

Michael Bohlander / Christian Latour

The German Judiciary in the Nineties

A study of the recruitment, promotion and
remuneration of judges in Germany

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Foreword

The text of this book is based on a lecture that Michael Bohlander presented to the Faculty of Northwestern University School of Law when he was a visiting scholar in Chicago in the spring of 1997. He would like to thank the law teachers and staff at Northwestern, especially Professor Ronald J. Allen, for stimulating discussions about his research project at that time and for the warm welcome he received.

He wishes to dedicate this book to Gene and Marilyn Herzer, who played a great part in making his stay in Chicago a memorable experience.

Christian Latour had the bold idea of sending the questionnaire to the judges at the Bundesgerichtshof, something which his co-author as a judge did not even think of.

He would like to dedicate the book to his wife Rita.

Meiningen, April 1998

Michael Bohlander

Christian Latour

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I. Introduction ¹

In the years from 1985 to 1988 the legal public in the United States witnessed a heated controversy between two prominent American law professors, *John H. Langbein*, then with the University of Chicago, and *Ronald J. Allen*, of Northwestern University. The source of their dispute was a 1985 article by *Langbein* in which he expounded his views on the allegedly superior qualities of German civil procedure and the recruitment of judges, comparing these to the situation in the USA.² *Allen* and his co-authors *Köck*, *Riechenberg* and *Rosen* questioned the accuracy of most of *Langbein*'s arguments in a response in 1988³. Both sides restated their positions⁴ in the *Northwestern University Law Review*.

We became aware of the controversy only in 1995, when *Ronald J. Allen* informed one of the authors about the papers in another context.

Even though more than ten years have passed since the first article was written, we felt that it might nevertheless be helpful to inform the Anglo-American debate about how the recruitment process of judges is structured, what their chances for promotion are and to what extent there is political meddling with the nomination of judges to higher office.

For this reason we decided to look into the practice of the recruitment and promotion of judges as it is handled by the ministries of justice in Germany. To this effect two topics appeared of special interest, being that as far as we could see nothing like this had been done before in Germany and certainly not by any foreign academic.

We first asked all the German justice ministries which criteria they expected applicants for judicial office to meet generally, and how these criteria had been met during the years from 1990 - 1995, a period of great changes in the German administration of justice, because that was the time when the East German court

¹ In this book we have used the male pronoun throughout for reasons of brevity and crispness of expression. This is, however, naturally meant to include the female counterpart, too.

² The German Advantage in Civil Procedure, [1985] 52 U. Chi. L. Rev. 823 - hereinafter called "The German Advantage". He has repeated some of his comments in [1995] 43 American Journal of Comparative Law, 545 - 554.

³ The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, [1988] 82 Northwestern University Law Review, 705 - hereinafter called "The Plea".

⁴ *Langbein*, Trashing the German Advantage, [1988] 82 Northwestern University Law Review, 763 and *Allen*, Idealization and Caricature in Comparative Scholarship, [1988] 82 Northwestern University Law Review, 785.

system was adapted to the West German law. With the year 1995 this process was more or less finished.

The second issue which had been in the public's eye for a long time and which plays a great role in the context of promotions was the influence of the political parties on the recruitment of judges and especially with respect to nominations to higher office. As an example we chose to look at the nominations to the *Bundesgerichtshof*, the Federal Court of Appeal, where there had been persistent rumours of unlawful influence by the parties. We sent a questionnaire to all the judges serving at the court at the time and asked them about their careers and their attitudes to issues connected with political meddling in the nomination process. This study was also a novelty in Germany.

Furthermore we do not purport to rehash the arguments of *Langbein* and *Allen* in their entirety, but want to concentrate on the salient points, as we see them, and to give a comment as German practitioners. We feel that a topic like the state of the judiciary can be more fully appreciated if practical experience is added to legal or sociological field research. Thus we want this book to be understood as a view from the inside, both from within the German legal system and from the viewpoint of our specific field of work.

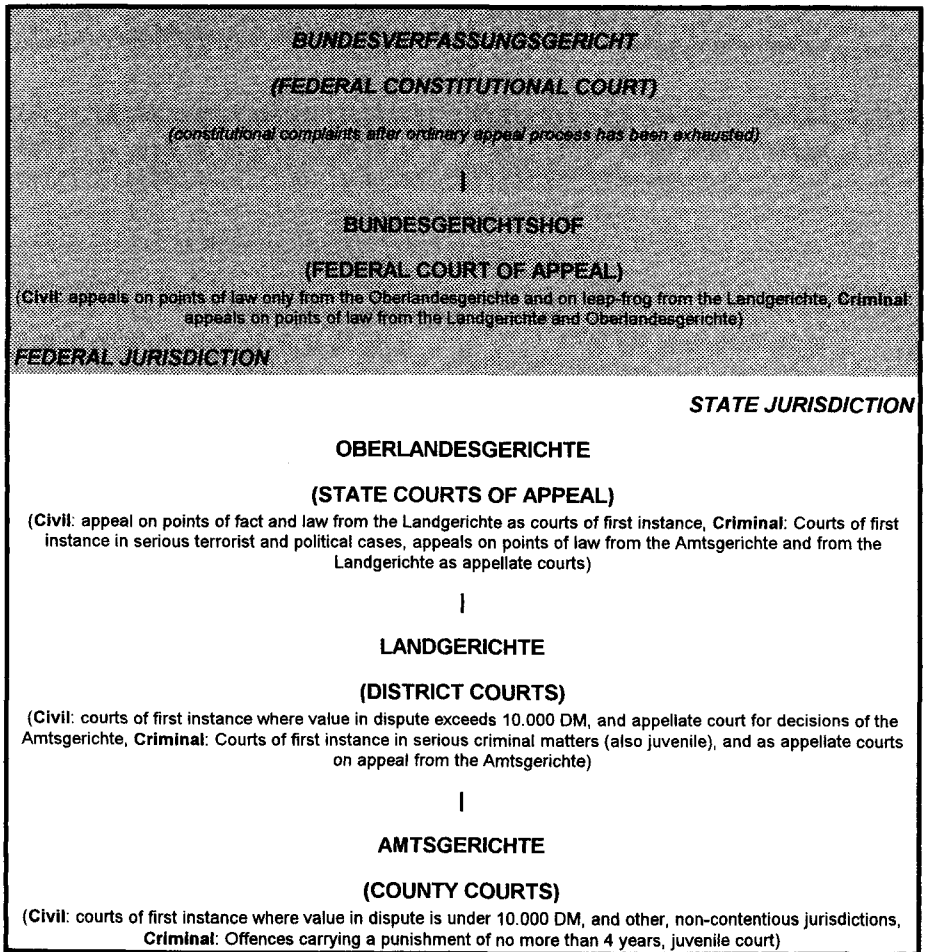
Court hierarchy

First of all, one needs to understand a bit about the court hierarchy. The following diagram shows the courts structure including appeals ⁵ (without family courts) starting from the top downwards within the ordinary jurisdiction.

It should also be mentioned that in Germany judges, like in the USA, are divided into the state judiciaries and the Federal judiciary. Normally nobody may be appointed to the latter unless he has served until the age of 40 in the state judiciary or administration of justice in the wider sense. There are exceptions, but these are rare.

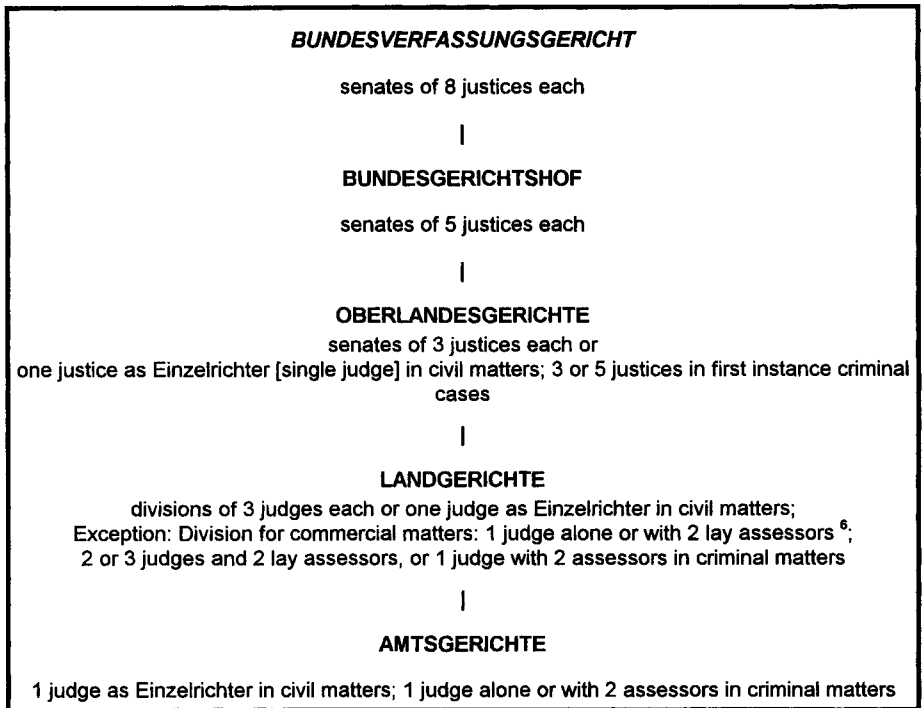
⁵ The diagram only shows appeals against judgments which end the instance; there is a different appeals structure for interlocutory and preliminary issues not shown here.

Figure 1: Court hierarchy of the ordinary jurisdiction



The courts sit as follows:

Figure 2: Staffing of the courts of ordinary jurisdiction



⁶ To this extent there is a lay element in civil procedure, but generally *Langbein* is right that there is no jury.

II. The German judiciary - recruitment, promotion and remuneration

*Langbein*⁷ advocated the German system of the career judiciary, arguing that judges are constantly scrutinized by the appellate courts and the presiding judges of their chamber on the basis of their decisions and judicial performance generally. He also thought that the judiciary was a profession with prestige and not badly compensated, and that only the best would be selected by the state administration.

*Allen*⁸ criticized the career judiciary as too close to the general civil service and therefore too close to the government. Young lawyers, who are appointed right out of law school at the age of 29 or even earlier sometimes, did not possess sufficient experience for such a responsibility. He also charged that the very best and brightest of the graduates chose a job in private practice with big law firms, where the pay was much better than in the government service.

To help answer the above questions, we will look at them in turn, and also at some more specific topics like the influence of party politics on a judicial career:

II. 1. Recruitment criteria

The recruitment of judges in Germany mainly depends on the grades of the state examinations, most importantly the second state examination. The second exam is now taken after two years' ⁹ preparatory practical education, the so-called *Vorbereitungsdienst*, during which candidates will have served as clerks with the prosecution service, the courts, attorneys and the administration.

The first exam, although organized through the ministries, is basically a university exam. The second exam, also run by the ministries, is a practitioner's exam and the tests are mostly thought up and marked by judges, attorneys and prosecutors as well

⁷ The German Advantage, at 848 et seq.

⁸ The Plea, at 745 et seq.

⁹ It used to be 2 ½ years.

as other civil servants. Only in recent years have academics been fully incorporated in this second exam. Each exam will feature a number of written tests and an oral examination.

Grades range from *sehr gut* (very good), *gut* (good), *vollbefriedigend* (fully satisfactory), *befriedigend* (satisfactory), *ausreichend* (pass), *mangelhaft* (fail grade I) down to *ungenügend* (fail grade II). The grades ¹⁰ are divided into 18 points and correlate as follows to the point system:

Table 1 Grade system

<i>sehr gut</i>	14,00 - 18,00
<i>gut</i>	11,50 - 13,99
<i>vollbefriedigend</i>	9,00 - 11,49
<i>befriedigend</i>	6,50 - 8,99
<i>ausreichend</i>	4,00 - 6,49
<i>mangelhaft</i>	1,50 - 3,99
<i>ungenügend</i>	0,00 - 1,49

Different states of the German Federation have a so-called “*Prädikatsexamen*“ (honors degree), which starts at greatly varying levels. For example, a Bavarian *Prädikatsexamen* would start at 6.5 points, whereas the candidate in the Saarland would have to have at least 9 points.

Nevertheless, the state of Bayern is notorious for overestimating the difficulty of its own examinations and therefore candidates with exams from other states experience immense problems if they want to enter the Bavarian judiciary or civil service, even if their grades are nominally equal or superior to those of their colleagues from Bayern.

Foreign students and academics will very likely wonder how an honors degree can be given to someone whose grade is on the lower half or almost on the lower third of the grade scale.

The explanation is that experience over a long time has shown that German universities and the examining practitioners during the second exam are extremely reluctant to give out grades that lie above the level of *vollbefriedigend*. Therefore this level features somewhere in the top 10 - 20 % of a class, so that an honors degree may start at a rather low level. This would certainly change if the exams were graded somewhat more leniently.

¹⁰ The grades for the tests during the university and practical education are slightly different.

The degree of the first or second exam also decides in most of the states whether a student or lawyer may enter the doctorate programme of a university. All states have a threshold level below which a candidate will not be eligible for state service. These levels change with the situation of offer and demand on the job market.

The grades of each year are published by the Federal Ministry of Justice, so it is fairly easy to compare the requirements of the individual states and the Federal Ministry, which also partly recruits its own staff directly from law school, and the results of the annual examinations. We were not aware of any survey of this kind before, so we asked all the justice ministries of the states and the Federal Ministry to send us a summary of their requirements for the period of 1990-1995, which most of them did. We also asked them by telephone back-up interview about the significance of additional qualifications like a doctorate or previous experience as an attorney etc. for the decision to recruit a candidate for the judiciary.

Unfortunately the replies we received, though mostly very detailed, were of such a differing nature that it was impossible to incorporate them into one or more graphs comparing certain elements, if we wanted to supply accurate information.

One has to bear in mind additionally that some states make a difference in the criteria according to whether a candidate applies for a judicial post or that of a prosecutor; the requirements for the latter may be lower.

This means that changing careers between judiciary and prosecution, which is a common feature in most states, is impossible or extremely difficult for prosecutors whose grades do not measure up to the criteria for judges.

Another important issue is the fact that during the first few years after German reunification the West German states "lent" a great number of their fully tenured judges and prosecutors to the East German states in order to get the administration of justice started there, which could not be done only with novices. Some of these "borrowed" judges decided to accept permanent employment in the East German judiciaries, mainly because it meant receiving a promotion they would have had to wait for much longer in their home state. Therefore more openings appeared than was the case in the years before. This had a profound effect on the relationship of offer and demand on the legal job market.

We will thus have to show the results of this survey state-by-state and then compare them to the overall exam statistics for all of Germany. The recruitment data were collected in late 1995, more recent ones were not available to us.

II. 2. State and Federal entry requirements and career idiosyncracies

II. 2.1. Baden-Württemberg

Judges and prosecutors must have the same qualifications and a change of careers appears to be usual.

The lowest entry grade would be 7.0 points, which is the state threshold for the *Prädikatsexamen*. A weak second exam cannot be compensated for by a good first, unless the overall personal impression of the applicant was exceptional. A doctorate is irrelevant. Previous experience as an attorney is seen as a positive factor; additional qualifications may be helpful, for example a degree in economics if the candidate wishes to join the white-collar prosecution unit.

The average grades in points achieved in the second exam by applicants were as follows:

Table 2: 2nd exam grades in Baden-Württemberg

1991: 8.17
1992: 8.82
1993: 9.41
1994: 9.44

The average entry level for 1995 was projected to be well above 9.0 points. The lower level in 1991 is explained by the recruitment of a total of 161 candidates because a large number of judges and prosecutors had been seconded to Sachsen in East Germany. Some of those recruited in 1991 had merely a pass grade in the second exam, but had to have exceptional grades in the different stages of the *Vorbereitungsdienst*.

II. 2. 2. Bayern

Bayern does not distinguish between entry qualifications for judges and prosecutors, a change of careers is usual and indeed a necessary precondition for promotion. Bayern is notorious for its relatively high entry criteria, as was mentioned above. There are two dates each year when applications for the judiciary and prosecution service are considered. The Bavarian Ministry of Justice sent the following table for the respective required minimum grades in the second exam:

Table 3. Required minimum grades of the 2nd exam in Bavaria

Year	Date I	Date II
1991	7.50	7.20
1992	7.20	8.00
1993	7.50	8.00
1994	8.30	9.15
1995	9.00	9.04

The low entry grades in 1991 - 1993 were owed to the fact that many Bavarian judges and prosecutors were seconded or moved to East Germany, so that a large number of new tenures had to be created.

II. 2. 3. Berlin

Berlin did not send any tables or other written information. The following was told to the authors during a phone interview:

There is no fixed grade level for eligibility, although in the period from 1990-1995 judges usually were required to show "*befriedigend*" at least twice, and on average that meant 8.0 points in both exams. In some exceptional cases 7.0 points were sufficient, if the average grade of the written tests was 7.0 points or higher. The first exam had to be better than a mere pass grade.

Since July 1995 the tendency had been to accept only candidates with almost *vollbefriedigend* twice, meaning at least 8.5 points and higher.

Judges and prosecutors are not treated differently, although a change between careers does not normally happen in practice notwithstanding its possibility in theory. As was said above, shortly after the unification there had been an enormous need for new prosecutors, as only 10 GDR lawyers had been taken over, which meant a huge wave of recruitments resulting in the fact that in October 1995 more than 50 % of all prosecutors were working in their probationary stage of the first three to five years. The demand was so high that in a few cases applicants with a mere pass grade in the second exam were accepted, if their grades for the stage with the prosecution service during their practical education were *vollbefriedigend* and better and their exam test grades in criminal law were good.

II. 2. 4. Brandenburg

This new Bundesland has separate entry grades for judges and prosecutors. The information sent to us resulted in the following table:

Table 4: Required minimum grades for the 2nd exam in Brandenburg

Year	Judges	Prosecutors
1991	1 st or 2 nd exam befriedigend	1 st or 2 nd exam befriedigend
1992	2 nd exam befriedigend	2 nd exam pass grade (6.00)
1993	1 st exam befr., 2 nd over 7.01	2 nd exam befriedigend (6.50)
1994	1 st exam befr., 2 nd over 7.50	2 nd exam befriedigend (7.00)
1995	1 st exam over 7.50, 2 nd over 8.00	2 nd exam befriedigend (7.50)

Entry grades were not seen as a strict requirement, because some candidates with inferior grades were recruited due to the fact that they had additional qualifications, e.g. previous experience as attorneys. On the other hand, achieving the entry level was no guarantee for recruitment if the overall personal impression was negative.

II. 2. 5. Bremen

The northern city state of Bremen supplied statistics for judges and prosecutors for the years 1991 through 1995. From 1993 onwards the recruitment for the courts of ordinary jurisdiction and the prosecution service was combined, so that there are no separate grades shown. We have also omitted the grades from the experimental system of the *Einstufige Juristenausbildung*, an education which combined university and practical training in one, but the grades of which cannot be compared with the traditional system. The state did not give the grades, either. The grades of the two-tier educational system were as follows:

Table 5: Grades in the 2nd exam in Bremen

Year	Judges	Prosecutors
1991	1 sehr gut 4 voll befriedigend 2 befriedigend	- 3 vollbefriedigend 1 befriedigend
1992	2 vollbefriedigend	-
1993		3 befriedigend
1994		1 gut 1 voll befriedigend
1995		4 vollbefriedigend

Bremen did not have any strict threshold grades, but the pre-choice of candidates was always made from the shortlist of the respective examination date. The candidates were evaluated by a commission. A bad second exam result could be compensated by a better grade in the first exam.

A doctorate was of no importance. However, previous experience as an attorney in private practice was considered a bonus. The same applied to computer literacy or previous experience as a *Rechtspfleger*, i.e. a quasi-judicial officer of the court who deals with non-contentious litigation, costs, land and company registries etc.

II. 2. 6. Hamburg

No differences are made between judges and prosecutors as far as entry qualifications are concerned. Changing careers is possible but not usual and must mostly be initiated by the judge or prosecutor himself.

Since 1991 the minimum level for the second exam has been *befriedigend*, yet a weaker second exam could be equalized by a very good first or by exceptionally good grades for the different stages during the *Vorbereitungsdienst*. A doctorate might be helpful if the object of the thesis was in some discernible way related to an issue of interest for the administration of justice, yet even then the impact on the overall picture would be minimal. Previous experience as an attorney might in some cases be considered.

The grades in the second exam for the years 1991 - 1995 were as follows:

Table 6: Grades in the 2nd exam in Hamburg

Year	Grade	Judges	Prosecutors
1991	gut	5	2
	vollbefriedigend	28	4
	befriedigend	3	6
1992	gut	8	1
	vollbefriedigend	27	9
	befriedigend	6	11
1993	gut	2	-
	vollbefriedigend	31	8
	befriedigend	11	4
1994/95	gut	5	1
	vollbefriedigend	7	12
	befriedigend	2	1

II. 2. 7. Niedersachsen

The data sent by Niedersachsen were rather rudimentary and did not carry much information. After a phone interview, the following results emerged:

Judges and prosecutors need the same entry qualifications. The state had never accepted candidates with a mere pass grade in the second exam, 6.5 points have always been the lowest level, in October 1995 the threshold was at 9.0 points. Weaker second exams could be compensated for by a *gut* or *sehr gut* in the first. A doctorate is irrelevant and may even seem to be counter-productive, as the official with whom we talked called it an “additional luxury” and used it to draw a distinction between purely theoretical and practical abilities.

The grades of those applicants admitted to the judiciary or prosecution from January 1st, 1994 until October 1995 were as follows:

Table 7. Grades in the 2nd exams in Niedersachsen

Grade	1 st exam	2 nd exam
sehr gut	1	-
gut	8	9
vollbefriedigend	42	49
befriedigend	29	27
pass	5	-

II. 2. 8. Nordrhein-Westfalen

Table 8. Entry grades of JUDGES in Nordrhein-Westfalen

Year	No. of recruitments	sehr gut	gut	vollbefried.	befried.
1991	165	-	8	72	85
1992	116	-	11	92	13
1993	131	-	13	92	26
1994	124	-	14	110	-
1995	73	1	15	57	-

Table 9. Entry grades for PROSECUTORS in Nordrhein-Westfalen

Year	No. of recruitments	sehr gut	gut	vollbefried.	befried.
1991	50	-	1	20	37
1992	55	-	1	10	44
1993	18	-	1	8	9
1994	28	-	-	15	12
1995	19	-	3	15	1

No interview could be done. The separate information appears to imply that entry levels for judges and prosecutors might be different. The inconsistencies in the sums for 1991 and 1994 were part of the original material sent by the state, so we do not know where the mistake lies.

II. 2.9. Saarland

This state sent the grades in the 2nd exams of all those applicants who had been recruited from 1991 until 1995:

Table 10. Grades achieved in the 2nd exam in the Saarland

Year	Lowest Grade	Highest Grade	No. of recruitments
1991	7,37	11,66	20
1992	7,01	12,20	20
1993	7,95	10,35	11
1994	7,17	11,67	15
1995	7,92	10,85	24

A doctorate would not normally be of importance; the same applied to previous experience as an attorney, the reason for the latter probably being the stereotype common amongst German officials that those who become attorneys have no other choice because of their grades. The minimum level for 1996 was projected to be 8.5 points twice or 9.0 in the second exam. No difference was made between judges and prosecutors. Change of careers is common practice, especially during the probationary phase.

II. 2. 10. Sachsen

Sachsen, another new member state of the Federation, had no fixed entry levels as of November 1995. Yet a certain minimum level was adhered to from the beginning, although this was very low with 5.0 points in 1991. It rose to 5.0 - 6.0 points in 1992, to 5.0 - 7.0 in 1993 and to a minimum qualification of 7.0 - 8.0 in 1994. Since 1995 the threshold lies at 8.0. Weaker second exams could be equalized by previous professional experience if that was useful in the new job. However, some applicants whose qualifications were well above the minimum were rejected because of the

overall personal impression. No differences exist with regard to entry grades between judges and prosecutors.

II. 2.11. Sachsen-Anhalt

Sachsen-Anhalt, one of the five new Bundesländer, supplied a table stating the year, number of applicants and the range of grades. Judges and prosecutors were not treated differently:

Table 11. Grades in the 2nd exams in Sachsen-Anhalt

Grade	1991		1992		1993		1994		1995	
	No.	grade	No.	grade	No.	grade	No.	grade	No.	grade
pass	8	5,4-6,39	43	4,36-6,43	10	4,8 - 6,4	3	4,57-6,14	-	-
befried.	29	6,45-8,62	44	6,5-8,68	76	6,5-8,54	65	6,53-8,75	24	6,55-8,93
vollbefr.	-	-	3	9,04-11,11	8	9,0-10,83	12	9,02-10,83	9	9,03-10,82
gut	-	-	-	-	-	-	1	11,5	1	12,67

In October 1995 the threshold lay at one *vollbefriedigend* and one *befriedigend* with a tendency to at least one *gut*. The lowest point grade was 7.0. A doctorate was of no importance for recruitment; however, additional qualifications were useful if they bore a relationship to the future work within the administration of justice.

II. 2. 12. Schleswig-Holstein

Grades in the second exam of those recruited were as follows.

Table 12: Grades in the 2nd exam in Schleswig-Holstein

Grade	1991	1992	1993	1994	1995 (November)
gut	1	1	5	1	3
vollbefried.	30	18	10	13	15
befriedigend	7	9	6	8	-
ausreichend	-	-	1	1	1

This table does not distinguish between judges and prosecutors, but the state makes a difference, especially according to offer and demand. Thus in the years of 1991 and 1992, when many judges and prosecutors were being seconded or transferred to East Germany, there was a shortage of candidates which meant lower entry criteria, yet this applied only to prosecutors, not judges, according to the information given to us in the telephone interview. The lowest acceptable grade for recruitment is normally *befriedigend*, whereas at the time of the interview it had risen again to *vollbefriedigend*.

Previous professional experience may be considered, but a doctorate would seem unlikely to be of any help. A weak second exam may be compensated for by a better first.

Judges and prosecutors may change careers, although it is not usual. Prosecutors will have to show special skills acquired on the job.

II. 2. 13 Thüringen

The state of Thüringen did not supply any materials. However, it was possible to conduct a telephone interview.

According to this the minimum requirements in January 1996 were two exams with at least 8.0 points. Earlier candidates had been accepted with grades ranging from 6.5 to 8.0.

Knowledge of foreign languages or a doctorate could only play a role if the grades were sufficient, as indicated above. In the case of two candidates with the same grades this apparently might have tipped the scales.

Previous activity as an attorney was a two-edged sword: It depended on whether the practice was rocky or not and how large a turnover it yielded.

II. 2. 14. Federal Ministry of Justice

The Federal Ministry recruits its personnel mainly from serving judges and prosecutors who are seconded by their state ministries which also decide who is to be seconded. After a certain time they may be taken over into the permanent service of the Federal Ministry, if they agree, thereby losing their judicial or prosecutorial status.

Direct recruitment after the second exam is the exception. Additional qualifications like knowledge of foreign languages or professional experience abroad are helpful, a doctorate only in restricted circumstances.

The grades achieved by the directly recruited candidates in their first and second exams by year of recruitment were as follows:

Table 13: Entry grades in the 2nd exam in the Federal Ministry of Justice

Year	1 st exam	2 nd exam	No.
1991	gut	gut	2
	gut	vollbefriedigend	2
	vollbefriedigend	gut	3
	vollbefriedigend	vollbefriedigend	1
	befriedigend	vollbefriedigend	2
1992	vollbefriedigend	befriedigend	2
	ausreichend	vollbefriedigend	1
1993	sehr gut	gut	1
	sehr gut	vollbefriedigend	1
	gut	vollbefriedigend	3
	gut	befriedigend	1
	vollbefriedigend	vollbefriedigend	3
	vollbefriedigend	befriedigend	3
1994	gut	gut	1
1995	sehr gut	gut	1
	gut	gut	1
	gut	vollbefriedigend	2
	vollbefriedigend	vollbefriedigend	1

II. 3. Nationwide results of the first and second state exams in the years 1990-1994

The Federal Ministry of Justice was kind enough to send us copies of the results of the 1st and 2nd exams for the years 1990-1994. We did exclude the tables for 1995, because at the time the information was being gathered from the individual states not all the exams had been finished, making an evaluation for 1995 less reliable. The results are usually broken down into the exams for the individual states, which would, however, make an overview in our context very difficult. We will therefore show only the nationwide results in both exams for 1990-1994. Regrettably, the data are not broken down with respect to the point system, but only to the overall grades. It must be borne in mind, however, that due to the fact that the new Bundesländer

did not always send their results for each year there is a measure of uncertainty contained in the data:

Table 14: 1st exams nationwide

1st exams 1990 - 1994 nationwide

Year	EC	OP	sg	g	vb	b	a	F	R
1990	10704	8175	22	273	1203	2842	3835	2529	610
1991	9635	7508	30	311	1172	2607	3388	2127	544
1992	10840	8411	28	321	1346	3056	3660	2429	501
1993	12731	9781	22	382	1635	3485	4257	2950	451
1994	13598	10127	26	366	1540	3689	4506	3471	526

Table 15: 2nd exams nationwide

2nd exams 1990 - 1994 nationwide

Year	EC	OP	sg	g	vb	b	a	F	R
1990	7647	6853	1	102	837	2644	3277	794	165
1991	7806	7037	4	122	878	2710	3323	769	146
1992	8344	7555	3	146	1044	2933	3429	789	148
1993	8609	7796	4	154	1147	3109	3382	813	178
1994	9326	8359	5	215	1267	3315	3557	967	197

Source: Federal Ministry of Justice; EC = Examined Candidates, OP = Overall Pass, sg = sehr gut, g = gut, vb = vollbefriedigend, b = befriedigend, a = ausreichend, F = Failed, R = Repeatedly failed (after a second attempt).

Comparing the data sent by the individual states and bearing in mind that not every state had sent information and that other federal and state agencies outside the ambit of the administration of justice not mentioned here also recruit law graduates it would appear that the majority of those recruited for the judiciary and the prosecution range within the grades of *befriedigend/vollbefriedigend* with a light tendency to *gut*. The years from 1990 - 1993 are, of course, an exception because of the increased need for lawyers in East Germany which made entry into the judiciary possible for candidates who would not have stood a chance in West Germany alone.

Compared to the data for the nationwide results, this could support *Allen's* claim, that the majority of the brightest graduates do not join the judiciary. Where they do

go, is difficult to say. Some may choose an academic career, although it must be said that here the 1st exam as the university exam is at least as important as the second one, if not even more important, and that much more weight is given to academic titles like the doctorate and the habilitation thesis, without which nobody can become a tenured professor.

Allen claims that the brightest go into private or corporate practice. We are not aware of any public source as to information about the grades of those joining law firms etc., apart from the firms themselves, who are naturally bound by their employment confidentiality. We have thus looked at the private sector job advertisements in the *Neue Juristische Wochenschrift*, the leading legal practitioners' weekly, which has the most of such advertisements. It could be seen that the big corporate and commercial law firms with connections to other countries usually set a lower entry level, and they mostly require two *Prädikatsexamina*, which, however, as we have seen, may already begin at 6.5 points and thus not mean anything. Quite a high proportion of the leading firms therefore want *vollbefriedigend* twice and a doctorate plus knowledge of foreign languages. The doctorate is said to be necessary to show that the attorney is able to approach case problems on a scholarly level, which may be partly true, but our guess and that of many attorneys, too, is that an additional "Dr." in the letter-head of the firm is a big advertising advantage. Smaller firms rarely have minimum grade requirements, but very often would like to see 2 or 3 years' professional experience as an attorney.

The upshot of this appears to be that the entry levels for the big firms do not differ too much from those of the majority of the ministries, at least in West Germany, although private practice puts more stress on additional qualifications like previous professional experience, a doctorate and foreign languages. For smaller firms the criteria may be even lower. The available data do not permit any statement as to those graduates who set up their own practice after the second exam or join a family practice, where the criteria are obviously totally different.

II. 4. Remuneration

A few words on salaries: The German judiciary and prosecution have their own salary scale called “*R-Besoldung*“, where R stands for *Richter*, the German word for judge. This special scale is the result of a long struggle by the *Deutscher Richterbund*, the German Judges Association, and was only introduced in 1972. Compared to the civil service, judges now start at a relatively high level, which a civil servant with the same educational background can only reach after long years, and mostly not at all. However, this sounds better in theory than it is in fact. Whereas in the civil service there are relatively many promotion placements, the promotion pyramid within the judiciary is different. It has a very broad base of the basic R1 tenures and narrows continually and very steeply with each additional tier. Promotion is thus rather the exception than the rule for the average judge.

The salary for the groups R1 and R2 increases automatically every two years, beginning with the age of 27 for R1 and 31 for R2. R1 is the entry salary, R10 is the top of the scale reserved for the Presiding Judges of the Federal Courts of Appeal. After R2 there are no more age-related increases. On July 1, 1997, a new scale was introduced, which changed the structure of the salaries. The respective basic salaries without any additional job-related benefits, are as follows [before tax]:

Table 16. Salary scale R

Salary group	Salary in DM per month	Basic Salary per year
R1	5331,14 [at 31: 5704,03]	63973,68
R2	6498,10 [only after the age of 31]	77977,20
R3	10436,60	125239,20
R4	11049,60	132595,20
R5	11753,10	141037,20
R6	12417,47	149009,64
R7	13063,72	156764,64
R8	13737,31	164847,72
R9	14573,66	174883,92
R10	17911,15	214933,38

Compared to this are the average annual turnover and profit rates for attorneys in private practice for the year 1994, which were the most recent available:¹¹

Attorneys in West Germany who were members of a firm had an average annual turnover of 325000,00 DM, those working as sole practitioners had 281000,00 DM. If the firm had only a local office, the average was 326000,00 DM, if it had several branch offices the rate rose to 852000,00 DM.

The annual average profit of sole practitioners was 140000,00 DM in West and 88000,00 DM in East Germany. The rates for firm members in West Germany were 164000,00 DM for local firms and 323000,00 DM for firms with more than one office, the respective numbers in East Germany were 111000,00 DM and 110000,00 DM.

From this comparison it is fairly easy to see that it cannot be the salary which makes people want to join the judiciary. A judge would have to reach a post as a presiding judge of the Oberlandesgericht in order to come into the same income brackets as the average attorney. We thus tend to agree with *Allen* that it depends more on the personality of the applicant and the additional qualities and connotations which the different professions hold, like job security or lack of entrepreneurial abilities etc.

II. 5. Assessment criteria and promotions

Judges, whether probationary or tenured, are assessed regularly on their professional performance up to a certain age or when they apply for a promotion. Any assessment of the way a judge handles his docket tends to collide with his judicial independence, as far as the genuine decision-making process is concerned.

A little excursion with regard to the German understanding of the concept of judicial independence is necessary to understand the peculiarities that feature in this area of law.

The German Constitution, the *Grundgesetz*, regulates the law of the judiciary in Article 97, which is almost a verbatim copy of the relevant provisions of the Weimar constitution of 1919. Article 97 provides that the judges are independent and only

¹¹ *Passenberger*, Einkommenssituation deutscher Rechtsanwälte 1994, Mitteilungen der Bundesrechtsanwaltskammer 1996, 174-179.

subject to the law. The constitutional provision is complemented by an act of parliament, the *Deutsches Richtergesetz* (German Judiciary Act) for federal judges, which to some extent applies also to state judges, and by the corresponding laws of the individual member states of the Federation. Judicial independence in its modern sense is a creation of 19th century German legal history. Before that time judges could be dismissed from office by order of the government if their behaviour in some way seriously displeased the government of the day. Even after the first liberal judiciary acts had been passed, *Ludwig I. of Bayern* stated in 1847:

“I do not favour the separation of the administration of justice from the executive in the lowest tiers of the hierarchy; it weakens the influence of the government.”

However, these promising beginnings suffered a setback under the *Bismarck* government when judges were discriminated against in matters of pay, promotion, rank and social standing, as opposed to civil servants within the executive branch of government and the military. The Weimar Republic saw great distrust against the partially still monarchistic judiciary, especially in politically sensitive trials, which sometimes even provoked physical attacks against judges. In 1937 the Nazis abolished all judiciary acts passed so far and *Hitler* proclaimed himself supreme judge. The independence of the judiciary was reinstated after the Second World War by the Allied Powers.

Judicial independence in its modern form is commonly divided into two separate aspects:

- personal independence (*persönliche Unabhängigkeit*) and
- independence in judicial decision-making (*sachliche Unabhängigkeit*).

The first means that judges who have been appointed for life - as opposed to probationary judges in the first 3 to 5 years of their career - may not be removed from office or transferred to another court without their consent unless one of the disciplinary provisions allows such a sanction for misbehaviour in office. There are some ramifications to this concept which do not concern us here. The latter means that judges are not subject to any directives or orders from others as far as their genuine judicial function is concerned.

This is what is normally understood by judicial independence. It does not apply to administrative functions, which judges also sometimes have, e.g. as presiding judge of a court district. This part of judicial independence is the area where conflicts with

the disciplinary control by the State Court of Appeal and the ministry of justice mostly occur.

The disciplinary control is exercised by the ministers of justice, the presiding judges of the State Courts of Appeal and the presiding judges of the lower courts. There is no federal disciplinary control over state judges. The federal judges of ordinary jurisdiction are under the disciplinary control of the Federal Ministry of Justice and the presiding judge of the Bundesgerichtshof.

Against this background *Langbein's* statements on the German practice are somewhat ambiguous.

He says that young judges are evaluated by their presiding judges and the appellate courts, who both know their decisions and can thus tell what their qualifications are. If by that he meant that the contents of the judgments may be made the basis for evaluation, he would be gravely mistaken. If there is one thing which must never figure on an assessment sheet it is a comment as to the decisions of the judge and their outcome. What may be assessed are the general legal knowledge of the judge and the formal aspects in the way he drafts his opinions, although the latter is fraught with possible conflicts, too, because the procedural law only prescribes the necessary contents of a judgment, not the form in which it has to be written.

Likewise it would be an inadmissible comment to say that the judge is reversed very often by the appellate courts. This is a consequence of the fact that German law does not subscribe to a doctrine of *stare decisis*. A judge at the Amtsgericht is completely at liberty to depart from the decisions of the Bundesgerichtshof, if in his opinion they have been wrongly decided. It does not happen often, however, for pragmatical reasons.

What remains as a basis for the evaluation are factors like

- general knowledge of different fields of law,
- ability to analyze the problems of a case quickly and logically,
- ability to draw logical conclusions, taking into account the social and economic consequences of the case and the judgment,
- ability to come to a decision within a reasonable period of time,
- quality of oral and written style,
- degree of organization of the docket, planning abilities,

- cooperation with colleagues,
- leadership in trials and negotiations,
- degree to which additional workload can be handled,
- reliability.¹²

Assessments are subject to judicial review. Admittedly in all the above factors there is something which involves judicial independence. It can therefore become very difficult for a disciplinary superior judge to put anything meaningful into such an assessment, especially if the judge concerned tends to stress his independence.

What happens in practice - according to the judicial grapevine - is, that superiors do, of course, evaluate the quality of the judge's work, including matters which might fall squarely into the realm of his independence, as well as factors which have nothing to do with whether a person is qualified to be promoted or not, like party membership, personal favours etc..

Promotions thus may be decided in the sphere of informal meetings of the presiding judges and the ministry. It is also traded as an open secret among judges, for example, that even though placements for promotions must be advertised so that any judge may apply for the post, the choice has usually been made before the advertisement is published and that one candidate has already been asked to put in his application. He will very likely receive an assessment which cannot be beaten by any other contender, if any should exist. It is possible to challenge the appointment of such a *protégé* by action in the administrative courts, but the outcome is often open to question.¹³

¹² For examples of the individual state rules on assessment and promotions see *Schnellenbach*, Die dienstliche Beurteilung der Beamten und Richter, 2nd ed., 1995.

¹³ A recent case that went through the regional newspapers in the state of Saarland concerned a vacancy in the tax court of that state. There were two applicants for the post, one favoured by the ministry of finance, who was not specially qualified as a tax lawyer, and another who had been the director of an IRS office for several years and had published numerous articles and comments on tax law [- to make matters even more complicated, *his* application was challenged by yet another]. He challenged the application of the protégé in court. The judges of the tax court and the council of the state tax judiciary, a body of judges who must be heard before such an appointment, both expressed their clear preference for the latter, but to no avail: When the ministry realized that it was getting nowhere without serious resistance, it simply had the workload of the court re-evaluated and predictably arrived at the convenient conclusion that this judgeship was not necessary to keep the court in working condition, although the court only had six tenures, now five, and is responsible for hearing judicial review cases for the whole of the state. The court's

The lack of meaningful criticism which in some parts applies to judicial job performance could therefore be one reason for clandestine nepotism.

II. 6. Promotion procedures

What *Langbein* has said about the promotion process, namely that R1-judges strive to become an R2-judge first and then to move on, is probably true in the majority of cases, yet there is a large minority of judges, especially those at the *Amtsgericht* level, who do not want to be promoted at all.

This possibly astonishing fact is easily explained: On the one hand, promotion almost always leads to a collegiate court and thus to the necessity of having one's own views challenged by the other judges of the panel and possibly to a situation where the judge is outvoted on a certain matter by the others. On the other hand, the freedom of deciding alone and not being criticized that a judge at the *Amtsgericht* may have enjoyed for a long time, is gone as soon as the judge enters a senate at the *Oberlandesgericht* level or even higher: Here the presiding judges of the senates and sometimes the older senate members, too, often tend to treat the newcomers as if they had come fresh out of law school; this sometimes even goes so far that they correct the draft judgments of the novices for clerical errors or in questions of style and expression.

This is hard to take for some people after years of judicial experience, bearing in mind that they have been promoted because their performance was without blemish.

As can be surmised from the salary figures, the increase from R1 to R2 is not very high, and if the promotion is to presiding judge of a chamber at the *Landgericht*, it hardly compensates the additional workload. What seems to count, however, is the enhanced prestige among the colleagues, and in the latter case just mentioned, the power to be in charge of serious trials at a higher level and to be able to shape proceedings as soon as they are docketed.

It is thus probably more a matter of power than money. The "serious money", as a German judge might see it unlike most of his British or American brethren, starts with R3-judgeships.

president stated that there would be even longer delays now. - See *Saarbrücker Zeitung* of 15th and 17th December 1997.

Promotion procedures differ a lot from state to state. The description given by *Langbein* is too simplistic in our view.

According to him the promotion goes from being a mere member of a chamber over presiding judge of a chamber of a Landgericht to member of a senate of an Oberlandesgericht to presiding judge of a senate to judge at the Bundesgerichtshof.

In our state, Thüringen, for example, as a rule nobody is promoted to an R2 placement without having gone through at least a nine months' probationary stage with the Oberlandesgericht, and even then not normally immediately afterwards.

In Bayern, promotion to presiding judge usually requires a prior change to the prosecution service and some time as a unit leader there.¹⁴

Promotion may be directly from member of a Landgericht chamber to member of an Oberlandesgericht senate, and it is not rare that the next move is from senate member to presiding judge back at the Landgericht, which carries the same salary, before a judge may be appointed presiding judge of a senate.

Likewise it is not necessarily the case that every candidate for a judgeship at the Bundesgerichtshof, for example, comes from an Oberlandesgericht. There have been cases where a judge at the Amtsgericht or Landgericht was appointed straight to the Federal Court, maybe with a prior stage at that court, a higher state court or in the ministry.

III. Political party influence on nominations to the Federal judiciary in Germany

Langbein is probably right that political issues play a minor role up to the R3 level, although that is not necessarily always the case in every state. However, the influence of the political parties on the elections to the German Federal Judiciary, especially to the Federal Court of Appeal, the Bundesgerichtshof (BGH) has for

¹⁴ This is said to serve as a reminder that the state values people who know where their allegiance should lie, because prosecutors are subject to orders of their superiors, and some states obviously fear the effect of too much judicial independence-mindedness in key positions of the administration of justice.

some time been a hotly debated issue ¹⁵. The scrutiny of the German legal community has long been focussed on the question of party-political meddling with the nominations to higher judicial office at Federal and state levels ¹⁶.

Statistical and other empirical data on this point are rather thin on the ground, because we deal with a political minefield here. After all, no political party wants to cause the impression of neglecting the principle of the selection of the best in favour of its party members. However, such allegations have been frequently made. ¹⁷

We have therefore asked the judges at the *Bundesgerichtshof* by means of a questionnaire containing mixed open and closed questions to provide some information on their careers and state their views concerning the influence of the political parties on the nomination process. This had never been done before, to our knowledge. ¹⁸

Such a survey does of course not yield the possibility of an objective verification of the allegations or their falsification. Yet we believe that the study produced some interesting insights on the perceptions and attitudes of people who have been through the nomination process.

III. 1. The nomination process in outline

The election and the nomination of the judges of the BGH and the federal supreme courts of the special jurisdictions are governed by the *Richterwahlgesetz* ¹⁹ (Election of Federal Judges Act) of August 25, 1950.

The judges are elected by an election committee, the *Richterwahlausschuss*, together with the federal minister who is in charge of the respective branch of the judiciary. The committee consists of the state ministers responsible for the state courts under

¹⁵ See e.g. *Vultejus*, Deutsche Richterzeitung (DRiZ) 1995, 393 and 1996, 39 - with a very critical reply by *Göhner*, DRiZ 1996, 21 and *Gmach*, DRiZ 1996, 302

¹⁶ See *Schmidt-Hieber/Kiesswetter*, NJW 1992, 1790; for a critique of the law relating to the election of the judges to the Bundesverfassungsgericht see also *Geck*, Wahl und Amtsrecht der Bundesverfassungsrichter, 1986

¹⁷ *Schmidt-Hieber/Kiesswetter*, op.cit.

¹⁸ This view is shared by *Geiger*, Stuttgarter Zeitung, 20 November 1997.

¹⁹ Bundesgesetzblatt I [1950] p. 368 as amended by the acts of Bundesgesetzblatt I [1968], p. 661 and 873

the respective supreme court jurisdiction as *ex officio* members and an equal number of elected members. The federal minister has no right to vote in the sessions of the committee, but is the *ex officio* chairman.

The elected members must be experienced in the matters of the law ("*Rechtsleben*"), but need not be qualified jurists.²⁰ They are elected by the *Bundestag*, the Federal Parliament. Their office is discontinued automatically with each newly elected *Bundestag*, who must elect a completely new *Richterwahlausschuß*.

Proposals for potential nominees may be made by the federal minister and the members of the committee. The committee has a right to inspect the personnel files of the candidates. The sessions and the elections are secret, the decision of the committee requires the simple majority of the votes actually cast. In order to achieve a quorum, the majority of each of the *ex officio* and the elected members must be present.

Although the responsible federal minister has no right to vote, he has an absolute power of vetoing any election made by the committee. Only if he agrees to the decision of the committee does he have to propose the candidate's nomination to the Federal President, the *Bundespräsident*.

III. 2. Methodological approach of the survey

The study was officially authorised by Professor Dr. *Odersky*, the Presiding Judge of the *Bundesgerichtshof*.²¹ The questionnaires were sent directly to all the judges with self-addressed stamped return envelopes. After the first questionnaires had been sent out, some of the judges expressed concerns with regard to the anonymity of the study, which had been guaranteed by us in the covering letter to the questionnaire.²² They feared that most of them could be identified by simply using a judges' directory published by the *Deutscher Richterbund*. In addition the concern was voiced that the

²⁰ *Schmidt-Ränsch*, Deutsches Richtergesetz, Commentary, 1995, Richterwahlgesetz, § 4 para. 1.

²¹ The authors would like to thank President Prof. Dr. *Odersky* for his support and Mrs. RiBGH Dr. *Tepperwien* for making available a current plan for the allocation of cases within the BGH.

²² The wording was obviously too short and could therefore be misunderstood.

study might have been commissioned by a political or ideological organisation and was to be used for party and/or opposition politics.

We therefore sent off a new covering letter explaining in greater detail the background and purely academic intentions of the study, together with a new set of questionnaires.

By August 1, 1996, the deadline for this evaluation, a total of 50 of 121 judges had answered, among them only one woman, which corresponds to a return rate of roughly 41,3 %. 36 judges answered the first questionnaire, and another 14 the second one.

One has to bear in mind, however, that 41 % of an absolute number of 121 judges is a less representative rate than 41 % of 1.200 judges. The following numbers must therefore be treated with some caution.

III. 3. The questions

III. 3. 1. Quota of party members and non-party members

Of the 50 judges 14 were party members (PM), 36 non-party members (NPM). That corresponds to a percentage of 28 % PM and 72 % NPM in the sample.

The party membership by party was as follows (n = 13, as one PM did not disclose his party - SPD = Social Democrats, CDU = Christian Democrats [Conservatives], FDP = Free Democrats [Liberals]):

Table 17. Party membership in the sample

SPD	7	53,8 %
CDU	4	30,8 %
FDP	2	15,4 %

One member each of the SPD and CDU said that they had joined the party only after the nomination. *They are nevertheless counted as PM unless stated otherwise.* A former member of the CDU stated that he had left the party for objective reasons after a long time of membership; the date when he left was not made clear, however.

One NPM offered some information which could pose a challenge to the reliability of these numbers:

RiBGH ²³ /male/NPM:

"Party membership, where it is not obvious, is not mentioned and/or denied even toward the colleagues in the senate. This will not be any different with this questionnaire. ... One colleague (a member of the SPD) has told me in 1995 that he knew at least 17 members of the SPD among the judges by name. The number of the members of the CDU/CSU and the FDP certainly is significantly higher. I would estimate the quota of party members among the judges at 40 %."

III. 3. 2. Compatibility of party membership and office as a judge at the BGH

This question was unanimously answered with yes by the PM. Among the NPM the following constellation arose (n = 36):

Table 18: Compatibility of party membership and office at the BGH

yes	no
30	6

²³ RiBGH is the abbreviation for *Richter am Bundesgerichtshof*, VRiBGH that for *Vorsitzender Richter am Bundesgerichtshof*. The latter is a presiding judge of a senate of the court, the former a mere member of that senate.

Among those answering with yes,

- two stressed that the membership should be a "silent" one without the judge holding any office in the party,
- one considered membership compatible, but not desirable,
- two considered it compatible only "in principle" or "with reservations".

None of the judges gave reasons for their answers.

One NPM who answered the above question with yes, added the following comment:

RiBGH/male/NPM:

"The high quota of party members among the federal judges is objectionable, because it bears no relation to the number of party members among the judges of all tiers of the court hierarchy. Preference of party members means that the resources within the judiciary for qualified recruitment are not used optimally. Under the existing circumstances party membership is not infrequently perceived as a personal flaw; the hushing-up of this question cannot be explained otherwise."

III. 3. 3. Conflict of conscience and party membership

The question of whether anybody had already experienced a conflict of conscience during his day-to-day work with respect to his party membership was answered in the negative by all PM. One NPM made the following comment:

RiBGH/male/NPM:

"Regarding the day-to-day work in the senate, party membership does not play any role. However, this does not apply to the chances of a federal judge of being appointed"

presiding judge [of a senate - M.B./C.L.]. There is also a worrying tendency among party members of uniform voting behaviour in the elections for the presidium, the judges' council and the presidial council." ²⁴

III. 3. 4. Direct recruitment from ministries and the administration

Some judges have been directly recruited from a career in a ministry or another part of the administration, and sometimes from a completely different profession. An allegation often heard among colleagues hints that a career in the ministry and/or the administration heightens the judicial career chances and is used frequently by party members.

The picture that emerges here is as follows (n/PM = 14; n/NPM = 36):

Table 19: Recruitment from ministries and administration

	PM	%	NMP	%
Administration	7,1	-	-	
Ministry	1	7,1	1	2,8
Advocates *	1	7,1	-	-
<u>Total:</u>	3	21,3	1	2,8

+ This person had worked for many years in the administration of the *Bundesverfassungsgericht*, the Federal Constitutional Court, without being a judge of that court. He joined the party only after his nomination to the BGH.

* The advocate had worked in a ministry directly before becoming an attorney.

All of the above had been judges before their administrative career.

²⁴ *Präsidium, Richterrat and Präsidialrat* - they are, broadly speaking, organs of the court's self-governance.

Among the PM one colleague was not counted, who had been an administrative official in the *Bundeskanzleramt*, the Office of the Federal Chancellor, 7 years before his nomination. With regard to the NPM two persons were not counted who had been seconded to a ministry until 8 and 10 years respectively prior to their nomination to the BGH.

With these three judges the possibility of the administrative career being an influential factor cannot be discarded, yet we cannot speak of a genuine direct recruitment, because all of them had held judicial office directly before their election to the BGH.

If one wanted to include them nonetheless, the result would be this:

Table 20: Percentage of direct recruitment

PM	NPM
28,5 %	8,3 %

This relation appears to be even more significant as the group of the NPM is almost three times the number of the PM. It could have been expected that the absolute number of directly recruited judges was higher, too.

III. 3. 5. Influence of party membership on the nomination

A key question with respect to the judges' perception was their assessment of the degree party membership had on the nomination process. In combination with the question about which judges were PM the following table emerged:

Table 21: Party influence on nominations

Influence	PM	NPM
very great	2	4
great	7	18
little	2	11
none	-	-

Note: Some answers differed too much from the structure of the questionnaire and were thus not counted, so that the numbers of $n/PM = 14$ and $n/NPM = 36$ are not reached here.

As can be seen from this none of the judges wanted to deny the possibility of the party political influence completely.

After all, 31 judges, i.e. 62 % , estimate that the influence is either great or very great. When broken down to the criterium of membership, 64,3 % of the PM and 61,1 % of the NPM hold this view. The judges are agreed on this point regardless of whether they are PM or NPM, which appears to rebut the statement of *Göhner*²⁵, who denies any influence of membership on behalf of the CDU/CSU.²⁶

On this point, a NPM judge has made an additional comment:

RiBGH/male/NPM:

"My experience from working with many colleagues: Those who do not belong to any party have very limited prospects of being nominated to the BGH even if they are highly qualified. In comparison to their future colleagues they must be able to show qualifications well above the average (e.g. by especially qualified academic publications or by having been a research clerk to judges at the Bundesverfassungsgericht or another supreme federal court). This applies even more if the person

²⁵ DRiZ 1996, 21

²⁶ CSU = Christian Social Union

does not even maintain contacts with a party. Weak colleagues are almost always party members."

One PM, who did not want to divulge his party, added the following:

RiBGH/PM/male

"The relationship to the superiors is more important. Working with party members, even with those of another 'couleur' is more agreeable and fruitful than working with judges who in some other way hold ideologically narrow views, or with 'Ivory Tower Lawyers'".

Another one stated:

RiBGH/CDU/male:

The influence of party membership was very great, "since the SPD holds the majority in the election committee.". Party membership was even "desirable after the experiences with the Reichs-gericht ²⁷ ." - "The election to the office of federal judge should require a majority of two thirds of the members of the election committee."

²⁷ The former Supreme Court of Germany before the end of WW II. The judges of this court, so it is said, had held rather a-political attitudes and seen themselves as servants of the pure law and not as political engineers. They were thus not equipped or maybe not even willing to resist the legal intrusion of fascist ideology into the positive law.

A third has made similar experiences.

RiBGH/SPD/male:

"Luckily within the last 16 years the attitude of the federal judges at the BGH towards their office and position has changed: From the somewhat too eager and therefore only supposedly politically independent servant of the state towards a self-confident dispute decider and settler, who is aware of his social responsibility."

A NPM judge summarised the determining parameters as follows:

RiBGH/male/NPM

"For the elections to the BGH the following factors are increasingly gaining importance:

■ *personal contacts to politicians and judges at the Federal Constitutional Court,*

■ *Party membership."*

A similar assessment is made by another judge:

RiBGH/male/NPM:

"More recently (and regrettably) massive trend to put the emphasis more on political interests ('societal experience') than on general and professional skills and qualifications and to make the judicial elections accordingly. Nomination often at too young an age combined with narrow and one-sided professional experience (e.g. 12 years as a public prosecutor and most of these without any trial experience with the Federal Prosecution Service)."

This view is also shared by others.

RiBGH/male/NPM:

"Even though I have answered question 16 ²⁸ in the affirmative I consider party political independence very desirable. The right to propose candidates should lie only with the state and federal justice administrations, not, however, with the Members of Parliament, who belong to the election committee. Their right to propose candidates significantly increases the party political influence."

RiBGH/male/NPM:

The influence of party membership "varies a lot: with one judge it has played no role at all, another judge would never have made it without such patronage. The political influence regrettably appears to become stronger and stronger. The candidate should not have represented party interests in his earlier career (e.g. as personal assistant of a minister or research clerk of a parliamentary group) and he should be absolutely free of any deferent behaviour."

RiBGH/male/NPM:

"The political dependency of the judges at the BGH has increased drastically over the last years. Personal qualification and professional skills are more and more losing importance; party- political orientation and allegiance often take priority ('Däubler-Gmelin-Syndrome' ²⁹ on the side of the SPD with

²⁸ Whether party membership was compatible with the office at the BGH.

²⁹ Mrs. Däubler-Gmelin is a member of the managing committee of the SPD and suffered a resounding defeat when she ran for office at the Federal Constitutional Court: The conservatives' resistance caused her to withdraw her application.

respect to the election to the BGH, package deals ['Kohl-effect'] with the CDU), especially in the case of promotions."

III. 3. 6. Professional qualification and party membership

By combining the question as to party membership with that about the results of the 1st and 2nd exams we tried to find out about the relationship between party membership and professional qualification in order to verify or falsify the often heard allegation, that judges who are party members are - often - less qualified than their non-party colleagues.

Of course, this evaluation must be treated with some caution: The exams do in no way mirror the increase of knowledge through long years of judicial experience. However, to analyse the progress of qualification over the years we would have had to look into the personnel files of each and every judge at the BGH. For obvious reasons, that was out of the question.

The following numbers are therefore subject to the above-mentioned reservations.³⁰

Table 22 Grades in the 1st and 2nd exams

Grade	Total	PM	NPM
s.g./g.	1	0	1
g./s.g.	1	0	1
g./g.	17	3	14
g./vb.	6	3	3
vb./g.	7	1	6
vb./vb.	7	0	7
vb./b.	3	3	0
b./g.	2	1	1
b./vb.	3	1	2
b./b.	2	2	0
ausr./g.	1	0	1

³⁰ The grades are *sehr gut* (very good), *gut* (good), *vollbefriedigend* (fully satisfactory), *befriedigend* (satisfactory), *ausreichend* (pass) and two fail grades not shown here. The experience is, that few students and pupils achieve higher grades than *befriedigend* in both exams. So fully satisfactory is already way above the average.

Converted into percentages of the respective sample groups the results are as follows:

Table 23: Percentages

Grade	Total	PM	NPM
s.g./g.	2,00	0,00	2,78
g./s.g.	2,00	0,00	2,78
g./g.	34,00	21,43	38,89
g./vb.	12,00	21,43	8,33
vb./g.	14,00	7,14	16,67
vb./vb.	14,00	0,00	19,44
vb./b.	6,00	21,43	0,00
b./g.	4,00	7,14	2,78
b./vb.	6,00	7,14	5,56
b./b.	4,00	14,29	0,00
ausr./g.	2,00	0,00	2,78

Setting the lower limit with a grade combination of *Vollbefriedigend/Vollbefriedigend* ³¹ to mark a qualification that is above the average, the following quota are above that line:

Table 24: Overall percentage of judges above the average

Total	PM	NPM
78,00	50,00	88,89

The result is impressive: In relation to their own sample group NPM judges have a significantly higher quota of persons who are above the average than PM judges do. But they also range far above the total average. Keeping in mind the previously

³¹ It is of course difficult to assess combinations like *ausreichend/gut* or *befriedigend/gut*, as an exam can always go wrong for all sorts of reasons. But those who had *vollbefriedigend* twice can under all circumstances be considered as being above the average.

mentioned reservations about the return rate one could conclude that it is indeed the PM judges who lower the total average.

III. 3. 7. Influence of party membership on the length of time before the nomination to the BGH

Another prejudice harboured by the opponents of party political participation in the election of federal judges is the assumption that party members are promoted faster than non-party members to the BGH.

We have tried to find an answer to this by combining the question about membership with that about the time between the first appointment as a probationary state judge and the nomination to the BGH. One NPM did not add the dates for the second question, so for this group $n = 35$. The two PM who joined the party only after the nomination are first counted as PM..

Table 25 Length of time before appointment

Years	PM/abs.	PM/%	NPM/abs.	NPM/%
11	0	0,00	2	5,71
12	0	0,00	1	2,86
13	0	0,00	3	8,57
14	0	0,00	0	0,00
15	3	21,43	2	5,71
16	3	21,43	3	8,57
17	4	28,57	1	2,86
18	0	0,00	3	8,57
19	1	7,14	7	20,00
20	0	0,00	1	2,86
21	0	0,00	4	11,43
22	2	14,29	3	8,57
23	0	0,00	1	2,86
24	0	0,00	0	0,00
25	0	0,00	1	2,86
26	1	7,14	2	5,71
27	0	0,00	1	2,86

These numbers have to be compared to the average career time of the sample of the whole study, which according to the above table is 18,18 years, or more simply 18 years.

The following percentages of both sample groups had been nominated to the BGH within 18 years of their first appointment as judge:

Table 26. Percentage of nominations up to 18 years

Total	PM	NPM
51,02 %	71,43 %	42,86 %

If the two PM mentioned above are included as NPM because they only joined the party after the nomination, the result shifts as follows ($n/PM = 12$, $n/NPM = 37$):

Table 27: Length of time before appointment

Years	PM/abs.	PM/%	NPM/abs.	NPM/%
11	0	0,00	2	5,41
12	0	0,00	1	2,70
13	0	0,00	3	8,11
14	0	0,00	0	0,00
15	3	25,0	2	5,41
16	2	16,66	4	10,81
17	3	25,00	2	5,41
18	0	0,00	3	8,11
19	1	8,33	7	18,92
20	0	0,00	1	2,70
21	0	0,00	4	10,81
22	2	16,66	3	8,11
23	0	0,00	1	2,70
24	0	0,00	0	0,00
25	0	0,00	1	2,70
26	1	8,33	2	5,41
27	0	0,00	1	2,70

The percentages for nominations within 18 years of career:

Table 28: Percentages of nominations up to 18 years II

Total	PM	NPM
51,02 %	66,66 %	45,96 %

Thus the sample of this study tends to support the prejudice rather than to provide grounds for falsification. In both cases a significantly lower quota of the NPM judges have reached their present office after the same time as the party members, despite the fact that their group is better qualified than the PM group.

III. 4. Conclusion to the survey results

The results of this survey draw a rather sinister picture of the influence political parties exert over the elections to the BGH, even bearing in mind the statistical reservations about the size of the sample.

The non-party members scathingly criticise the election practice of the parties, the criticism culminating in expressions like "*Däubler-Gmelin-Syndrome*" and "*Kohl-Effect*". They do not shrink from considering their fellow judges - after all judges of the highest court of ordinary jurisdiction - as "weak" in the professional sense and from connecting this weakness to the fact of a party membership.

Even if this study may not be suitable for generalisation, it still shows that there exists a manifest disapproval by a significant number of judges. It should give those responsible for the elections an incentive to think about modifications to the current procedure, maybe even towards a rule similar to that the Spaniards have had for years in article 395 of their *Ley Orgánica del Poder Judicial*³² :

"Judges must not be members of a political party or union nor stand in their service..."

IV. Summary

Judges are recruited from the upper 10 % of each year's class after a period of two years' practical training. This level had dropped significantly during the first years after re-unification, owing to the immense demand for jurists trained in West German law for the reconstruction of an administration of justice comparable to that of the Federal Republic. Now that most positions have been filled, the entry criteria are rising again.

Prominent corporate law firms require minimum qualifications comparable to those of the judiciary or even higher, but also look for additional qualifications like a doctorate, an LL.M. degree and foreign languages which normally do not play any

³² Organisation of the Courts and Judiciary Act

role at all for someone who wants to become a judge. Smaller firms put the stress more on practical experience than on additional academic titles.

Judges are assessed regularly, but the concept of judicial independence as it is understood in Germany, with some exceptions forbids any comments by the disciplinary superiors on the contents of the judge's decisions or the way he handles his docket. There is widespread unease among the judiciary about the basis for promotion decisions, where nepotism and political patronage are said to play a significant role. Especially with respect to the Bundesgerichtshof, the highest court of ordinary jurisdiction, a recent survey shows that these fears would appear to be founded.