



# Cracks in the justice system

For the past 70 years, the German Basic Law has guaranteed the independence of judges, whose decisions are “subject only to the law.” But aren’t there other influences at play? Legal scholars **Konrad Duden** from the **Max Planck Institute for Comparative and International Private Law** in Hamburg and **Jasper Kunstreich** from the **Max Planck Institute for European Legal History** in Frankfurt am Main have researched this question and come up with some astonishing answers.

TEXT **MICHAELA HUTTERER**

**E**very birthday celebration raises the question of the celebrant’s state of health. This also applies to the Basic Law, which has guaranteed both the fundamental rights of the individual and an independent judiciary for 70 years. But how is the justice system faring now, when autocratic tendencies throughout Europe and political attacks on the rule of law are on the increase, and respect for state institutions and the judiciary seems to be waning?

The rule of law has already come under fire in certain EU member states, so much so, in fact, that the EU Commission now wants to introduce an annual rule of law check in member states to ensure that those which have already departed furthest from the binding maxim of maintaining a free and independent judiciary are not the sole focus.

The most striking development has occurred in Poland, where, thanks to its parliamentary majority, the ruling party – PiS (Prawo i Sprawiedliwość = Law and Justice) – has transformed the legal system in less than four years to give

itself almost unfettered access to the courts and public prosecutor’s office. As Konrad Duden from the Max Planck Institute for Comparative and International Private Law in Hamburg and Jasper Kunstreich from the Max Planck Institute for European Legal History in Frankfurt am Main observe: “the Polish experience adds to the list of states that are moving away from the separation of powers and judicial independence at varying speeds.” Together the researchers set out to explore the underlying issues. How independent are the judges? To what extent is the judiciary subject to political influence? How free is the legislature?

“We wanted a broad discourse, a discussion conducted in and with the involvement of the public,” the researchers explain. Together with Astrid Séville, a political scientist from the Ludwig-Maximilians-Universität in Munich, they organized a symposium in Mainz and invited constitutional judges and lawyers, political scientists, legal historians, politicians and media representatives to join them at the Academy of Sciences and Literature to discuss the

following questions in front of and with 150 guests: how much juridical influence over the political system and how much politicization of the judiciary can a constitutional democracy based on the division of powers tolerate, and how much does it require? They concluded that the gains achieved on the basis of constitutional democracy are by no means to be taken for granted and must always be defended in the face of populist propaganda and newly emerging autocratic systems.

## **AUTHORITARIAN REGIMES VIEW JUDGES AS ADVERSARIES**

Constitutional democracies rarely collapse loudly under the chaos of coups and riots. Instead, they are eroded – insidiously, quietly, often unnoticed. The law is dismantled by means of the law. “There can be isolated directives, decrees and seemingly harmless regulations introduced in new legislation,” explains Konrad Duden: “multiple tiny pinpricks rather than one fell swoop of the axe – yet, the consequences are comparable.” >



Critical scrutiny: Jasper Kunstreich from the Max Planck Institute for European Legal History (left) and Konrad Duden from the Max Planck Institute for Comparative and International Private Law have been looking into the difficult relationship between the justice system and politics and have organized a symposium at the Academy of Sciences and Literature in Mainz.

Why? “Autocratically oriented governments,” says legal historian Jasper Kunstreich, “adhere to a familiar script designed to secure their power without causing too much drama.” This includes everything from fostering resentments among the general public to evoking a common “will of the people” and arrogating to themselves the right to sole representation, right up to the consolidation of institutional powers. Their opponents, such as the judiciary, the press and representatives of the arts and sciences are gradually eliminated.

#### **THE CONTROL OF RESOURCES GIVES THE POLITICIANS A WAY IN**

The constitutional courts are often the first targets: judges are discredited in a targeted manner, their authority is undermined, their verdicts questioned, resources are withheld and successor appointments refused. There is political intervention in the court administration system and decision making process, reshuffles and, finally, judicial verdicts are simply ignored.

Much of this can be observed in Poland, for example: elected constitutional judges have not been sworn in, and the voting procedure for judges of the Supreme Court has been changed. “Constitutional courts,” as Duden explains, “have no armed forces or bailiffs at their disposal – all they have is the force of their words.” And in Poland, their words no longer even make it into the public domain, as it is the government, not the constitutional judges, that decides which verdicts of the court are published. Since the new appointments, the court is no longer

» Constitutional courts have no armed forces or bailiffs at their disposal – all they have is the force of their words.

seen as an impartial check on the government’s actions.

For the past 70 years, it has been enshrined in Article 97 of the Basic Law that German judges are “independent and subject only to the law”. The progenitors of the Basic Law were clear from the outset that an independent judiciary would be essential for the construction of a new, democratic Germany. The powerlessness of the judiciary and its solidarity with the National Socialist regime had been too obvious and the consequences too devastating. Therefore, they wrote the division of powers between the judiciary, the executive (government, ministries, administration) and the legislature (Bundestag, Bundesrat) into several clauses of the Basic Law, the idea being that nobody would be able to rule alone, the powers of the state would be divided, and each of the three powers would exercise mutual control over each other. The Federal Constitutional Court has the power to put a halt to the plans of the Federal Chancellor or the Bundestag if they violate the Basic Law.

Political attacks on the judiciary, such as those taking place in Poland or Turkey, are not evident in this country. But are there cracks beginning to appear? Small incidents, initiatives or even everyday occurrences that run counter to the guiding principles of the Basic Law?

Clearly, direct orders from above are strictly prohibited: no court president or minister of justice has the right to tell judges how to decide in any given case. The cracks are beginning to appear elsewhere. Workload, career prospects and prestige are just three of the

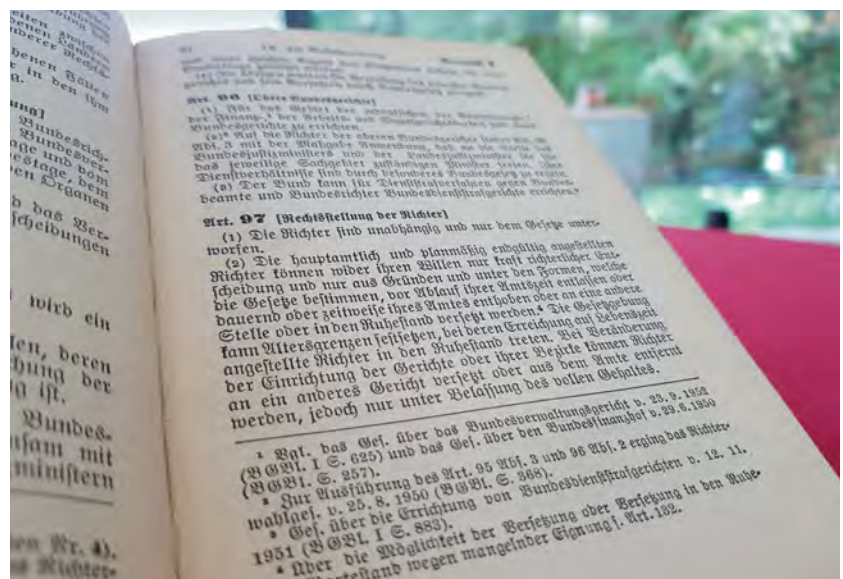
many areas in which political pressure is being felt. The selection and appointment of judges, the allocation of resources and reputation present obvious routes of attack.

This influence is most obvious when it comes to selecting the judges for the highest courts. “This decision involves both a technical and a political aspect,” as Duden explains. It is not the judges nor the courts who select and appoint their colleagues for positions in the highest German courts. This is the task of the MPs and ministers. It is the politicians themselves who determine who can establish the guidelines in German jurisprudence.

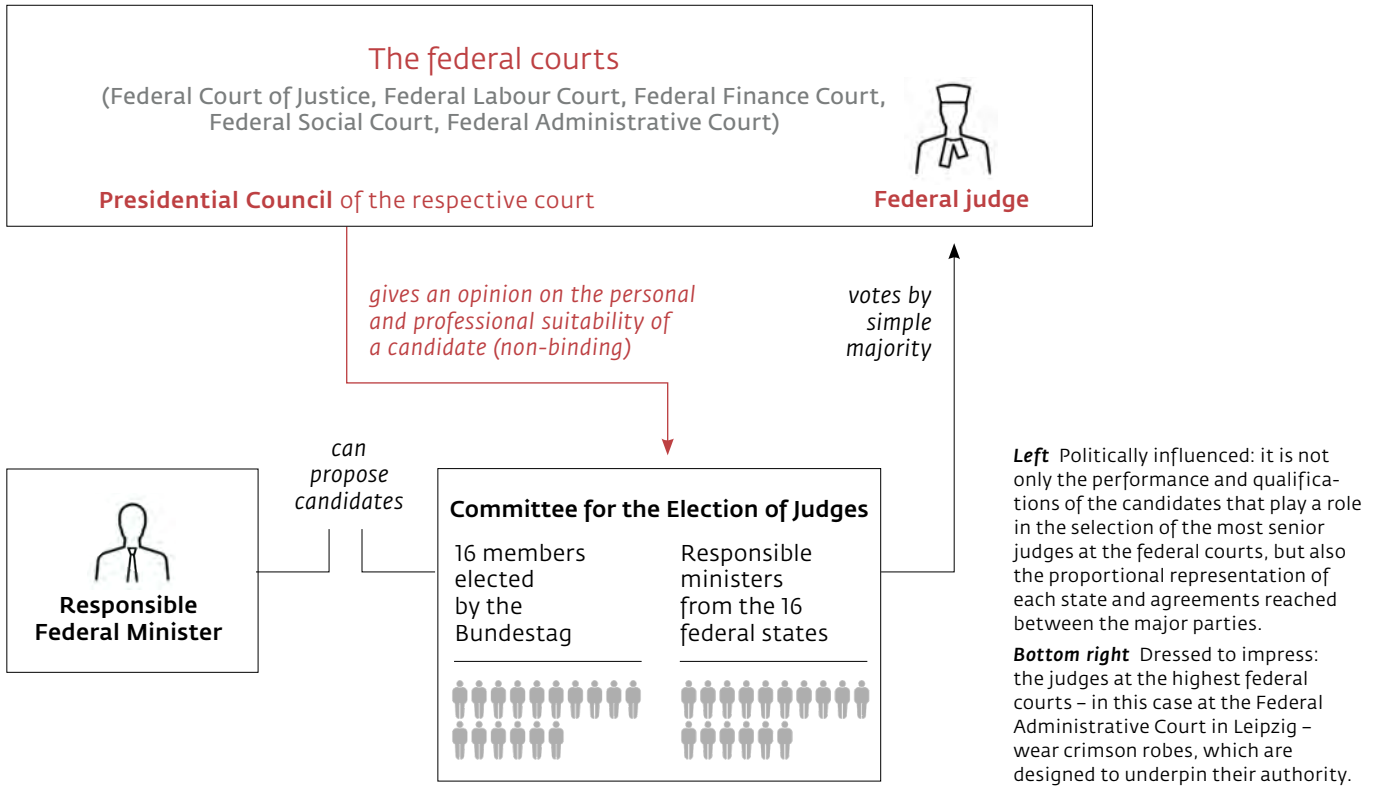
“In the case of federal judges,” Duden explains, “the relevant decision is taken by the responsible federal minister together with a committee consisting of 16 corresponding state ministers and 16 members of the Bundestag. This involves selecting the best candidate in terms of qualification, professional achievements and ability, but the choice is also influenced by the proportional representation of each state and by arrangements between the major parties.”

Put bluntly, this means that hardly any candidate stands a chance of donning the red judge’s gown in Kassel, Munich or Leipzig without the support of

A conscious choice: the independence of the judiciary was an important concern for the progenitors of the Basic Law, who enshrined judicial freedom and the protection of judges against arbitrary dismissal in Article 97. The image below shows the relevant article in the 1953 edition.



## Election of federal judges



contacts in the CDU/CSU and SPD. The judges are elected by simple majority, in secret and without public scrutiny. According to legal experts, the procedure would benefit from greater transparency. As Jasper Kunstreich reports: “the details of the job specification and selection criteria are unclear and the vacancies are not advertised.”

Political considerations also play a role in the election of judges to the Federal Constitutional Court. If a judge retires or resigns, the Bundestag or Bundesrat appoint the successor by a two-thirds majority. Usually, federal judges and professors are elected, but sometimes, active politicians are also appointed. “In this case, too, the selection of candidates is subject to political agreements,” says Duden.

The high hurdle of the two-thirds majority presupposes a broad consensus in respect of the candidates. “There is a conscious policy in this country not to hold public hearings – such as those held

in the U.S.,” Duden explains and recalls the politicized confirmation hearings that take place in the U.S. in connection with Supreme Court appointments. “Objectivity should not be compromised for the sake of transparency.”

However, courts are not only dependent when it comes to the appointment of judges, but also on the resources made available to them. The federal and state governments provide the relevant funding from their own budgets, which means that it is ultimately the executive that decides how well equipped the courts are – from computers to employees to the security guards. According to a recent survey of 988 judges and prosecutors by the Allensbach Institute, the respondents primarily complained about insufficient personnel and technical equipment. The majority of them have observed a deterioration in the working conditions over the past few years. At the same time, as a further survey re-

veals, public criticism of excessively protracted proceedings and overworked courts is increasing.

### THE AUTHORITIES DO NOT ABIDE BY COURT RULINGS

It was against this background that the federal and state governments concluded the “Pact for the Rule of Law” in January 2019. Together they want to create 2000 new jobs for judges, prosecutors and court employees around the country by 2021, including two new senates for the Federal Court of Justice. Yet this does not go far enough according to insiders.

However, politicians can also influence the courts in another way – and one with a profound effect: they simply ignore them. The bans on diesel-powered vehicles offer an example: the state of Baden-Wuerttemberg ignored a judgement issued by its administrative court and accepted a fine, because the

state did not include a ban on diesel-powered vehicles with Euro 5 compliant engines in their clean air plan. Bavaria refused to even develop a concept for “proportional” bans on diesel-powered vehicles in Munich.

As the journalist and lawyer Heribert Prantl comments in the *SÜDDEUTSCHE ZEITUNG* with reference to the case of the Islamist Sami A. from North Rhine-Westphalia, who was deported to Tunisia last year, despite the fact that the administrative judges in Gelsenkirchen had forbidden this due to formal procedural mistakes and ordered his return: “If the authorities refuse to comply with a court order, then the second power is simply sabotaging the third.” In a press interview, the Interior Minister responsible, Herbert Reul (CDU), roundly criticized the decision by the Higher Administrative Court of North Rhine-Westphalia to uphold

the verdict: “The independence of the courts is a great good. But judges should always ensure that their decisions reflect the sense of justice felt by the general public.”

In Jasper Kunstreich’s view, this is an extremely problematic statement: “Judges are bound to abide by law and justice, not by the wishes and sentiments of the public.” Criticizing controversial judgments with reference to some diffuse sense of justice among the general population will gradually destroy the authority of the courts.

Disdain, devalue, or ignore: the defamation of judges is aimed – consciously or unconsciously – at the heart of judicial power, namely the confidence of the general public in an effective and independent judiciary, which remains high in Germany. Germans place more trust in the Federal Constitutional Court than almost any other state insti-

tution. As studies by political scientist Hans Vorländer have shown, even controversial decisions have not changed this situation, for instance when the decision about abortion rights caused an uproar in 1975, or in 1995, when the court ruled against the mandatory placement of crucifixes in Bavarian schools. According to Vorländer, the Constitutional Court even enjoys greater trust than other political institutions such as the legislature, the executive or the political parties.

**PERSONAL ATTACKS ON JUDGES ARE INCREASING**

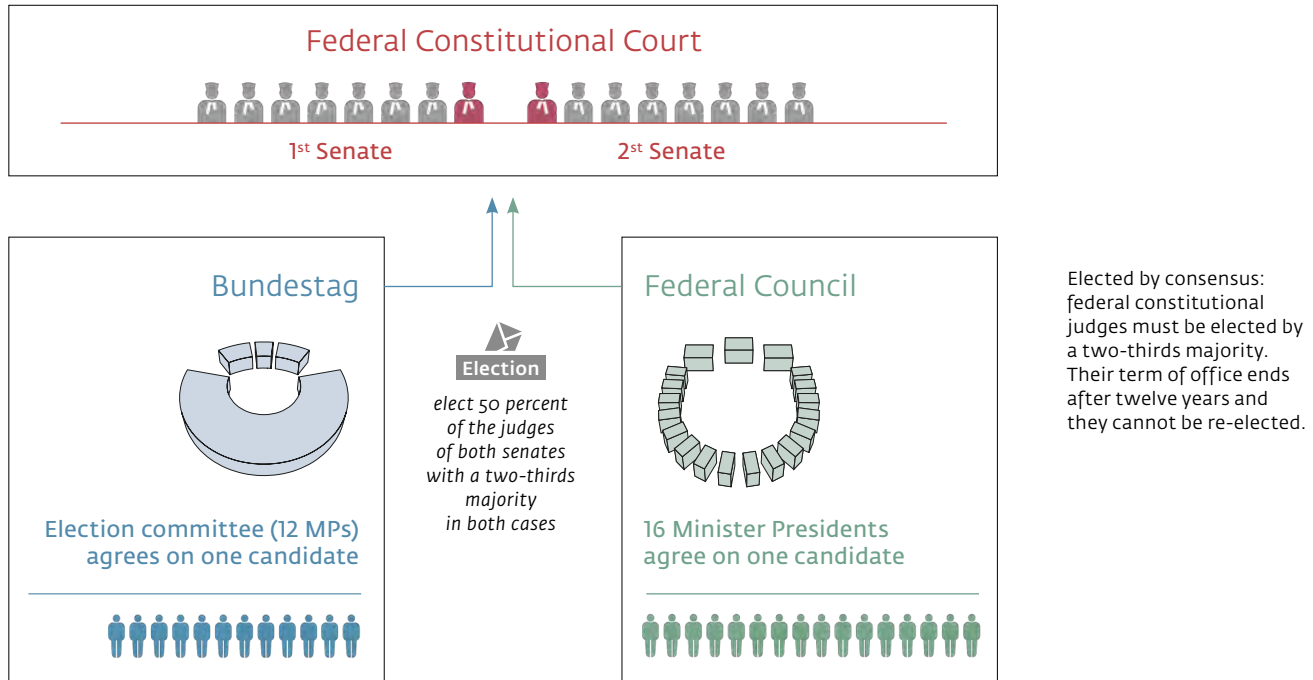
Yet the authority of the court is increasingly coming under attack. Judge of the Federal Constitutional Court Susanne Baer said at the Mainz symposium that she was worried “about the personalization, scandalization and defamation of

» If politicians criticize controversial judgments with reference to some diffuse sense of justice among the general population, it will gradually destroy the authority of the courts.



Photo: picture alliance/Jan Woitas/dpa-Zentralbild/dpa

## Election of constitutional judges



the judiciary as well as the activation of resentments against judges.” Personal attacks against judges are increasing in private discussions, on the Internet, in the media and in parliament.

U.S. President Donald Trump is one prominent figure who berates judges. When a U.S. federal court ruled that a certain government action was illegal, Trump took to Twitter to defame the judges as “Obama judges,” This gave a rise to a rare statement by the Chief Justice of the Supreme Court indirectly criticizing President Trump: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.” he said. “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”

### **BORING REGULATIONS CAN HAVE A STING IN THE TAIL**

Nor was Italy’s former Interior Minister, Matteo Salvini (Lega Nord) backward in coming forward when it comes to condemning court decisions. He took to the media to inform the magistrate

who released the German Sea-Watch captain, Carola Rackete, from prison that rather than being an expression of judicial independence, her verdict was “madness,” and advised her to “hang up her judge’s gown and apply for some political office for the Left.”

And here too, political parties with autocratic tendencies know how to sow doubt, promote suspicion and arouse distrust via minor administrative regulations that often go unnoticed. But these “boring” regulations can have a sting in the tail: the AfD, for example, submitted a draft resolution to the Bundestag in December, according to which the Federal Constitutional Court must justify any non-acceptance of a constitutional complaint: the court currently has the discretion to decide whether or not to justify its non-acceptance. At just under 6000 complaints received per year, the court is already more than busy and, at less than three per cent, the number of successful complaints is low. And what many people do not know is that “a committee consisting of at least three judges decides on every complaint,” explains lawyer

Konrad Duden, who worked at the Constitutional Court as a trainee lawyer himself. “A comprehensive mandatory justification requirement may sound reasonable at first, but it would stretch the court to its limits and jeopardize its ability to function.”

Yet, is it not the case that the Basic Law itself protects our constitutional democracy against attacks? “Not enough!” as Duden and Kunstreich both agree: “It would make sense to supplement it, as it contains no binding provisions relating to appointments to the Constitutional Court as yet. The number of judges, the two-thirds majority required for their election and their term of office could all be changed easily by law in response to changed majorities ratios in the Bundestag.” Both Poland and the U.S. have demonstrated how quickly this can be done. In 2015, the Democrats in the U.S. abolished the requirement for a 60 percent majority for the election of federal judges in favor of a simple majority. Two years later the Republican Senate majority also overturned this higher hurdle for the Supreme Court.

## » Parliament undermines its own authority when it fails to deal with controversial issues and acts only as an executive body for the enforcement of judicial decisions.

While there might be ways to gain political influence over the judiciary, is it not also the case that the judiciary itself sometimes acts beyond its remit? The Federal Constitutional Court, which has the sole authority to interpret the Basic Law, is a focus of criticism. “Both it and the European Court of Justice are repeatedly accused of overstepping the boundaries between politics and the law and interfering in fundamental political issues,” Kunstreich reports. And that, as Duden adds, is no wonder: “almost every significant political issue in the history of the Federal Republic of Germany – from dealing with the legacy of the Third Reich to the RAF terror regime to the equality of homosexual couples – has been dealt with by the constitutional judges in one form or another.”

### POLITICAL MAJORITIES ARE BECOMING HARDER TO ACHIEVE

According to Oliver Lepsius, an expert on constitutional law, decisions by the Constitutional Court on individual cases become incorporated into the legislative process. The court sets standards that fit in the hierarchy of norms are situated between the Basic Law and general laws. However, these standards are beyond the influence of the legislature and can therefore hardly be changed.

Does the removal of such questions from political scrutiny or correction by the legislator adversely affect the political process in Germany? As Duden and Kunstreich recognize “promoting political objectives via the Federal Constitutional Court now seems to be an almost integral part of our system.”


70 years after the introduction of the Basic Law, it is evident how difficult

the task of the legislature has become. “There are all sorts of problems: achieving political majorities and reaching a consensus are becoming more difficult,” says Kunstreich. The party system, he continues, is becoming more fragmented, and political parties are increasingly perceiving themselves as minorities and blocking decisions. With their integrative power and ability to objectify debates, he goes on, the courts fill this gap. “To a certain extent, they shoulder some of the parliamentary burden and relieve the pressure on politicians,” says Kunstreich.

This is especially the case when controversial issues are concerned that could scare off core voters. “Political parties sometimes seem almost pleased when the Constitutional Court addresses issues that are hotly debated by the general public,” Duden adds. “Take the gradual steps taken towards granting equality to homosexual couples, for example. For the federal government it seemed very convenient to be able to cushion the pressure for reform through selective changes whilst at the same time pointing out that it wasn’t the government but the Federal Constitutional Court in Karlsruhe who wanted it that way.”

But isn’t this harmful to the political process itself? “Parliament undermines its own authority when it fails to deal with controversial issues and acts only as an executive body for the enforcement of judicial decisions,” Kunstreich confirms. “The courts then run the risk of being seen as the scapegoat in debates that ought really to be conducted in parliament.” And not just there. “As the fourth estate, the media but also the cultural sector and the sciences all have a responsibility to address various topics and expand public knowledge through the addition of context and detail.”

Ultimately, this applies to society as a whole, to each and every one of us. Even 71 years after the introduction of the Basic Law, those who want an independent judiciary and a functioning constitutional democracy must never tire of learning about and defending these achievements, whether in conversations, on the street or especially in those forums for political discussion that would have been inconceivable to the authors of the Basic Law – the Internet and social media. ◀

 [www.mpg.de/podcasts/freiheit](http://www.mpg.de/podcasts/freiheit)  
(in German)

### SUMMARY

- Autocratically oriented governments that undermine constitutional democracies often begin with the Constitutional Court, discrediting judges, ignoring verdicts, restricting resources and filling vacancies with their own supporters.
- Even in Germany, politicians exert their influence over the judiciary primarily through the provision of financial resources to the courts and the election of federal and constitutional judges.
- Examples of the executive simply ignoring or discrediting court verdicts have been increasing in recent times.
- On the other hand, the ruling parties often give the Constitutional Court a political role when they leave it to decide on controversial issues.