Judicial Review of Judicial Appointments in Germany

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Abstract:

With its career justices, Germany is often criticized for its lack of self-admin-istration of the judiciary. This is because judges are, as a rule, appointed by the government - even if at times a parliamentary committee is involved in selecting candidates. In assessing the German system, however, it is often overlooked that career decisions are subject to tight judicial review.

The article explains how this system developed. It provides an overview of the procedure, summarizes the criteria for judicial review, and details how accord-ing to constitutional requirements competing candidates have to be assessed and compared. The article also discusses leading cases of this system, reviewing their facts, and showing their application. As such, it is a small study of how case law can work in a continental legal system.

Rezumat:

Cu judecătorii săi de carieră, Germania este adesea criticată pentru lipsa de autoadministrare a sistemului judiciar. Acest lucru se datorează faptului că, de regulă, judecătorii sunt numiți de guvern - chiar dacă uneori o comisie parlamentară este implicată în selectarea candidaților. Cu toate acestea, la evaluarea sistemului german, este deseori trecut cu vederea faptul că deciziile de carieră sunt supuse unui control judiciar strict.

Articolul explică modul în care s-a dezvoltat acest sistem. Acesta oferă o imagine de ansamblu a procedurii, sintetizează criteriile de control judiciar și detaliază modul în care candidații concurenți trebuie să fie evaluați și comparați în conformitate cu cerințele constituționale. Articolul discută, de asemenea, principalele cazuri ale acestui sistem, analizând faptele acestora și prezentând aplicarea lor. Ca atare, reprezintă un mic studiu privind modul în care jurisprudența poate funcționa într-un sistem juridic continental.

Keywords: judicial selection, judicial appointment, judicial candidate, judicial promotion

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1. Introduction[142]

Germany, as a rule, has a career judiciary; judges spend all or most of their working lives in the judiciary. Their careers usually begin at a court of first instance in the employment of one of the 16 German Federal States, or *Länder*. The *Länder* administrations organize the system of judi-cial recruitment and promotion. Within the *Länder*, the Ministry of Justice usually manages this process. In half of the *Länder*, judicial electoral committees, or *Richterwahlausschüsse*, participate in the recruitment and promotions processes.

The general criteria for appointment to any public office – and this includes positions in the civil service and the judiciary – are laid down in article 33, para.2, *Grundgesetz* (German Constitution).[143] According to this article, all German citizens have equal access to public office according to their aptitude, qualification, and professional ability. This guarantees equal access to judicial office for all citizens. It follows from this that for initial appointments and especially for decisions on promotions for civil servants and judges, assessment and evalua-tion systems have to be employed.[144]

The promotion process is quite formal. The law with respect to judges largely follows legal rules enacted for civil servants.[145] Invariably, positions for higher judicial office in the *Länder* are made public by position advertisements in official gazettes. Candidates who apply are evaluated by their respective presidents upon application. The president then reports to the president of the higher regional court (court of appeal) who, in turn, will add their own evalu-ation, then report to the Ministry of Justice. The ministry determines who is best qualified for the position.[146] It will then communicate its view to the relevant presidential council; a professional body of judges elected by their peers. Presidential councils in most *Länder* serve only in an advisory function, but justice ministers are reluctant to overrule their vote. When judicial electoral committees participate in the appointments and promotions process, their members decide who should be elected and consequently appointed to higher judicial office. Where no electoral committees are involved, decisions on promotions are either rendered by the responsible minister (normally the Minister of Justice) or by the cabinet of the *Land*. As regards the criteria of promotion, final rankings in actual evaluations play a decisive role in the decision. Generally, the ministry is not in a position to promote a person with a lower final result over an applicant who has attained a higher result in the evaluation.

In discussions concerning self-administration or self-government of the judiciary, Germany is often criticized for not having the equivalent of a high council

[142] For further details see *Riedel* (2005); for details concerning training and recruitment see Riedel (2013).

[143] There are certain exceptions to this rule for so-called "political" positions in the civil service, i.e. for persons working closely with the prime minister of the *Land* or with cabinet members; this exception does not apply to judges.

[144] For details of the evaluation process, see *Riedel* (2014).

[145] Cf. *Riedel* (2005) p. 77.

[146] First appointments in many of the *Länder* are by the responsible ministry, usually the Ministry of Justice (for exceptions cf. note 35, *infra*), and in some of the *Länder* by the president of the relevant Higher Regional Court (Court of Appeal). Decisions on promotions of judges are either by the Minister of Justice or by the government (cabinet). For civil servants (e.g. in the local authority, the police, the inland revenue) the relevant authority for promotions may be the cabinet, the minister, or a lower-ranked person. For simplicity's sake, insofar as the following text refers to civil servants, the term 'relevant authority', and insofar as it refers to judges, the term 'Minister of Justice' is being used.

of the judiciary as recom-mended by the Council of Europe. Presidential (staff) councils mostly have a mere advisory function.[147] Countries that are criticized for not sufficiently observing the independence of the judiciary point to these presumed deficiencies in Germany.[148] In this approach, several aspects of the German system which are designed to safeguard judicial independence and self-administration of the judiciary are often overlooked.[149] A further aspect which seems to escape attention is that decisions on appointments and promotions are subject to judicial control. This follows from article 19, para. 4, *Grundgesetz* which guarantees that a person who claims their rights have been violated by a public authority may have recourse to the courts. It follows from this that applicants who think they, rather than a competitor, should be promoted may request formal judicial review.

2. History[150]

The present mechanism of judicial control emerged from a rather inconspicuous decision of the German Constitutional Court.[151] The case concerned a female teacher who had applied for the post of head of department at a teachers' training institute. The relevant government authority promoted her competitor and informed her of the outcome. She filed a claim in the administrative court seeking review and demanding a new decision on her application for the position. The Federal Administrative Court which reviewed the case at last instance held that her claim was inadmissible because the candidate-selection process for the open position had closed with the appointment of her competitor and could not be[152] reopened.[153]

The threat that an unsuccessful candidate may seek legal redress in court requires due professional care and diligence in evaluating the performance of con-tenders and also in weighing and comparing their respective merits.

The case was decided by a panel of three judges of the Constitutional Court.[154] Referring to earlier decisions of the court, the panel held that in the case of a dispute concerning access to public office, the unsuccessful applicant must be given the opportunity to have the claim that their right under article 33, para. 2, *Grundgesetz* had been violated reviewed by a court of law. Considering that article 19, para. 4, *Grundgesetz* demands effective judicial remedies, the panel held that, as a rule, it would not suffice to state a violation of the right under arti-cle 33

[147] After a recent change to the law, promotions in the *Land* North Rhine-Westphalia are only possible with the consent of the presidential council, cf. s. 65 Landesrichtergesetz, in force since Jan. 1, 2017.

[148] In this context cf. *Sanders/v. Danwitz.*

[149] For a detailed analysis cf. *Wittreck* (2018).

[150] The following text is a broad overview of the subject. Details and special aspects of substantive and procedural law which are of interest primarily to German practitioners are not being dealt with. An exhaustive German-language overview of the whole field can be found in the book by *Schnellenbach*, esp. in chapters 20 and 21.

[151] Case no. 1 (cases cited are listed in the case list below), Bundesverfassungsgericht – 2 BvR 1576/88–

[152] The federal courts in Germany are courts of (final) appeals.

[153] Case no. 2, Bundesverwaltungsgericht – 2 C 62/85 –.

[154] Which is possible only if the decision is unanimous and the case does not involve constitutional questions which have not yet been decided, cf. ss. 93b, 93c Bundesverfassungs-gerichtsgesetz.

after the appointment of a competitor and to merely award monetary compensation. Notwithstanding a possible violation, the panel dismissed the application, holding that the opinion of the administrative court that the appointment of the competitor could not be revoked was acceptable under constitutional law.

The panel went further, noting that to enable an applicant to seek timely judicial review prior to the formal appointment of a competitor, prospective plaintiffs must be informed of the intended outcome of promotion proceedings. The panel held that the relevant authority deciding on the appointment was under a duty under article 33, para. 2, and article 19, para. 4, *Grundgesetz* to deliver this information well before the final appointment in order to not frustrate recourse to the courts. However, because the applicant teacher in the pending case had not argued that the authority had failed to publicize its choice, the case was dismissed.

Although the remarks on the need for timely information were, in a strict sense, an *obiter dictum,* the decision nevertheless provoked an avalanche of disruptions to promotion pro-ceedings in Germany's public sector. As it was now clear that unsuccessful applicants had to be informed well in advance of the appointment of a successful competitor, it was mandatory to restructure these appointment proceedings. This first required that, already at this early stage, the reasons why one applicant was to be preferred over their competitors had to be detailed in writing.[155] Respective considerations and arguments could not be deferred down the road if a disgruntled applicant were to later seek judicial review. It was also necessary to provide the information in a way that protected the personal privacy rights of all applicants. Therefore, as a first step, the relevant authorities would only inform unsuccessful applicants that the appointment or promotion of another applicant was intended and that proceedings would be continued after a given period of time. If an unsuccessful applicant demanded they be informed of the grounds of the intended decision, it was clear that such information had to be provided to enable litigants to detail their claim about how their rights under articles 19, para. 4, and 33, para. 2, *Grundgesetz* had been violated. Unsuccessful applicants needed access to the details of the decision-making process so they could weigh up the chances and risks of applying to the court. This meant that the person whose promotion was intended had to be named and the reasons why their promotion was intended transmitted to the applicant.

3. Court Proceedings

Applications for judicial review have to be brought before administrative courts because decisions on the appointment and promotion of civil servants and judges are governed by administrative law.[156] Court proceedings themselves are in the form of an application for an interlocutory injunction, seeking a court order to stay the appointment until a decision could be reached on the merits. The applicant (claimant) is the civil servant or judge whom the rel-evant government authority does not intend to promote. The defendant is the government (of the *Land* or the Federal Government, respectively),

[155] In a later decision, the constitutional court held that written documentation is mandatory, cf. case no. 3, Bun-desverfassungsgericht – 2 BvR 1461/15 –.

[156] Similar proceedings are possible where government employees whose working contracts are governed by labor law compete for a position; these cases have to be dealt with by labor courts (Arbeitsgerichte).

acting through the relevant authority, or in the case of a judge, the Ministry of Justice. Invariably, the person whom the government intends to promote takes part in the proceedings, because their constitutional rights under article 33, para. 2, *Grundgesetz* are equally at stake.

As a first step in the proceedings, the applicant only has to claim that on the basis of the information provided, their constitutional right would be violated. The government then has to hand over the relevant files to the court, usually the personnel file of the applicant contain-ing all performance evaluations, the personnel file of the competitor whom the government intends to appoint, and the file containing the written records of the promotion determina-tion – starting with the publication of the open position and ending with the reasoning behind the government's intention to promote its preferred candidate. As a rule, the govern-ment also includes a brief giving detailed reasoning for the intended decision. The third party also has a right to state their view, although, in practice, they mostly refrain from formally joining the proceedings.

There are several lines of argument with which the applicant may attack the intended deci-sion. First, it can be argued that certain formal requirements for the open position are met only by the applicant but not the competitor. Another possibility is to challenge the appli-cant's evaluation as wrong or insufficient in its result or wording and to claim that the final result of this evaluation should be higher than that of the competitor. The applicant could also challenge the evaluation of their competitor as being not merited, too positive, and that its final result should be lower than that of the applicant. Finally, the applicant may chal-lenge the reasoning of the government or the relevant authority in which the merits of the two competitors are compared, arguing that it was incorrect, e.g. that it did not sufficiently consider all relevant aspects or raised doubts as to certain factual aspects, etc.

As proceedings at this stage are on the basis of an application for an interlocutory injunc-tion, the court considers whether there is a prima facie violation of constitutional rights of the applicant.[157] It is sufficient to show that, in correct proceedings, chances for the applicant will be "open". If the court finds that this is not the case, the application for an injunction will be dismissed and the proceedings for the appointment can go on. If the court finds a prima facie violation it will grant the injunction. The relevant authority then has to recon-sider the case, decide again on who was to be appointed or promoted – with another oppor-tunity for unsuccessful applicants to seek judicial review. Against first-instance decisions of the administrative court lies an appeal to the Administrative Court of Appeal of the *Land* (Oberverwaltungs-gericht) where these interlocutory proceedings end. There is no appeal to the Federal Administrative Court (Bundesverwaltungsgericht) so the only further recourse at this stage is an application to the (federal) Constitutional Court.

In practice, these proceedings are mostly final even though they are only interlocutory. The reason for this is that these interlocutory decisions rely almost without exception on docu-ments. If the documents in the case show some deficiencies in the handling of the promotion proceedings, this can only be redressed by reopening the proceeding. If such a mistake has been identified

[157] Cf. case no. 3, Bundesverfassungsgericht – 2 BvR 1461/15 –.Art. 2, page 4 of 19

during the interlocutory proceedings, most parties will refrain from taking it further to an ordinary hearing, because it is unlikely the same court would arrive at a different result via an ordinary hearing. Likewise, if the case is being dismissed, there is, as a rule, little point for the applicant to bring ordinary proceedings because, in the absence of an injunc-tion, the government can appoint the competitor and the position sought by the applicant will then be out of reach.

Since 1990, numerous cases have been brought before the courts, mostly concerning civil servants but a fair number also involved judges. As a result, quite often such posi-tions remained open pending the outcome of interlocutory applications which, including appeals, often take more than a year to be decided.[158] This also concerned judicial posi-tions which caused additional problems of whether courts were correctly staffed under constitutional requi-rements.[159] Some of the more interesting cases will be presented in more detail below.

4. Criteria for promotions[160]

When seeking judicial review, an applicant has to show that the intended decision favouring their competitor will violate his or her rights under article 33, para. 2, *Grundgesetz*. Relevant elements are aptitude, qualification, and profe-ssional ability. In order to assess these ele-ments, evaluations are necessary. As has been pointed out above, there are several lines of possible reasoning for an application for judicial review.

These are:

Formal requirements

The applicant's evaluation

The competitor's evaluation

The comparison of merits of the contenders

a) Formal requirements

Sometimes, the government ministry has defined formal requirements for the open position (so-called 'Anfor-derungsprofile' – employee profiles, job profiles, job descriptions).[161] Such formal requirements may play a decisive role in the outcome of promotion proceedings. The courts distinguish between 'strict' and 'optional' requirements. Strict requi-rements have to be met by an applicant whereas optional requirements 'should' be fulfilled. If an applicant does not fulfill strict requirements they have to be excluded from the proceedings. With respect to optional requirements, if competitors for a position show an equal level of qualification, the relevant authority has to examine who best meets these optional requirements.

Decisions of the Federal Administrative Court (Bundesverwaltungs-gericht) have set stand-ards for defining profiles for positions in the civil service.[162] The government has discretion as to defining requirements for a specific post; such requirements, however, have to be in line with article 33, para. 2,

[158] Sometimes even longer if, e.g., the applicant challenges his evaluation in separate proceedings before the administrative court and the outcome of this is deemed to be relevant for the interlocutory application on the promotion.

[159] A rather famous recent case was that of a judge of the Federal Supreme Court (Bundesgerichtshof) who chal-lenged the intended decision to appoint another judge to the position of presiding judge of a panel of the court, cf. case no. 4, Verwaltungsgericht Karlsruhe – 1 K 2614/12 –, see further *infra*, 6 c; the case took a long time during which the position of presiding judge remained vacant and it was a question whether this was acceptable, cf. case no. 5, Bundesgerichtshof – 5 StR 420/15 –.

[160] Cf. *Riedel* (2014) p. 984.

[161] For details cf. *Riedel* (2013) p. 48.Art. 2, page 5 of 19

[162] Cf. case no. 6, Bundesverwaltungsgericht – 2 VR 1/13 –.

Grundgesetz, i.e. they must be in the interest of the effective func-tioning of public administration and must not have the effect of excluding applicants with possible aptitude for the post. Designing a position so that only the person the government intends to promote meets the requirements is illegal and leads to a complete restart of the proceedings.

For leadership positions in the judiciary, factors such as judicial experience in the rele-vant jurisdiction, experience in court management, administration and aptitude to 'lead' are listed. In a number of recent decisions, several administrative courts have dealt with such requirements.[163] The results were different because the wording of the respective require-ments had been different. The courts accepted that governments of the respective *Länder* had been acting within the limits of their discretion when setting up their requirements.[164] Where requirements were strict, the courts found that the government was bound by its own rules and that it had to bar competitors who did not meet such requirements.[165]

As a result, it can be said that self-binding rules which are too detailed may narrow pos-sibilities both for the government and the applicants. If governments and the judiciary are aiming at more flexibility for judicial careers they will be well advised to mirror such aims in their job profiles and employ more open definitions of requirements.

b) The applicant's evaluation

In many cases, applicants seek judicial review because they disagree with their professional evaluations and thereby hope to reach a new decision on the merits of their application. In these cases, promotion proceedings overlap proceedings contesting an evaluation. Judicial review of a professional evaluation of civil servants and judges is also before administrative courts but normally does not occur in interlocutory proceedings. The application for an inter-locutory injunction concerning an intended promotion, however, will be successful if it can be established that chances for promotion of the applicant are 'open'. To this end, it is suffi-cient to show that reasonable doubts with respect to the correctness of the applicant's evalu-ation are justified. If this is the case, in the absence of other grounds which might rule out the applicant's chances, the court would grant the interlocutory injunction pending proceed-ings to review the evaluation. Judicial review of an evaluation would take place in ordinary adversarial proceedings, the applicant being the claimant, the relevant authority being the defendant; competitors for the position open for appointment would not be a party to these proceedings. Awaiting the outcome of a case on the evaluation – which can be appealed all the way to the Federal Administrative Court – may result in considerable delay in solving the dispute over the open position.[166]

The overall rule of every evaluation of a civil servant in Germany, including judges, is that the evaluator has to have a reliable factual basis for their evaluation.[167] Evaluators have a duty not to omit relevant aspects, to consider all the facts making up the picture of an applicant's professional performance and

[163] Germany has five branches of courts, i.e. ordinary courts for criminal, civil and family cases, administrative courts, labor courts, social security courts and tax courts.

[164] Cf. cases nos. 7 to 9: Oberverwaltungs-gericht Münster – 1 B 612/18 –; Oberverwaltungs-gericht Ber-lin-Brandenburg – OVG 4 S 41.17 -; Hessischer Verwaltungsgerichtshof – 1 B 2345/17 –.

[165] Cf. case no. 7, Oberverwaltungsgericht Münster – 1 B 612/18 –.

[166] Cf. note 19, *supra*.Art. 2, page 6 of 19

[167] For further details of the evaluation process and criteria cf. *Riedel* (2014).

aptitude, not to select arbitrarily but to attempt presenting a true and comprehensive representation of the person being evaluated. In practice, this mostly includes collecting reports from the immediate superiors of the person being evalu-ated. In the case of judges, for example, reports can be from the presiding judge of a panel or the head of a department in a local court where judges sit as single judges.[168]

In the administrative court, evaluations may be challenged on grounds of fact and law. It is well established that any negative aspect of an evaluation has to be supported by a factual basis. If the evaluation of a judge is challenged for lack of factual basis, the Ministry of Justice will have to support the opinion of the court president with relevant facts, includ-ing, for example, statistics, and reports of misconduct. Additionally, an evaluation has to be consistent. That is, the text or the individual elements of the evaluation have to be conclu-sive with respect to the final result. If, for example, the text contains only positive remarks, a final result 'average' will not be deemed conclusive. On the other hand, it is accepted that the evaluation process involves elements of personal judgement which cannot be subject to judicial review in the strict sense, because a full review would result in the court substituting its own evaluation for the evaluation by the relevant authority, such as by the court president in the case of a judge. It is thus quite difficult to successfully challenge an evaluation unless the factual basis is deficient or a substantial procedural error – such as bias of one's superior – can be established.[169]

c) The competitor's evaluation

Challenging the evaluation of a competitor is more difficult. Although the applicant in inter-locutory proceedings can inspect the staff file of their competitor, they would not normally be in a position to bring substantial objections against this evaluation because, as a rule, they do not have sufficient information about the factual basis of this evaluation. Therefore, the applicant is limited to arguing, for example, that the evaluation is inconclusive or inconsist-ent in itself or that it is not plausible in comparison to other previous evaluations of the competitor. As far as is known, applicants have not yet demanded to review the documentary basis for a competitor's evaluation and courts have not relied on such detailed documenta-tion when (only) general criticism with respect to this evaluation had been brought forward.[170]

[168] The author of this paper, when working in the Ministry of Justice, was personally involved in a very controversial case concerning a civil servant; in order to establish a reliable factual basis for the evaluation, he conducted about 40 interviews with superiors, colleagues and subordinates of the person. Eventually, the documents had to be produced in court when the evaluation was challenged. Cf. case no. 10, Oberverwaltungs-gericht Münster – 1 B 301/05 –.

[169] Cf. case no. 11, Bundesverwaltungsgericht – 2 C 31/01 – ; case no. 12, Bundesverwaltungs-gericht – 2 A 10/13 –; as far as the author is aware, statistics as to the rate of success are not available.

[170] An example is case no. 13, Oberverwal-tungsgericht Münster – 1 B 29/14 –; the case concerned the position of president (chief judge) of a regional court. The applicant unsuccessfully tried to argue that the evaluation of his competitor was too good. The court found that the evaluation was not implausible. Inconclusiveness of a competitor's evaluation has been found in a case where the result of the actual evaluation was much higher than previous evaluations and there was a lack of factual support for this, cf. case no. 14, Oberverwaltungs-gericht Rheinland-Pfalz – 10 B 10320/14 –. The case concerned the position of president (chief judge) of a regional court. The competitor had been appointed two years earlier to the position of president of a smaller regional court (lower rank of the position); in the actual evaluation he was ranked two grades higher than in the earlier evaluation. The most prominent example where insufficient factual basis of a competitor's evaluation has been found is the case concerning the president (chief judge) of the Court of Appeal in Koblenz, cf. case no. 15, Bun-desverwaltungsgericht – 2 C 16/09 – ; the case is discussed in detail *infra* 6 d.

The question of whether an applicant is entitled to inspect the documentation on which a competitor's evaluation is based in order to substantiate the applicant's argument appears to be as yet undecided.

d) The comparison of merits of the contenders

More promising avenue is challenging the actual decision on the promotion, such as the process where merits of candidates are weighed and compared and where the final decision on who is to be promoted is found. The courts demand this is stated in writing and filed with the courts, so that there is little chance for the relevant authority to alter its arguments at a later stage in the proceedings.

Although, in theory, it is accepted that in evaluations and decisions on promotions, there must be some discretion for the relevant authorities, administrative courts demand that reli-able facts be shown for every aspect which may not be considered favorable for the appli-cant. Especially in decisions on promotions, it is vital that all possible aspects are considered, thoroughly weighed and that an acceptable, balanced, and well-considered decision can be shown.

With respect to promotion criteria, it is established that final marks reached in actual evalu-ations play a decisive role in the decision, and generally the ministry is not in a position to promote a person with a lower final result over an applicant who has reached a better result in the evaluation. This rule appears to be well established by a long series of decisions of the Constitutional Court and the Federal Administrative Court in which the courts have pointed out that selection among applicants for higher posts has to follow, above all, the results of actual professional evaluations. If contenders for a position have different ranks in the civil service or the judiciary and the results of their evaluations show the same level, it is assumed that the person with the higher rank is better qualified. The rationale behind this is the assumption that a higher-ranked office carries with it higher demands so that a high result in the evaluation in a position of higher demands will result in a higher qualification than an equally good result in a lower position with fewer demands. Other aspects like former evalu-ations which may date back some time or other criteria which are not strictly related to pro-fessional performance – such as age, rank, and time spent in office – can only be taken into account if, in view of their professional performance, applicants can be regarded as 'by and large' of equal standing. Such aspects can be the period of time for which the relevant evalu-ation result has been achieved, time served in the judiciary, age, and laws asking for prefer-ential treatment of female applicants. Exceptions to this rule would have to be well-founded in order to be upheld on judicial review; they may, for example, be possible where applicants have been evaluated by different bodies – different court presidents, a government ministry, another *Land* judicial administration – and if there is evidence that the practice of evaluation in one case may have been more lenient than with other applicants.[171]

5. Involvement of electoral committees

Specific problems arise when, besides the government or the minister of justice, parliamen-tary committees are involved in the appointment or promotion process which varies among the *Länder*.[172] With

[171] Cf. case no. 16, Bundesverfassungsgericht – 2 BvR 1120/12 –; case no. 17, Bundesverwaltungsgericht – 2 C 16/02 –.

[172] Cf. *Riedel* (2005), p. 78–79. Art. 2, page 8 of 19

respect to federal judges who are the judges serving in the five federal courts of appeal, the process is regulated by article 95, para. 2, *Grundgesetz* and by a special act of[173] parliament.[174] According to this legislation, appointment is by the President of the Federal Republic on the basis of a decision of the parliamentary committee and the consent of the responsible federal minister.[175] The committee consists of the respective ministers of the *Länder* and an equal number of members of the federal parliament, or *Bundestag*, elected by parliament on the basis of proportionate representation of the factions in parliament. The federal minister chairs the committee but has no right to vote. Any member of the commit-tee – including the federal minister – may propose a person for appointment. The committee is supposed to examine whether the person proposed fulfills the necessary requirements.[176] Election is by majority in secret ballot. If the competent federal minister agrees with the result, they have to ask the President of the Federal Republic to appoint the candidate.

This raises the question as to what extent the constitutional and procedural guarantees as explained above are observed in this process. In a more recent decision, the Constitutional Court has laid out how these principles take effect with respect to the involvement of elec-toral committees.[177] The case concerned the intended appointment to the position of judge of the Federal Supreme Court.[178] The applicant had been proposed by a minister of justice, while her competitor had been proposed by a member of the committee. In all, 32 candi-dates had been proposed. All candidates had received evaluations by their respective court presidents. The presidential council of the Federal Supreme Court had given its opinion on all the candidates.[179] The council's vote concerning the applicant had been more favourable than that for her competitor. Among other candidates, the committee elected the competi-tor. Applications for injunctions to the administrative court and the administrative court of appeal were rejected. The Constitutional Court upheld these decisions.

First the Constitutional Court pointed out that the fact that the appointment process for federal judges involved the election by a parliamentary committee did not mean that the principles of article 33, para. 2, *Grundgesetz* were inapplicable.

[173] Cf. note 23, *supra;* Federal Supreme Court (Bundesgerichtshof) for civil, criminal and family cases, Federal Administrative Court (Bundesverwaltungsgericht) for administrative law, Federal Labor Court (Bundesarbe-itsgericht) for labor law, Federal Social Security Court (Bundessozialgericht) for social and social security law, Federal Tax Court (Bundesfinanzhof) for tax law. There are a few other federal courts which are not final courts of appeal. Appointment of their members is neglected here.

[174] Richterwahlgesetz of August 25, 1950, as of August 31, 2015 (Bundesgesetzblatt 2015 I, p. 1474).

[175] The person of the competent minister depends on which court is involved. With respect to the Federal Supreme Court it is the federal Minister of Justice, for the labor and social security courts it is the minister responsible for this field. The same applies to some of the *Länder*. In North Rhine-Westphalia, however, the Minister of Justice is responsible for all courts.

[176] "Die sachlichen und persönlichen Voraussetzungen", cf. s. 11 Richterwahlgesetz.

[177] Cf. case no. 18, Bundesverfassungsgericht – 2 BvR 2453/15 –.

[178] There is a technical difference between (first) appointment to a federal court of appeal and the appointment of a member of the federal judiciary to the higher position of presiding judge of a panel (cf. 6 c, *infra*). In the first case, in order to become a member of the federal judiciary, the involvement of the electoral committee is neces-sary. In the latter case, the decision is an administrative decision only, therefore, in the case discussed *infra sub* 6 c, the electoral committee was not involved.

[179] Which has an advisory function, cf. note 7, *supra*.

These principles also required procedural guarantees as laid out above, that is, documentation of relevant aspects, informa-tion about candidates and the possibility of judicial review. The court considered that the system of cooperation between executive and legislative powers, the involvement of electoral committees and the responsible minister, had the aim of strengthening the legitimacy of such appointments to high judicial office.[180] The court held that, whereas the electoral com-mittee is, in principle, free to elect the candidate whom its members prefer, the minister has to observe the principles of article 33, para. 2, *Grundgesetz*. As the two bodies have to find a common decision, the committee is under a duty to respect that the minister is bound by article 33, para. 2, *Grundgesetz*. As a result, the minister is not necessarily bound to only accept the election of a candidate whom the minister considers to be best qualified but in this instance they are supposed to follow the result of the electoral process, unless, after weighing up all aspects, they come to the conclusion that, in the light of article 33, para. 2, *Grundgesetz*, such a result is clearly unacceptable. In this process, he is obligated to also consider the evalu-ations and the vote of the presidential council. Furthermore, the court held that the minister has to give reasons for their decision in two possible situations; namely, if they reject the vote of the committee and also in cases where they follow an election which, in effect, would over-rule evaluations or votes of the presidential council saying that a candidate was not qualified for the position. In the case at hand, the court held that evaluations and votes with respect to both candidates had differed only by degree and both had basically been found qualified for the position. Therefore, the minister had not erred in following the vote of the committee.

6. Significant Cases

In this chapter, a number of cases or groups of cases which have been quoted in the preced-ing chapters will be discussed in more detail.[181] Some of them are famous in the judiciary. All are significant for the system of judicial review of intended appointments.

a) Formal requirements

As has been pointed out above, a recent line of cases has dealt with formal requirements.

In North Rhine-Westphalia, several judges had applied for the position of president (chief judge) of the Social Security Court of Appeal, or *Landessozialgericht*. One of them was the vice-president of this court, another applicant had been a judge in an administrative court and later was a high-ranking civil servant, first in the prime minister's office and most recently as head of department in the Ministry of Justice. Requirements for the position as laid down in a general rule of the Ministry of Justice said that presidents, *inter alia*, had to fulfill require-ments for presiding judges (of panels) of the respective court; these, in turn, demanded that presiding judges must have experience as judges of the Social Security Court of Appeal.[182] The Ministry of Justice wanted to promote the head of department to president of the

[180] The Court referred to the historical background and to several publications considering the systems in Germany and also in the United States of America, cf. case no. 18, there no. 26.

[181] German court decisions normally do not name the litigants. In more prominent cases, some factual details are often omitted when judgments are published. It is therefore sometimes difficult to extract these details from the reasoning in the judgments.

[182] There is a distinction between a presiding judge (of a panel) of a court and of the president (chief judge) of a court, the latter having the higher rank.

court. They argued that he had wider experience in leadership and that the requirement of prior experience in this particular jurisdiction was only optional. The vice-president took the case to the administrative court where it was held that the requirement was binding and that the applicant who had not been a judge in this jurisdiction should have been excluded from the promotion proceedings.[183] The court also found that the requirement of prior experience in social security courts was within the government's discretion of defining the particular posi-tion, that it 'made sense'.

At about the same time, the Administrative Court of Appeal for Berlin and Brandenburg had to consider a case where the position of chief prosecutor was at stake.[184] The government intended to appoint the female vice-president of the police in Berlin who apparently had prior experience as a judge in a criminal court. Her competitor was head of department in the Ministry of Justice in the *Land* Brandenburg, apparently with prior experience in prosecution. General requirements for the position were not as detailed as in North Rhine-Westphalia and did not include prior experience as a prosecutor. Hence, the court held that the government was not barred from including the police vice-president in the proceedings.[185]

In Hesse, the position of president (chief judge) of the Social Security Court of Appeal was also in dispute. The applicant was president of a first-instance social security court, the competitor head of department in a government office several levels higher in rank than the applicant. The Ministry of Justice had decided as a general rule not to apply requirements for appointments of (ordinary) judges in proceedings for positions of court presidents (chief judges) because, in their view, administrative functions in these positions were of greater importance than professional experience as a judge. The Administrative Court of Appeal accepted this as being within the discretion of the Ministry and hence held that the head of department did not have to be excluded from the proceedings.[186]

Another prominent recent case concerned the position of president (chief judge) of the Court of Appeal in Celle, Lower Saxony. The government intended to appoint a woman who had formerly been a judge of this court and who also had been working in the administra-tion in this court of appeal. She had later been appointed secretary of state (vice-minister) in the Ministry of Justice. Her intended appointment was challenged by a president of a regional court, or *Landgericht*. The courts did not even discuss the question of requirements because, apparently, she had sufficient experience in the court of appeal. The problem of the case was more the fact that, because of her status as secretary of state, she had entered the proceedings from a far higher – and political – position than her competitor. The Federal Constitutional Court declined to take the case.4[187]

[183] Cf. case no. 7, Oberverwaltungsgericht Münster – 1 B 612/18 –.

[184] The literal translation of 'General-staatsanwalt' is attorney general which, however, does not correctly describe this function: 'Generalstaatsanwalt' means chief prosecutor, for example head in the hierarchy of prosecution offices in a *Land*.Art. 2, page 10 of 19

[185] Cf. case no. 8, Oberverwaltungsgericht Berlin-Brandenburg – 4 S 41.17 –.

[186] Cf. case no. 9, Hessischer Verwaltungsgerichtshof – 1 B 2345/17 –.

[187] Cf. case no. 19, Bundesverfassungsgericht – 2 BvR 1207/18 –; see also 4 d, *supra*, as to evaluations in positions of different rank.

b) Weighing up the merits of candidates

An exemplary case for the process of comparing candidates was decided by the Constitutional Court in 2012.[188] The case concerned the position of president (chief justice) of a social secu-rity court of first instance. Contenders were a presiding judge of the Social Security Court of Appeal – the applicant in the case – and a judge of the same court who was not a presiding judge. The applicant, therefore, had a higher rank than the competitor. The competitor in his career had been vice-president of a social security court of first instance. After this he had become a judge in the Social Security Court of Appeal where, apart from his judicial duties, he was in charge of certain administrative functions. The applicant, before he had been pro-moted to the position of presiding judge of a panel in this court, had also worked in admin-istrative functions in this same court. The results of the evaluations for both contenders were described with the final top mark 'excellent'.

The Ministry of Justice, relying on the proposal of the president (chief judge) of the court, intended to promote the lower-ranking competitor into the open position. As far as can be deduced from the court decisions, they took into account that both contenders had equal final results in their evaluation. They also considered that the applicant had been evaluated in his position of higher rank. They conceded that with respect to judicial work the applicant as presiding judge had shown more experience and qualifi-cations. Then they argued that in the position of president of a court of first instance, experience and performance in mat-ters of court administration were more important and that the competitor was more experi-enced and qualified in this field. Finally, they found that this competitor's advantage was so important that it would outweigh the higher rank and the higher judicial experience of the applicant.

The court at first instance granted the injunction. They considered that chances of the applicant were 'open' because his top mark was given to him in his position of higher rank and hence could not practically be topped by a similar mark given to the competitor in his lower rank. The Administrative Court of Appeal overturned this decision and dismissed the application.[189] It held that, under the circumstances, it was acceptable to regard the two can-didates as 'by and large' of equal standing and that the Ministry of Justice was entitled to analyze their evaluations in more detail. The detailed argument of the ministry explained that both candidates had gained their experience in court administration in positions of lower rank, that this was more important for the open position and that, upon a detailed analy-sis, the competitor had shown better performance in this field. The Administrative Court of Appeal found this argument tolerable. The Constitutional Court, however, overturned this decision. It held that the two candidates were not 'by and large' equally qualified. As both the Ministry of Justice and the Administrative Court of Appeal had considered that the applicant had attained his evaluation result in a higher ranking position, they should have concluded that there had been no room for further detailed analysis.

c) Presiding Judge at the Federal Supreme Court

A very prominent case which even made it into the media concerned a judge of the Federal Supreme Court

[188] Cf. case no. 16; see *supra* 4 d.Art. 2, page 11 of 19

[189] Cf. case no. 20, Oberverwaltungsgericht Münster – 1 B 214/12 –.

(*Bundesgerichtshof*). He was a member of a criminal panel of the court and chaired the panel in the absence of the presiding judge. His professional competence and experience as a criminal law expert were undisputed. He was the author of a standard com-mentary of the criminal code, had participated in many conferences, seminars, and expert meetings and was therefore well known in respective professional circles. Over a period of several years, due to the retirement of other judges, several positions of presiding judge of a panel in the court became open for appointment. He applied on every occasion and each time received an evaluation by the president of the court. The evaluations dated from 2010, 2011, 2012, and 2014 and were each based, *inter alia*, on reports by the presiding judge of the panel of which the applicant was a member. Over the years the incumbent presiding judge had changed and, at a later stage, also the incumbent president of the court. The evalua-tions stated top marks for professional competence of the applicant but his competence or aptitude to lead a panel as presiding judge (social competence) was downgraded from top mark in 2010 to the next mark down in 2011 and left there in later evaluations. The judge challenged the evaluations in ordinary proceedings before the administrative court and also asked for an injunction with respect to the intended appointment of competitors for the open position.

The administrative court granted injunctions in every case.[190] In the first decision it held that the factual basis for the more critical view of the applicant's social competence had not been sufficient. In the second decision, the court was not satisfied with the extent of fact-finding done by the president of the court and with the weighing of the facts: the president of the court had relied with some emphasis on the undisputed fact that three colleagues had asked to be transferred to another panel and, after this had been done, had expressed the view that cooperation with the applicant in a panel was too difficult, and that they were not prepared to work with him as presiding judge of a panel. The administrative court found that the presi-dent of the court had not sufficiently shown why this and other facts – some of which had dated back years but according to the court president had only recently come to his atten-tion – were enough to arrive at a lower result than the long line of previous evaluations prior to spring 2010 and the long series of reports by presiding judges of the panel. In the third decision, the administrative court of appeal found that the new court president had not suf-ficiently explained which period of time was covered by her evaluation and had not collected reports from former presiding judges who had since retired.

The end of the story was that, after three rounds of court decisions and a considerable blockade of appointments to senior positions in the court, the Federal Ministry of Justice sought a way out. The applicant was finally promoted and took over a criminal panel in 2013. In 2017, he retired at the age of 64 just before reaching the legal retirement age.

This line of cases shows a rather strict approach by the administrative court which, in the opinion of the author, may be considered too narrow. The two basic principles which derive from the case law as laid out above are that the relevant authorities have some discretion for their

[190] Cf. cases no. 21, 4, 22, 23, Verwaltungsgericht Karlsruhe – 4 K 2146/11 – and – 4 K 2614/12 –; Verwal-tungsgerichtshof Baden-Württemberg – 4 S 1405/15 – (decision on appeal against an injunction granted by Verwaltungsgericht Karlsruhe – 1 K 499/15 –).

evaluations and their decisions on promotions and that, on the other hand, there has to be a reliable factual basis for these decisions. In the case of the judge at the Federal Supreme Court, the controversial element was his ability to head a panel. In this context, apart from professional competence in the relevant field of law, the ability to manage deliberations of the panel, to conduct professional discussions and, above all, a personality which has a posi-tive standing along with respect and acceptance by the members of the panel are decisive in a panel of the final court of appeal. If, as has been the case, it can be shown that such accept-ance cannot be found in a relevant group of members of the panel – there were no indica-tions of arbitrary campaigning or mobbing against the judge – efficient professional work in a positive collegiate climate is at stake. Under such circumstances, this should be considered as a sufficient factual basis to exercise discretion in favor of a competitor who promises better acceptance by their peers.

d) President of the Court of Appeal in Koblenz

Another very prominent case which made it into the national media was the controversial appointment of the president of the Court of Appeal in Koblenz, Rhineland-Palatinate. The position had become vacant because, following a general election, the former president of the court had been appointed Minister of Justice in the new government of the *Land*. His preference as his successor was the president of the Social Security Court of Appeal. The other applicant was the president of the regional court of Koblenz – a court of first instance. He had been informed that the government intended to appoint the president of the Social Security Court of Appeal. He sought injunctions from the administrative court but his application was dismissed by the court and, on June 13, 2007, by the Administrative Court of Appeal as well. The decision of June 13, 2007, was communicated by fax to the involved parties on June 22. Immediately after this, on the very same day, the Minister of Justice effected the appoint-ment by handing over the relevant document to the president of the Social Security Court of Appeal. is competitor applied to the Federal Constitutional Court, challenging these proceedings as a violation of his right under article 19, para. 4, *Grundgesetz*. The Constitutional Court held that the duty of the relevant authorities to give the unsuccessful applicant the opportunity to seek judicial review also includes the extraordinary recourse to the Constitutional Court, that is, that the Minister of Justice should have postponed exercising the appointment, especially since the applicant had announced that in the event his claims were denied by the adminis-trative courts, he would apply to the Constitutional Court.[191]

Having found this violation of constitutional procedural rights, the Constitutional Court considered whether the appointment of the former president of the Social Security Court of Appeal could be revoked. The court referred to a more recent decision of the Federal Administrative Court.[192] In this decision, the supreme administrative court had to consider a case where a civil servant had been promoted although his competitor had been granted an injunction. In case

[191] Case no. 24, Bundesverfassungsgericht – 2 BvR 1586/07 –, referring to a decision of the same court of July 9, 2007, case no. 25, Bundesverfassungsgericht – 2 BvR 206/07 –, which concerned the position of presiding judge of a panel in the Hesse Tax Court of Appeal. –.

[192] Case no. 26, Bundesverwaltungsgericht – 2 C 14/02

of violation of such a court order, the court had found, the principle that an appointment which had been effected could no longer be challenged, did not apply.[193] Taking this into account, the Constitutional Court rejected the application because the appli-cant – president of the regional court in Koblenz – could seek effective judicial review before the administrative courts.

This is what he did so that, at long last, by judgement of November 4, 2010, the Federal Administrative Court held that if effective judicial review had been frustrated by appoint-ing a competitor, effective review can only be granted by revoking the appointment.[194] The court followed the decision of the Constitutional Court that such a frustrating violation of procedural constitutional guarantees had happened in this case by prematurely effecting the appointment. After finding that the process of evaluation and selecting the successful candidate had not been correct, the court arrived at the conclusion that the appointment of June 22, 2007, had to be revoked effective the date on which the judgement of the court was taking effect. The court also said that the government was under a duty to minimize the consequences for the judge who, by this decision, lost his position as president of the Court of Appeal, and that he could reapply for the position in the new appointment round where his performance in this office could also be considered.

This decision of the Federal Administrative Court has caused a far-reaching and very contro-versial discussion which cannot be reported in this context.[195] In the opinion of the author, the most important point where the court erred was in the final result. By revoking the appoint-ment of a president of the Court of Appeal, the court not only took away from him the position which he had received in a constitutionally questionable and therefore incorrect procedure. Moreover, the result of the decision was that *every* position, every judicial office, was taken away from him. He could not be reinstated in his former post as president (chief judge) of the Social Security Court of Appeal because, between 2007 and 2010, another per-son had been duly appointed to this position. Remedying a wrong done to one contender by in effect taking even the former position away from the other contender who himself had not committed a wrong – other than accepting the appointment – cannot be right. Therefore, at least where somewhat unique positions are at stake, the principle that an appointment which has been effected can no longer be challenged should have been upheld. Finally, the court's decision that the appointment had to be revoked as from the date on which the judge-ment took effect, that is, *ex nunc* and not *ex tunc*, was a legal invention without foundation in respective legislation. As a consequence of the questionable reasoning of the court, this invention was, however, necessary in order to con-veniently avoid the question of whether the judgements the ousted court president

[193] The case concerned a civil servant of somewhat lower rank, that is, where several positions for promotion would be available in the course of time and factual compensation for the competitor was possible by appointing him to the next free position. Nevertheless, the decision was an inroad to the principle as mentioned under 2, *supra.*

[194] Case no. 15, Bundesverwaltungsgericht – 2 C 16/09 –.

[195] For further reference, see the list of comments to this decision in juris database.

had rendered during those three years were valid.[196]

7. Conclusion

The framework of judicial control of judicial appointments, especially of promotions – as laid out above – affirms that effective and fairly strict control mechanisms do exist. Administrative decisions on promotions, whether they are taken with or without consultation or the neces-sary express consent of staff councils or parliamentary committees, have to be taken in the light of these mechanisms. The threat that an unsuccessful candidate may seek legal redress in court requires due professional care and diligence in evaluating the performance of con-tenders and also in weighing and comparing their respective merits. The need to justify an administrative decision under this rigorous review authority of administrative courts and, ultimately, of the Constitutional Court is in itself a precaution against and a strong deterrent from arbitrary decisions – whether politically motivated or not.

The other side of the picture is that judges and, to a much greater extent, other civil serv-ants increasingly make use of this remedy. It seems that frustration is quite often the basis of such a move. Many applicants seem to feel that their career has come to an end, or perhaps they have strong feelings they are better qualified than their competitors who often may be younger in age (cf. cases *sub* 6 c and d, *supra*). Maybe at times superiors – such as court presidents and the ministry – have conveyed hope or expectations that did not materialize. More transparency, communication and caution at earlier stages could perhaps avoid such outcomes.

In this context, another cause for irritation may be the policy of evaluation of some court presidents and other responsible superiors. It is understandable and justified that evalua-tors want to give positive feedback to civil servants and judges for whom they are, in a way, responsible. The objective of pursuing early promotion for well-qualified and hard-working individuals often leads to superlative performance evaluations and spawns somewhat infla-tionary expectations for career opportunities. When, at a later stage, other individuals seem to be even more qualified for highly desirable and competitive promotions, the line of out-standing evaluations may be at an end and several contenders with the top rating of 'excel-lent' will emerge in the competition. In this situation, a ministry has lost the opportunity to document in an honest and fair evaluation who is really the best qualified. In such cases, ministries sometimes try to 'push' persons who – perhaps also in the eyes of many colleagues – are deemed to be better qualified, but where documentary evidence does not fully support the preferred candidate, so that the decision will not be upheld in court (cf. cases *sub* 6 c and d, *supra*).

[196] Meanwhile, in a case decided in 2018, case no.27, Bundesverwaltungsgericht – 2 C 10/17 –, the court has made a slight turn. In the case, the *Land* Thuringia since 2009 had effected several promotions of teachers without prior announcement of open positions. In 2013, the applicant enquired about this and was informed that decisions on promotions would be made *ex officio.* The applicant then challenged the promotions of her colleagues since the year 2009. The court found that her procedural constitutional rights had been violated because the relevant authorities had not taken her into consideration when deciding on promotions. The court held, however, that she had forfeited her right to challenge these promotions by having waited too long. Stability and functioning of public administration demanded fast and decisive clarity for cases of competition for public positions. Whether this decision announces a certain retraction from the decision discussed in the text will remain to be seen.

To conclude from the number of court cases that the administration of promotions in the public service – and especially in the judiciary – is faulty, arbitrary, and generally incorrect and unjust, would not be accurate in the opinion of the author. Although statistics are not available, it appears that most of the applications for injunctions are unsuccessful. The suc-cessful ones seem to be more likely to make it into the 'books'.

Finally, from the cases discussed above, it appears that the courts have failed to a certain extent to develop a useful, strictly functional, and reliable case law to reasonably approach such cases with. They have created an extensive and complicated web of case law under which, even for the experienced practitioner, it may be difficult to determine what is accept-able and what is not. Superiors seem to have enormous difficulties when gathering relevant performance data and using it to write evaluations which are persuasive when subjected to rigorous analysis and examination by the courts (cf. cases *sub* 6 c, *supra*). Administrations face equal difficulties and find themselves lost in the maze created by case law when weighing the relative merits of several competitors. Sometimes, even the courts themselves seem to get entangled in this maze; a phenomenon familiar to lawyers who have been educated in a case law system but somewhat new to continental lawyers (cf. cases *sub* 6 c and d, *supra*).

In spite of these deficiencies, no substantial criticism has been mounted against this form of judicial review. It is accepted that it is the result of consistent application of constitutional law. As far as the author is aware, in discussions about judicial self-administration in Germany, it is not argued that introducing high councils of the judiciary would render the judicial review of appointments unnecessary. In the opinion of the author, the cases discussed above show quite clearly that judicial control can be tighter and more effective when appointments are made by a single responsible person and not based on committee or council decisions. Reasoning given in writing by a responsible authority can be scrutinized more thoroughly than a secret ballot in an electoral committee.[197] With respect to possible delays in filling positions in the courts, ministries have meanwhile turned to starting promotion proceedings well before the date at which the respective position becomes vacant. The bottom line of case law is that judicial control is effective, even if at times it may appear to be too strict. Better to implement controls which may seem too strict than have no judicial review process at all.

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[197] Cf. 5, *supra; Riedel* (2005) p. 118. Recent developments in some European countries suggests that even high councils of the judiciary may be brought under political control and hence may not guarantee independence of the judiciary; see only the relevant opinions of the Consultative Council of European Judges (CCJE) and of the Venice Commission of the Council of Europe.