beyond its borders. Principles of criminal law thus are forms of protecting freedom, and these principles must be translated into criminal law.[2] These forms of protection are being seriously eroded in court proceedings.

1. The guiding Principle: Principle of a constitutional based Law *(nulla poena sine lege – stricta, praevia, certa, scripta)*

The principle of nulla poena sine lege is the central principle of criminal law. With that principle, legitimate criminal law that restricts the power of the state begins. "No punishment without a law" – that is the abbreviated form of the principle of a constitutional based criminal law. It represents the most fundamental achievement of an enlightened and modern criminal law that is in accordance with the rule of law. The message of this principle lies in their ability to *restrict the power* of the punishing state and

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1 Revised version of a speech held both at the University of Luxembourg on the occasion of the symposium "Quel contrôle juridictionnel dans l'espace pénal européen?" on 9 Nov 2007 and in a slightly different form before the sub-committee on European law of the Legal committee in the German Bundestag on 28 Nov 2007 on the occasion of an open discussion with experts.

2 On this and the subsequent mentions of principles of criminal law, cf. *Albrecht*, The forgotten freedom, 2003, 47ff., with further references.