

The Appointment of Judges in Germany ^{*)}
by Volker G. Heinz ^{)}**

Introduction

Ladies and Gentlemen, distinguished members of the judiciary, dear Colleagues,

You will, I hope, forgive me for being somewhat nervous in this beautiful hall. It is not only the age and history of the venue and the eminence of my audience; this is also the hall where many years ago I sat my English legal exams.

I appear before you with the honest intention of trying to pass on some information with respect to a topic which, I assure you, I would have never chosen myself.

When some weeks ago I was asked by my Australian colleagues in Queensland to address you on the subject of appointment of judges in Germany, three thoughts almost simultaneously crossed my mind.

Firstly, who on earth outside Germany is interested in such a dry and boring subject? Secondly, which friendly colleague did this to me, passing on a wonderful honorary duty which he or she was too lazy to deal with him- or herself?

And thirdly, an embarrassing scene flashed through my mind: after much lobbying, my Australian wife managed to persuade me to take her to court where I was supposed to make a number of complicated submissions. During a break, having, as I thought, so far brilliantly disposed of my task, my wife approached me, whispering into my ear “k i s s“. You will not be surprised to hear that I was somewhat bewildered and embarrassed. All I could do was to quietly ask her: what do you mean? My wife whispered again: “**keep it short stupid**“ and smiled broadly, obviously wishing me to improve my performance for the second half of my appearance.

As you can see, I have overcome my initial shock and accepted your invitation. I have also done some legal research in a subject hitherto largely unknown to me. I humbly ask you to accept my contribution as the modest effort of someone who I think still enjoys the innocence of the ignorant. However, I will make every effort to heed my wife’s advice, hoping to keep or gain your sympathy.

On a more serious note of my introductory remarks: I think it is fair to say that the personal requirements for judicial office, independent of the methods of selection and appointment, have not changed a lot over the centuries. According to the Bible, Jethro advises his son-in-law Moses, to “search for able men among all the people who revere God and are honest, men who despise unfair profit“. The great Jewish thinker Maimonides, author of the most important Code of Jewish law, wrote over 850 years ago a judge should have “wisdom, humility, fear of God, disdain of money, love of truth, love of his fellowmen, and a good reputation“.

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The 19th century Lord Chancellor of England, Lord Lyndhurst, also focussed on character, stating: „I look about for a gentleman, and if he knows a little law, so much the better“. Today we still look for character, but equally for intellectual abilities and professional and social skills. But there it does not stop. On an increasingly broad international level we are witnessing the rise of an inclusionary principle, known as the ‘principle of fair reflection of society by the judiciary’, as expressed in article 2.13 of the „Montreal Universal Declaration on the Independence of Justice“, relating to the process and standards of judicial selection.

But which aspects of society should be reflected in this process of selection? Gender? Ethnicity? Religion? Ideology? Sexual inclination? Geographical area? Culture? Or, as one cynical critic once suggested, mediocrity, referring to the great numbers of mediocre lawyers?

Behind this principle of fair reflection is I believe a general tendency to democratize not only the process of selection of judges, but also the composition of the judiciary, right down to certain individual judicial bodies, by scrutinizing, if possible publicly, the background of judges and the views held by them.

As far as Australia is concerned I understand that the discussion centres around the term of public confidence in the judiciary which, it is argued, demands for greater transparency, wider participation of all governmental powers in the selection process itself, and for a so called balanced judiciary, concentrating on increased participation of women, members of ethnic minorities, classes other than the upper middle class and lawyers other than barristers.

In Germany the emphasis of the discussion differs noticeably from the one in your country. The difference is largely a direct reflection of the different composition of society, different access to higher education and a different legal System both with respect to the legal profession and to the judiciary.

So - how do the Germans do it? I hope you will see at the end of my contribution that, unlike the recent playing of the German national soccer team, the German way of judicial appointment is not “painfully efficient”, but a solution worth pondering.

I have divided my speech into three sections, taking into account that, as I presume, you are not altogether familiar with the German legal system. The first section is headed ‘Background and numbers’, where I will attempt to give you the briefest possible introduction to the German judicial System. In the second section I will try to explain to you briefly what sort of an animal a German judge actually is, by presenting the ‘Statutory basis of judicial office in Germany’. The third and main section will deal with our subject proper, the appointment of judges in Germany, followed by a few critical remarks.

I. Background and Numbers

1.

Judicial jurisdiction in Germany is vested on the one-hand in the courts of ordinary jurisdiction, dealing with civil and criminal matters, and on the other hand in special courts belonging to the Labour, Social, Administrative and Tax jurisdictions. Including the constitutional jurisdiction there are altogether six judicial branches, each governed by its own procedural rules.

Each of these branches, except for the constitutional branch, is subdivided in two or three instances. As a general rule, it is possible to challenge all decisions of the courts of 1st instance and to have them reviewed by way of appeal (review of facts and law) or by way of review (review of law alone).

2.

In 1994, Germany with a population of roughly 80 million people had some 1.200 courts altogether of which 848 belonged to the ordinary jurisdiction of first and second instance, 123 to the labour courts of first instance and altogether 140 to first instance courts of administrative, social and tax jurisdictions.

3.

Under Germany's federal constitutional rules the administration of justice is primarily a matter for the regional states or regions ("Länder" in German), notwithstanding certain important federal powers. As a consequence, the bulk of the courts are those established by the regions. Normally, the unsuccessful party may bring an appeal and/or review to one of the five federal courts of the various jurisdictional branches. However, there are also federal courts of 1st instance like the Federal Patent Court. Decisions of the various federal courts cannot be appealed against unless, exceptionally, a remedy is open to the respective constitutional court.

Among the federal courts the Federal Constitutional Court as the guardian of the constitution plays an eminent role. It can effectively invalidate parliamentary enactments by stating that they (or parts of them) are unconstitutional.

4.

The decision-taking judicial bodies consist either of a judge sitting alone, as is the rule in the municipal courts, or of a collegium of judges. Divisions ("Kammern"), Senates ("Senate"), Lay Judge Benches ("Schöffengerichte") and the Jurors' Court ("Schwurgerichte") are all collegial bodies where career judges sit next to honorary judges, mostly lay persons. The participation of honorary judges is seen as answering the constitutional demands for democracy and social separation of powers. Honorary and career judges have the same voting powers; therefore, they may dissent. On the other hand, like their professional brethren, they may not voice their unsuccessful dissenting opinion. However in 1971, the system of dissenting vote was introduced, but to the Federal Constitutional Court alone.

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5.

The judicial business volume in Germany in 1994 amounted to more than 4 million court cases initiated in the respective courts of 1st instance. More than 2.5 million civil cases and not much less than one million criminal cases were resolved in the 1st instance. In addition, almost 200,000 civil and about 60,000 criminal cases were resolved in the appeal or review stage of the proceedings.

6.

At the end of 1994, altogether 22,134 judges were employed by the federal and regional governments. At the same time, there were 5,375 state prosecutors, 65,576 attorneys, 8,715 notaries simultaneously acting as attorneys and 1,628 notaries practising in a notarial capacity alone.

Female judges make up for 26.3% of all judges, 47.9% of all judges on probation and 42.8% of all articulated clerks. The share of female judges has steadily increased over the years. However, within the higher judicial offices, their share at present is still just below 12%.

Women at present dominate in only one section of the law: as students in the legal departments of the universities.

II. Statutory basis of judicial office

1. Constitutional rules

The German Basic Law (“Grundgesetz“), Federal Germany’s constitution, provides for a far-reaching separation of powers, giving the judiciary independence of the two other governmental powers and each individual judge both personal independence and the freedom to take his or her decisions without undue influence. In particular, no judge may be removed from office against his or her will unless so authorised by a special Court of Judicial Office (“Richterdienstgericht“).

The constitution also demands that each citizen seeking legal redress is entitled to have his case decided by what is called „his statutory judge“, i.e. the judge determined by statutory rules to hear his or her particular case. On the basis of these rules mainly contained in the Federal Judicature Act (“Gerichtsverfassungsgesetz“) the presiding committee of each court issues each year rules governing the distribution of business between the various judges and/or judicial bodies. These distribution rules, the so-called “Geschäftsverteilungsplan”, also determine the persons sitting as judges in the various judicial bodies of the court. In other words: no Master of the Rolls enjoying the privilege of picking the high-profile cases for the purpose of moving the law into his direction.

Within the judicial bodies the presiding judge exercises special powers of which the most important is the authority to distribute the business between the various members of his judicial body - a rule presently under parliamentary scrutiny.

The constitution also provides that, with the necessary amendments, the holder of judicial office is entitled to be treated by his employer having regard to the „handed down principles of the civil service“, i.e. mainly tenure for life, adequate remuneration and protection from civil and criminal liability unless his or her decisions are intentionally wrong.

2. Non-constitutional statutory rules

Again, Germany being a federal state and its legislative powers therefore divided between the federal and regional parliaments, some of the non-constitutional statutory rules governing courts and judges were enacted by the federal parliament, others by the regional parliaments. The Federal Parliament has enacted the Judicature Act. This statute deals, apart from the distribution of business rules mentioned above, with the basic career rules of judges, the reasons for which judicial office may be terminated, or a judge removed from office or transferred to another office, and an active judge's maximum age.

The Federal Parliament has also enacted the German Judges Act („Deutsches Richtergesetz“). This piece of legislative work, in its first part, deals with general rules applicable both to federal and regional judges; in its second part, it deals with rules applicable to federal judges alone. Another federal statute is the German Selection of Judges Act („Richterwahlgesetz“), regulating the appointment of Federal Judges.

Within the constraints of these federal enactments, the regions are free to issue their own judicial rules. This has led to a variety of differing sets of rules. This is especially true for the rules governing the appointment of judges.

III. The appointment of judges in Germany

1.

There are 3 important features to be mentioned:

1. the large number of career judges to be appointed
2. no presiding lay judges on the local court level (no magistrates)
3. the widespread use of special committees for the selection of judges.

These committees are frequently used at the federal level. On a regional level, they are used in seven out of sixteen regional states. The rules governing the establishment and composition of these committees vary widely. Looking at the system from abroad, Germany almost appears to be a legal playground for how to select and appoint judges.

This is particularly surprising against the background that, with the exception of the administrative jurisdictional branch, both regional and federal courts apply predominantly federal law: the most important legal enactments are products of the federal parliament. And where the courts apply regional law, it is surprising, or perhaps not, to see, that regional acts in many areas look very much the same from regional state to regional state.

2.

Back to the core of our topic, the appointment of judges. Three systems in various forms are used in Germany. Before I go into greater detail, it may perhaps be useful to know that two systems are not used in Germany at all. One is the System of co-optation, in other words the system whereby the judges refill their ranks by choosing their own peers and leaving to the executive power the purely ceremonial act of appointment. Such a System would clearly be anticonstitutional in Germany. By adopting the system of judicial co-optation there is an obvious danger that the judiciary could develop outside such popular control. On the other hand, Germany, as opposed to the United States, does not know a system of direct popular election. I can see certain disadvantages of direct popular election to judicial office, in particular some less appetizing forms of hustings of judicial candidates. However, I can also see its beauty, i.e. the public strengthening of judicial office and their holders.

3.

As I said before, three systems of appointment of judges are in use, appointment by the executive, appointment by parliament, and appointment through judicial selection committees.

The appointment by judges by the executive, regularly the federal or regional Minister of Justice, is the traditional manner of appointment of judges in Germany.

In this system the Minister of Justice both selects and appoints the judges, the minister bearing political responsibility to his parliament. This purely governmental system is used on a federal level for the appointment of judges sitting in the lower federal courts, e.g. in the Federal Military Court, the Federal Disciplinary Court and the Federal Restitution Court; it is also used in the majority of regions, in particular in the regional states of Bavaria, Mecklenburg-Near Pommerania, Lower Saxony, Northrhine-Westfalia, Rhineland-Palatinate, Saar, Saxony, Saxony-Anhalt and Baden-Württemberg. Some of these regional states have slightly modified the system by involving the local presidential council, the representation of judges at each court in purely judicial matters, by way of consultation.

4.

As mentioned before, there is no election of judges directly through popular vote. However, some judges are directly elected by parliament. This is especially true for the judges of the Federal Constitutional Court. Each of the two parliamentary houses appoints its quota, i.e. four judges of both senates of the constitutional court, each senate comprising eight judges altogether. The Upper House of Parliament, the Federal Council or "Bundesrat", votes by a 2/3 majority. The Lower House of Parliament, the Federal Parliament or "Bundestag" with its normally 656 Members of Parliament, also elects half of the judges by a 2/3 majority; however, the selection is not effected directly, but through a special judicial selection committee, the 12 member "Wahlausschuß", itself elected by the Federal Parliament by proportional representation. After their election, the judges are appointed by the Federal President and handed over a deed of appointment.

The election of judges to the Federal Constitutional Court is an important political event in Germany. The procedure is accompanied by a high-profile press campaign, the press as the fourth power trying to bring transparency into an obviously highly political process. It is not surprising to observe that usually the appointments run strictly along party-political lines.

5.

Let us now look at the committees involved in the selection of judges of the supreme federal courts, i.e. the Federal Court of Justice, the Federal Administrative Court, the Federal Labour Court, the Federal Tax Court and the Federal Social Court. The committee consists of 16 members ex officio, i.e. the 16 regional ministers of justice, and 16 members elected by the federal parliament by proportional representation. The committee's 32 members then, jointly with the federal minister of justice, appoint the federal judge after having consulted the presidential council of the federal court to which the future judge shall be appointed.

6.

On a regional level, committees for the selection of judges are used in the regional States of Berlin, Bremen, Brandenburg, Hamburg, Hesse, Schleswig-Holstein and Thuringia. Again, these committees vary from state to state. For example, in Bremen and Hamburg the judicial members of the committees are elected by the judges, in other states by the regional parliament. In some states the non-judicial members of the committees are elected by a mixed parliamentary-judicial body, in other states again by a mixed parliamentary-governmental body. There is, as you can see, room for all sorts of combinations. It has been said that committees for the selection of judges are hotbeds for creative legal minds.

7.

I am sure you will not want me to explain each of the sixteen regional Systems in greater detail. It would, I feel, turn this audience itself into a hotbed with me becoming the obvious victim. On the other hand, I am sure you will forgive me for expanding a bit on the system of judicial appointment in use in Berlin, and this for three reasons: firstly, Berlin is the old and new capital. Secondly, my own practice is in Berlin although I do not mind mentioning occasionally that I am also a Door Tenant in this city. And thirdly, and more importantly, Berlin can claim to have the oldest and most far-reaching system of employing committees for the selection of judges, dating back to the late forties and obviously against the background of Nazi-led misuse of ministerial powers of appointment.

a.

According to the „Berlin Judges Act“ it is the committee and the Senator of Justice who jointly elect the judge due to be appointed or, and that is important, to be promoted. Whether a judge is to be appointed on probation, whether the judge is to be appointed for life, whether the judge is to be promoted, either for the first or a repeated time, the decision cannot be taken without a positive vote by the committee. This is truly unique.

This system of joint appointment has even been judicially tested. In November 1987 the Berlin Higher Administrative Court, in a landmark decision read and interpreted throughout Germany, the Court decided that the committee has not just a limited right of veto, but a right of full participation in the decision making-process.

b.

The Berlin Regional Parliament has enacted its own „Selection of Judges Code“ containing the most important procedural rules governing the appointment of judges. According to these rules, the Senator of justice convenes the committee; he also chairs its meetings. The committee is composed of 6 members elected by the Berlin Regional Parliament, two judges of the ordinary jurisdiction, one Judge each of the administrative, labour and tax jurisdiction and one attorney. The five Judges sitting as members of the committee were appointed by the Senator of Justice on the basis of propositions made in a list of candidates and submitted by

the competent representative body of judges of Berlin. The local Berlin Bar also presents a list containing names of attorneys to be appointed to the committee.

c.

The committee, established afresh after each election, then appoints a rapporteur and a deputy rapporteur. Their duty is to study all the available information on the candidates and to present the candidates before the committee. The committee then decides in camera by simple majority. No reasons are given. The decision is taken after hearing the arguments offered by the presidential council of the court to which the present or future judge in question shall belong or already belongs.

d.

The selected judges will then be appointed by the Senator of Justice by handing over a deed of appointment or, as the case may be, a deed of promotion.

e.

What are the criteria followed by these committees in selecting hopefully the right person?

Throughout the Federal Republic the persons and bodies selecting the judges are asked to follow the principle of selection of the best. In other words, the aim is to appoint the most gifted, suitable and professionally qualified candidate. As a German judge, he also has to hold German citizenship; furthermore he or she is expected to defend the liberal and democratic fundamental order of the constitutions of both the Federal Republic and Berlin. Also, at various stages of the Appointment Process, interviews are conducted with the candidates in order to establish their character. In order to briefly summarize the criteria for the selection of judges: they are legal skills, character and constitutional loyalty.

Before being appointed judge for life, the young career judge will be appointed judge on probation. The probationary period will last at least three, at most five years. During the first two probationary years the young judge can be dismissed without the need to give special reasons; later he may be removed from office only when not suitable or as a consequence of disciplinary proceedings.

When appointing the young judge on probation, the committee will take into consideration primarily the results of the two German state examinations and the contents of his personal records kept by the respective court during his time as articled clerk. Unless removed in the way described above, the young career judge has to be appointed for life after five years of probationary period.

Having being appointed judge for life after five years, the professional performance of the now less young career judge is evaluated in a lengthy written report. About 20 % of all judges are marked ‘good‘; they are subsequently registered in a „list of judges worthy of promotion“. If the listed judge so wishes, he will then be seconded for another probationary year to the Higher Regional Court, or to the Governmental Department of the Senator of Justice. When working for the Senator of Justice, his judicial office is dormant. Most of the career judges will successfully pass this renewed period of probation. If they do, they will then be promoted to presiding judges in the various divisions and senates of the Berlin courts. From their ranks, in turn, parliament will choose the presidents of the Higher Regional Courts.

The 80 % of judges not evaluated “good“ in the above-mentioned report can, under certain difficult conditions, still be promoted, though this rarely happens. Normally they either become Single Judge at a municipal Court, or Assistant Judge at a Regional Court.

f.

The man in charge on behalf of the Senator of Justice in Berlin for the appointment and promotion of judges is himself a judge presently on secondment. He and the vice-president of Berlin's Regional Court both seem to be very happy with the present system. They do admit that there is still room for improvement, in particular on the transparency side. But they have no doubt that, cum grano salis, the system of the Berlin committee for the selection of judges works well and selects the best.

g.

The system of judicial appointment in Germany seems to be widely accepted. As far as I can judge, the System works fairly smoothly. I would not really know how to measure the efficiency of such appointments other than by trying to establish whether the general public is happy with the judges and the way they handle their cases. I find one result interesting: the regional court in Berlin, being subject to the Berlin appointment system described above, is the second fastest in the country in terms of case turnover and has long been on top of the league. But speed and efficiency are not the same. Let us wait for the first enterprising young academics to produce a study on the subject, hoping they will get the necessary cooperation both from the judges and the government.

Conclusions

In my personal view the German System has both strengths and weaknesses, perhaps more of the former.

On the "Fair Reflection of Society" issue it is fairly successful in bringing in judges from a wider social background, largely as a consequence of equal access to higher education. It also produces more and more women judges, mainly as a result of the introduction of judicial half-time jobs in combination with generous rights to take special motherhood and child-rearing leave. And party-political loyalties are more or less openly introduced through the selection committees' parliamentary influence and the preselection and co-determination powers of the elected Minister of Justice.

The committees also represent a wider participation of society in the selection process.

On the transparency issue, confidentiality rules in Germany protect all judges from public scrutiny of their views.

Finally, the System of ongoing evaluation of junior judges is meant to ensure that the candidates for higher judicial office generally meet the demand for well-rounded personalities and skillful legal technicians.

The weaknesses of the German system are harder to see, particularly for a German. I think two of them are worth mentioning:

Firstly, Germany still refuses to accept that it is de facto a country of immigration. By asking its future judges to be holders of German citizenship while at the same time granting citizenship to foreigners only under conditions difficult for them to accept, it effectively excludes sizeable ethnic minorities from judicial office, in particular Turks and people from a number of southern European countries.

Secondly, by excluding its large Turkish population, Germany appears to be biased against Muslims, its largest religious minority. That there are only relatively few Jewish judges is obviously a continuing result of Germany's painful Third Reich period.

Lastly, I feel that, at least with respect to the Federal Constitutional Court, a System of greater in-depth-scrutiny of the Judges' character and political convictions should be introduced - after all, constitutional judges, through their decisions, can easily affect the personal and political lives of the ultimate sovereign, each single citizen.

Thank you very much for your attention.

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