

RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE:

Austria, France, Germany, Italy, The Netherlands and Spain

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"The law as administered cannot be better than the judge who expounds it [...] the best organization of the courts will be ineffective, if the judges who man it are lacking the necessary qualifications"

(Arthur T. Vanderbilt, *Judges and Jurors, their Functions, Qualifications and Selection*, Boston University Press, 1956, pp. 2-3).

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PREFACE

A research on the functioning of recruitment, professional evaluation, career, and discipline of judges and prosecutors in different countries has both scientific and practical implications. In analysing and comparing those features in various judicial systems, the values of independence and impartiality are in many ways revealed in their multifaceted aspects. In fact, the higher the actual guarantees of professional qualifications in the various systems, the higher also are the guarantees of independent and impartial behaviour of the judge (insofar as his technical preparation and his deeply rooted professional values make him far less likely to be receptive to improper external influences). Furthermore the empirical analysis of who does what and how in performing those functions in the various judicial systems (the Ministry of justice, the judicial councils, elected representatives of the judiciary, the judicial hierarchy, etc.) illustrates also the varying conceptions of internal and external judicial independence operating in the different countries. The comparative analysis of the solutions adopted by the six countries also provides basic information needed to evaluate important features of the relation between judicial independence and judicial accountability: in particular it raises the question of what is the proper balance between the protection of judicial independence in the evaluation of professional performance on the one hand and other no less important values like those of guaranteeing the citizens judicial efficiency and high professional qualifications of those that have the solemn responsibility to administer justice. As the reader of the papers here published will readily notice the six judicial systems do present often noticeable differences concerning all the aforementioned issues.

The desire to acquire factual data on those crucial aspects of the judicial systems was certainly one of the primary motivation in our decision to conduct a research on the recruitment, professional evaluation, career and discipline of judges and prosecutors in six countries of Continental Europe with a consolidated democratic tradition. However there are other and no less important reasons. Among the recognized goals of the European Union one can certainly list the promotion of a greater homogeneity of the judicial systems of the various member states as a premise for a grater reciprocal trust and a more efficient cooperation in the judicial area. An equally important and connected goal is to provide the European citizens “with a high level of safety within an area of freedom security and justice”. The guarantees of professional qualifications of judges and prosecutors resulting from their recruitment, initial and continuing education, professional evaluation and discipline provided for by the various member states certainly are of primary importance for the promotion of those goals. Goals that in order to be effectively promoted necessitate not only the formal but also the factual knowledge of the actual performance of the various member states in carrying out those functions. Unfortunately, the empirical study of those and other functions that contribute to the effective and efficient working of the judicial systems is substantially extraneous to the academic traditions of Continental Europe. In the final remarks of his paper, Judge Riedel rightly underlines the “remarkable lack of interest of researchers” for all that concerns the actual working and efficiency of the German judicial system. The same difficulties that he encountered in collecting the relevant data he needed to write his paper were encountered, in various degrees, also by the authors of the papers concerning Austria, France, The Netherlands and Spain. None of them could rely on previous empirical research done in their respective countries on the same subject or some aspects of it. The fact is that in Continental European countries the study of the law and legal institutions has been the reserved domain of traditional, dogmatic jurists whose academic interests in “law in action” or in the actual working and performance of legal institutions has been minimal, to say the least. During the 40 years in which I have promoted conducted and/or coordinated research initiatives in the field of judicial administration in Italy and other European countries I have found from time to time scholars that were momentarily engaged in the empirical study of relevant segments of the judicial systems. However, to my knowledge, such research activities have not lead so far to the creation of institutions composed of qualified researchers engaged full time in the study of the actual working of judicial systems nor have they led to the inclusion of such a subject in the teaching curricula of universities. The only exception in Continental Europe that I know of is to be found in Bologna¹. I must add, however, that in recent years it has become less

¹ The University of Bologna Centre for Judicial Studies (CeSROG) and the Research Institute on Judicial Systems of the National Research Council. Three different courses dealing with judicial

difficult to find European scholars and members of the judiciaries who are dedicating their scholarly attention to the actual working of selected segments of their judicial systems and that are willing to collaborate in research undertakings of a comparative nature in the field of judicial administration². It seem to me reasonable to attribute such a change of attitudes to the greater and more diffused awareness of the increasing social, political and economic relevance that the effective and efficient working of the judicial systems has progressively acquired in all countries in recent decades.

The six national reports on recruitment, career, professional evaluation, and discipline published in this volume are to be considered a provisional but substantial version of a research work that still needs to be refined and integrated in varying measure for the different countries. The decision to publish the reports as they are is not only due to the consideration that they already represent in their present form a valid and novel contribution to the knowledge of a relevant aspect of the actual working of the judicial system of six European countries. By making this work available in print and through our web site³ to a qualified European audience (such as Ministries of justice, members of judicial councils, interested scholars, etc.) we hope to gain a double result: on the one hand to stimulate and obtain useful comments and suggestions by scholars and other competent subjects operating in the judicial systems of the six countries considered in these research papers; on the other hand to stimulate research initiatives regarding the actual guarantees of the professional qualifications of judges and prosecutors in European countries other than those here considered.

Our limited financial resources did not allow us to conduct our research in more than six European countries. Obviously the choice was not made at random but with the end in view of maximizing, as much as possible, the scientific and practical implication of our work in a European perspective. It seemed to me convenient to restrict the choice to continental European judicial systems whose judicial corps have characteristics which are quite similar but at the same time

systems are offered yearly at the University of Bologna: The Italian Judicial System (*Ordinamento giudiziario*), Comparative Judicial Systems, and Judicial Organization and Behaviour.

² While during the 70s' and 80s' we had to carry out ourselves field research work in other European countries, in recent years we have been able to find collaborators in most of them. So, just to quote our most recent comparative research activities, we were able to conduct with the contribution of national rapporteurs various studies: a research on the use of ICT in the justice systems of 15 European countries (see M. Fabri, F. Contini ed., *Justice and Technology in Europe: how ICT is changing the judicial business*, Kluwer Law International, The Hague 2001); a research on electronic data interchange in 21 European countries (see M. Fabri, F. Contini ed., *Judicial Electronic Data interchange in Europe: application, Policies and Trends*, Research Papers IRSIG-CNR, Bologna 2003), a research on victim-offender mediation in 15 European countries (see A. Mestitz, S. Getti ed., *Victim-Offender Mediation with Youth Offenders in Europe*, Springer, Dordrecht, 2005, forthcoming).

³ www.irsig.cnr.it

markedly different from those of the United Kingdom and Ireland. In fact in the United Kingdom and Ireland judges are chosen from among experienced lawyers to fill specific judicial positions and there is no formal system of judicial career and professional evaluation while in service. Quite different the status of judges and prosecutors predominant in continental European countries. They are recruited exclusively or prevalently from among young law graduates without previous professional experience by means of competitive written and/or oral exams intended to evaluate their general knowledge of various branches of the law. This model of selection is based on the assumption that judges and prosecutors thus recruited will develop their professional competence and will be culturally socialized within the judiciary, where they are expected to remain for the rest of their working lives, moving along career ladders whose steps are based on successive evaluations which in various ways take into account seniority and professional merit. Moreover, newly appointed judges and prosecutors are not recruited to fill permanently specific judicial functions but rather to fill indifferently the vacancies existing at the first level of jurisdiction and, when promoted, they are expected, once again, to fill indifferently the existing vacancies in the judicial positions reserved to the higher level of the career. In other words the judicial corps of the countries of continental Europe follow to a large extent the same organizational model of the higher echelons of public bureaucracies (to a certain extent they both share the same basic regulations regarding their status). If on the one hand the judiciaries of continental Europe share the same organizational model, on the other they use quite different means of recruitment, initial and continuing education, professional evaluation for the career, and discipline. Furthermore they differ considerably regarding the scope of the generalistic approach to role assignment⁴. The fact that the judicial corps of the six countries we have chosen to study have in general a common organizational model allows for more profitable comparisons. The fact that the same general model is activated by using different organizational means allows to use the comparisons also for assessing their respective efficacy. Furthermore, such an assessment can certainly be relevant also for those that operate in the other judicial systems of continental Europe not considered in this study but sharing the same general organizational model for their judicial corps. It allows them to revisit critically and step by step the guarantees of professional qualifications of their judges and prosecutors offered by their own judicial system in the light of the solutions adopted by six continental European countries of long standing democratic traditions.

⁴ For example, the scope of role assignment is obviously far greater in countries like Italy and France where judges and prosecutors are jointly recruited, can be assigned indifferently to the various roles of judge and prosecutor and can also move from one of the two functions to the other. It is far less great in countries like Germany not only because judges and prosecutors belong to different corps but also because judges are specifically recruited for and assigned to specific branches of the ordinary justice system.

A few words on the way this research was initiated and conducted. I first prepared a detailed research outline to be followed in all the national reports (the text of this document is published in the appendix to this volume). The outline was then discussed in a meeting with all the national rapporteurs. Thereafter I organized various meetings with them to discuss the content of their research work and the various, successive versions of their papers. In conducting all those activities and in preparing my own paper I was competently helped by Cristina Di Cocco, my assistant at the Superior Council of the Italian Judiciary, by Daniela Cavallini, teaching and research assistant at the University of Bologna, by Roberta Maggini, a researcher at the IRSIG-CNR. My sincere thanks go also to Domenico Piscitelli who has provided us with technical assistance in preparing the text of the papers for this publication.

Giuseppe Di Federico

Chapter 1

RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN AUSTRIA

Mag. Georg Stawa¹

1. PROFILE OF THE AUSTRIAN JUDICIAL SYSTEM²

1.1 General remarks³

Austria is a federal state made up of nine independent “Bundesländer”. Under Austria’s federal constitution, jurisdiction is exclusively the responsibility of the federal state. Consequently, while there are federal courts, there are no judicial authorities in the Bundesländer⁴. The court system is laid down by federal

¹ Georg Stawa (1969) has been an Austrian judge since 1999. Assigned to the Ministry of Justice, Vienna, he is a member of unit PR 1 (general coordination) and PR 6 (office law and personnel controlling).

² See also section 2.

³ Partially based on: Dr. Ihor Tarko, Director, Federal Ministry of Justice: “Austrian Judicial System”, JMZ 31.126/1-I.11/1998; adapted.

⁴ In 1988 independent tribunals ("Independent Administrative Boards") were established in each Bundesland and have - amongst others - the task of reviewing decisions of administrative authorities that impose administrative penalties (fines and terms of imprisonment). These tribunals took up work in 1991. The possibility of transferring the work of these tribunals to the administrative courts of each Bundesländer is being considered. Since 1991 the Independent Administrative Boards have provided legal protection against administrative decisions. Applicants have to address their appeals first to an Independent Administrative Board, in cases that are within its competence. An appeal against the ruling of the board can be lodged with the courts of public law.

2. 20 first instance courts ("regional courts", "Landesgerichte");
3. Criminal assize courts ("Geschworenengerichte"), acting within first instance courts;
4. 4 courts of appeal ("Oberlandesgerichte", "courts of second instance"): in Vienna, Graz, Linz and Innsbruck;
5. The Supreme Court ("Oberster Gerichtshof"), which sits in Vienna.

District courts and first instance courts (courts of first instance), as a rule, cover both civil and criminal cases. Exceptions to this rule are the following:

1. A special district court for commercial cases ("Bezirksgericht für Handelssachen") and a commercial court serving as a first instance court ("Handelsgericht") sit in Vienna. The reason for establishing these special courts in Vienna (as well as in Prague and other major cities of the former Austro-Hungarian empire) was a historical one, given the importance of having such courts in business centers, and the capitals of the former Austro-Hungarian empire have always been business centers too. This decision was not motivated by a question of caseloads, as there have always been enough special commercial cases for a whole court to deal with. Commercial cases outside the jurisdiction of these two courts are dealt with by district courts and first instance courts;
2. Special district courts and special courts of first instance in Vienna (a first instance court for civil cases and one for criminal cases) and in Graz (for both civil and criminal cases);
3. A separate juvenile court ("Jugendgericht Graz") in Graz; it is responsible for juvenile civil and criminal cases;⁷
4. A special labour and social tribunal ("Arbeits- und Sozialgericht") acts as a court of first instance in Vienna in disputes arising from labour relations and certain branches of the social insurance system.

All special courts were set up because of a need for specialisation rather than as a result of caseloads⁸. It should also be noted that civil cases include contentious and non-contentious cases.

⁶ Eight of these have been closed or merged with others in 2005. In 2004, the "Österreich Konvent" (a constitutional convention established by parliament) is due to discuss the possibility of merging the District Courts with the first instance courts, to create a new kind of court of first instance.

⁷ It will close at the end of 2004. A special juvenile court ("Jugendgerichtshof Wien") in Vienna, acting as a court of first instance and as a district court, and responsible for handling cases in certain sections of civil and criminal jurisdiction was closed on the 1st of July 2003. In all the other courts juvenile cases are dealt with by courts of "general competence".

⁸ Judges of all special courts may move from one court to another, even if they are specialized.

1.3 The public prosecutor's office

The Public Prosecutor's Office is organized as a administrative judicial authority. It is competent to institute proceedings in the case of offences subject to public prosecution and, in particular, to represent the Public Prosecutor's Office. Every public prosecutor's office includes a chief prosecutor (“Leitender Staatsanwalt”) and a deputy chief prosecutor (“Erster Stellvertreter des Leitenden Staatsanwaltes”). The office can be organized in groups headed by a group chief (“Gruppenleiter”).

The functions of the public prosecutor are dealt with by so-called “agents”⁹ within the public prosecutor's offices at district courts. There are 16 public prosecutor's offices at the courts of first instance (except for the civil first instance courts in Vienna and Graz, the Viennese Court of Labour and Social matters and the court of first instance in commercial matters in Vienna; see 1.2.1.). Furthermore, there are senior public prosecutors at courts of second instance, and the Attorney General and deputies at the Supreme Court.

In the exercise of their duties, the members of the public prosecution offices are independent of the courts to which they are appointed. Public prosecutors at courts of first instance are subject to directions from senior public prosecutors, while the latter and the Attorney General at the Supreme Court are subject to directions from the Federal Ministry of Justice (for example the Minister of Justice may instruct a senior public prosecutor to instruct the public prosecutor of a particular case to appeal against the sentence). In the course of their duties, public prosecutors are authorized to contact directly and enlist the support of police authorities, other authorities of the Bund and the Bundesländer as well as local authorities.¹⁰

Public prosecutors have an important role beyond their role in criminal proceedings. They represent, for instance, the “public interest” in disciplinary cases against judges (complaints against public prosecutors themselves are dealt with by “disciplinary commissions” according to the regulations of “Public Office Law”). In civil cases their cooperation is necessary, among other things, in cases concerning legitimacy, marriage and declarations of death.

⁹ The agents of public prosecutor's offices (“Bezirksanwälte”) are judicial officers with legal training, and are allowed to act for the public prosecutor's offices under the supervision of a public prosecutor (quite similar to the well known Austrian “Rechtspfleger”, but with a lower range of competence and a fewer qualifications). They are permanent appointed, recruited and trained by the presidents of the courts of appeal, as are clerks.

¹⁰ The above-mentioned reform of the Code of Criminal Procedure for conducting preliminary investigations or preliminary inquiries should strengthen the role of public prosecutors in many ways.

2. THE SYSTEM OF RECRUITING JUDGES AND PROSECUTORS¹¹

2.1 Requirements for becoming a judge

2.1.1 In general

The educational requirements for joining the profession of judge in Austria are in two stages. First it is necessary to complete a law degree - which lasts approximately five years on average - in one of five universities . Then would-be judges have to undertake practical training in courts, lawyers' or notaries' offices. The beginning of this practical training is the so-called "court-practice" ("Gerichtspraxis"), and functions as a bridge between university education and practicing the profession. The initial training for judges and prosecutors is the same, as the prosecutors are recruited from the body of judges (see 2.4).

2.1.2 Court-Practice

Anyone who has graduated in law, can speak the German language and is able to follow a trial, has the right to do court practice, which lasts nine months. In these nine months the trainees are supervised by a judge, rotating every three months to another judge/court in order to receive training in different branches of the law and at different courts. The main goal of this practice is to enable trainees to become familiar with the daily business of the courts, doing preparative work for the judge they are assigned to, and attending trials, as well as participating as a typist of court in criminal matters. A period of time spent at a public prosecution office or a prison is also possible under some circumstances. There are also regular training-courses offered to court-trainees, especially in civil and criminal law.

Every supervising judge has to evaluate the trainees by giving a detailed report at the end of the three month placement, detailing the abilities, activities and the personality of the trainee. This means that at least three different judges acting as supervisors during the nine months of court-practice draw a very accurate picture of each potential new judge. This training is mandatory for anyone wishing to join one of the classic legal professions (lawyer, notary, judge, public prosecutor). After this court-practice, qualifying for the professions of judge, lawyer and notary follows different routes.

¹¹ Partially based on a report given at the European Conference of Judges and Senior Judges in Barcelona on 3rd of December 1997 by LStA Dr. Gabriele Bajons, JMZ 108.00/7-III.1/1997

2.1.3 How to become a Judge

The legal requirements for being appointed as a judge are laid out in a section of the Federal Constitution and in a law of its own, the “Judge Office Law” (“Richterdienstgesetz”) containing the regulations concerning the legal profession and the pay scales.

After the court-practice, candidates have to apply for “the Judge Preparation Service”. To be accepted in this service a candidate is appointed as a “Judge Office Candidate” (“Richteramtsanwärter”). Law graduates who wish to follow the judge preparation service -and ultimately to be appointed as a judge - have to apply for a post as a judge office candidate. Under the law, the President of the Court of Appeal¹² proposes the applicants to the Federal Ministry of Justice for an appointment as judge office candidates, after checking that the requirements are fulfilled. Successful applicants are those who are deemed to be most suitable for the profession of judge. There is no appeal against the decision of proposal, selection and appointment as a judge office candidate by the applicants: according to the practice of the Administrative Court, they cannot be a party to the selection process in a procedural way.

By law the Minister of Justice is not obliged to uphold the proposals of the president of the court of appeal. But in practice only those proposed by the president of the court of appeal are appointed as judge office candidates.

Because the president of the court of appeal is not able to check all the prerequisites of the candidates on his/her own, this task is delegated as follows: the judges, having been entrusted with the supervision of the applicants during the Court-practice, produce reports outlining the ability of each trained candidate to become a good judge (this is the most important criterion in evaluating the candidates, see above). Additional exams in civil and criminal matters, set by judges who examine the training courses offered, are also common practice. Moreover the president has, personally or delegated to entrusted judges, an interview¹³ with the applicant, to check the suitability of applicants and to get an impression of their personality. Last but not least, the candidates have to undergo a health-check. Although not explicitly required by law, it seems to be common practice to check whether the applicant has a criminal record. In addition (since 1986) each of the applicants has to undergo a psychological aptitude test, carried out by psychologists independent of the judiciary. The psychological aptitude test consists of establishing the personal characteristics, intelligence, performance in group discussion, decision-making ability, working speed, and the mode of expression etc of applicants, and its aim is to broaden the basis of decisions

¹² Thus the process of recruitment is organized within the territories of the four Courts of Appeal.

¹³ These interviews offer an informal opportunity to the elected representatives of the judiciary (mostly representatives of the Association of Judges), who are invited to participate in these sessions, to comment on the applicants.

regarding who is accepted in the judge preparation service. It has to contain a personal interview with the applicant and is done on a standardised basis.

The same people more or less are involved in the process of recruitment at each Court of Appeal, carrying out the exams and the interview. A time limit for selection is stipulated as being the end of the nine months of court practice, so the selection should take place during the practice time.

The methods used for selection seem to be very reliable, because it is unusual for a judge office candidate to be dismissed due to bad performance, and the incidence and results of the disciplinary proceedings are within the threshold of tolerance.

2.1.4 Thousand of students - hundreds of candidates

As at the 1st of April 2003 there were 1147 graduates participating in the court-practice. 820 of them had (formally) declared that they were interested in becoming judge office candidates (Richteramtsanwärter). The average number of judge office candidates appointed each year is 50 to 60 (approx. 7% of those interested). The average age of newly recruited judges is about 29 years, so the average age of judge office candidates is around 25-26 years.

2.1.5 Relation of selected judge office candidates and serious applicants

As stated above, each president of the court of appeal handles the selection of the judge office candidates. Because of the regional devolution of this process (in Vienna for example only those preselected can apply for a post; in Graz anyone who is interested applies and selection takes place afterwards), there is no comparable relationship between the number of applicants, interested court trainees and appointed judge office candidates. In general it is estimated that approximately 7% of the court trainees who have formally declared their interest in becoming judge office candidates have a real chance of being appointed as judge office candidate.

2.2 Training of the Judge Office Candidate

2.2.1 Initial training system

After being accepted as judge office candidate, the training continues. In principle, this should last four years. However, since court-practice is included as part of the whole training programme, from being appointed as judge office candidate there is another three years of training.

The judge office candidates are trained by judges. The “Judge Office Law” stipulates that it is every judge’s duty to train judge office candidates (but in reality usually only the most able and experienced judges are entrusted with the training of judge office candidates). The supervising judge changes every 3-5 months in a system of job-rotation. The judge office candidates are trained at district courts (limited jurisdiction) - in most cases at a court in country areas - at the courts of first instance and the courts of appeal, as well as some who are also trained at the Supreme Court. The training has to cover civil (contentious and non-contentious) and criminal matters. A training period covering commercial and labor and social matters is usually also included. Further training takes place at the department of public prosecution and at a lawyer’s office, to gain familiarity with all activities and perspectives of being a judge. The supervising judge has to evaluate the judge office candidates in the same way that the trainees were evaluated (see above) by giving the same detailed report at the end of the three months’ assignment, describing the abilities, activities and the personality of the assigned trainee. The aim of this is to guarantee the quality of training received and the performance of the candidates.

In addition there are special training courses in several specific traditional areas. These specific items include the acquisition of relational capacities, forensic skills, the acquisition of knowledge of non-legal subjects and the use of information technologies. Their content is slightly different, depending on which of the four Courts of Appeal is involved. 33 % of the training is “off the job”.

At the end of the training period, there is the Judge Office Examination, which has a written and an oral component. The written examination consists in two decisions in civil and in criminal matters, on the basis of court documents. The main components of the oral exam cover all branches of procedural and substantive civil and criminal law, as well as constitutional and office law.

The exams are set by examining boards set up by each Court of Appeal. Members of the examining boards *ex officio* are the President, the Vicepresident and the heads of the panels of the Court of Appeal (the chief senior public prosecutor and deputy). Additional members from the body of judges and lawyers are proposed by the president of the court of appeal to the Ministry of Justice and are appointed for five years. University law professors can also be appointed.

The Judge Office Law stipulates that the examination board should consist of five members, all judges or lawyers: At least two of them have to be judges, and one of them has to be a lawyer. At least one of the judges has to be appointed at a Court of Appeal.

In reality the board consists of the president of the court of appeal (or the Vicepresident), three judges from the court of appeal and one lawyer. It should be pointed out that this exam is an overall opportunity for young would-be judges to brush up their knowledge, and is not another round of selection in which some are failed.

2.2.2 Evaluation during the training

The above-mentioned evaluation carried out during the training periods is standardised. It consists of an evaluation of traditional knowledge, reliability, decision-making ability, working speed, the capacity to work under stress, the mode of expression (written or oral), the social and personal behavior and a general description of the candidate.

2.3 Applying for a post and appointment of judges

After having passed the Judge Office Examination, the judge office candidate may apply for any vacant post of judge. It should be pointed out that any judge in Austria may apply for any vacant post of a judge (there are no age limits). The vacant posts are advertised publicly by the president of the court of appeal. After the closing date for applications, the “Judicial Board” plays the main role in the selection procedure for appointments¹⁴.

It is the judicial board of the court of first instance with the vacant post or in whose jurisdiction the vacant post is to be found that makes a first proposal for appointment. This is followed by a second proposal by the judicial board of the court of appeal. This proposal will, if there are enough applicants, contain at least three names. If there is more than one post vacant, the proposal will contain at least twice the number of people who are to be appointed. From various applicants those to be preferred are candidates who are most able for the vacant post (same criteria as for selecting judge office candidates under § 54 Judge Office Law). This has to be argued in the proposal. In case of equal ability, the elder judge has precedence.

The appointment of judges is, according to the Federal Constitution, within the competence of the Federal President. But for most of the kinds of posts of judge this competence is delegated to the Federal Minister of Justice. Only the presidents and vice-presidents of the courts of first instance and the judges of the courts of appeal and of the Supreme Court are appointed by the Federal President, who is

¹⁴ The “Judicial Boards” (in Austria called “Personnel Senates”) are panels of judges at courts of first and second instance composed of *ex officio* members (the president and vice-president of the court) and of three members elected by the judges of these courts (and in the case of courts of first instance (general jurisdiction) also by judges of the lower level district courts (limited jurisdiction). Where there are more than 100 judges at one court, including the subordinated district courts, five members have to be elected. Thus the number of elected members is always higher than the number of members *ex officio*. In addition to their tasks regarding the allocation of cases within courts, they are also responsible for the appointment of judges, the assignment of ‘flexible’ judges attached to a Court of Appeal and its territory to a specific court, and the administration of justice and they have to select the members of disciplinary-courts. In this way the Judicial Boards guarantee judicial (personnel) independence. They are the result of separating justice from its “administration”.

bound by the proposal of the Federal Government (which may delegate this authority to the Federal Minister of Justice).

The appointment of a judge is for life.

The fact that any judge in Austria may apply for any vacant post¹⁵ of a judge in another court without any limitations, and that the applicant who is the most able for the vacant post (or the elder judge in case of equal ability) has to be preferred leads to a knock-on effect: for example, if a judge of the Supreme Court retires, usually a judge appointed to the court of appeal would be appointed for the vacant post, causing another vacancy. A judge of one of the courts of first instance would then be appointed to that post, leaving a vacant post, and so on. As a result, posts at the district courts or posts of judges appointed for the whole area of a court of appeal are generally available to newly appointed young “first round” judges. At the same time, this means that the most attractive posts are accessible to the best-qualified and most experienced judges.

2.4 How to become public prosecutor

Public Prosecutors are recruited from the body of judges, on the basis of evaluation by a “recruiting commission” and are appointed after an endorsement by the Federal Minister of Justice. They need to have administered justice for at least one year before becoming a prosecutor.

§ 12 StAG (=Staatsanwaltschaftsgesetz, Public Prosecution’s Law) states” that a person can only be appointed as a public prosecutor if they fulfill the requirements to be appointed as a judge and have administered justice at the court or as a public prosecutor at least for one year”. Under this law (which is somewhat confusing), it is generally understood that you have to practise as a judge for one year, before becoming a prosecutor. But if there is no other candidate for a vacant post of a prosecutor available, an exception is made and it is possible to be appointed as a prosecutor with less than one year’s practice under a special agreement with the Federal Ministry of Finance. If later on this prosecutor wants to apply for another post as a public prosecutor, it is not necessary to make another exception for the appointment (on the grounds that she/he has still not had one year of practical experience as a judge), because of she/he has practiced “as a public prosecutor for at least one year”.

The average age of the newly recruited prosecutors is about 30 years old.

¹⁵It should be noted in addition that a post could also become vacant because of pregnancy, a political mandate, assignment to an international institution etc. In this case a new post (“Ersatzplanstelle”) is created automatically and another judge (judge office candidate or public prosecutor) may be appointed.

2.5 Statistics

The number of judges, public prosecutors, judge office candidates and court trainees developed as shown in graphics in par. 9.6 and 9.7. We have to talk about 1.732 judges (slightly decreasing in the next future)¹⁶, 219 public prosecutors¹⁷ (stable or raising, dependent on the reform of the Code of Criminal Procedure), 225 judge office candidates (depending on the presumed retirements) and 1.146 court trainees (stable in the next years, number of new law-graduates applying for traineeships).

If we ask, how many Judge Office Candidates have been appointed within the last years, we have to focus our interest on the figures of the appointed judges to get the answer: because it is the norm, that all selected judge office candidates are appointed as judges in the long run (Only approximately four candidates dismissed the training within the last ten years). As it can be seen in par. 9.8. between 1995 and 1st of September 2003 a total of 708 judges have been newly appointed. These are a little bit more than 40% (!) of all judges in Austria.

The amount of all proceedings of all appointments of judges is much bigger, but not available in a user-friendly data-form. I.e. between 1st of June 1996 and 1st of Oct. 2003 47 concurs for a post of a judge at the Supreme Court, 389 for a post of a judge or judge office candidate in the area of the Court of Appeal Graz and 1065 for a post of a judge or judge office candidate in the area of the Court of Appeal Vienna took place. This is because a retired judge of the Supreme Court may be followed by a judge of a court of appeal, this one by a judge of a regional Court and so on.

The amount of selected judge office candidates/judges is given by the amount of judges/prosecutors, which are expected to retire, referring to the duration of the four-year education and training. Otherwise a new law may result in a higher amount of needed judges/prosecutors, as seen 1997 and 1998¹⁸.

¹⁶ Data given in “full-time-equivalents”, April 1st 2003; The different figure of total heads on April 1st 2003 was: 1.799 judges, 221 public prosecutors and 226 judge office candidates. Those include the judges in “waiting period” staying at home with their children and those working half-time.

¹⁷ Without Ministry of Justice: App. half of the 117 academic posts within the ministry (among of them all heads of departments) are held by public prosecutors. As it is common to young judges to be assigned to the ministry for 2-3 years, the colleagues, who are engaged for a longer time, are appointed to a post of a public prosecutor at the ministry.

¹⁸ i.e. the “Bundespfllegegeldgesetz”, a social-law with new court competences.

3. THE CAREER STRUCTURE IN THE JUDICIARY

3.1 Professional evaluation of judges and prosecutors

The average age of retirement is approximately 61 years (rising) and the average number of years in which a judge is in office is therefore 32 (also rising). A judge has to retire by the end of the year in which she/he reaches the age of 65.

During this time each judge has to be evaluated (the president, the vice-president and the head of panels of the courts of appeal are exempt) after every second year of appointment to a new position¹⁹.

Evaluation is carried out by the above-mentioned judicial boards. The head of the district courts is involved, as is the head of the appellate panel which examines the files of the evaluated judge in second instance. New evaluations can be requested by the president of the court or the head of the district courts (if it seems that the last evaluation is no longer valid) or by the judge concerned (one year after the last evaluation).

The evaluations are in writing and are similar to those carried out during the training period (consisting of an evaluation of formal knowledge, reliability, decision making ability, working speed, the capacity to work under stress, the mode of expression (written or oral), social and personal behavior and a general description of the candidate. There are five grades: excellent, very good, good (average), pass and fail. The judge concerned is informed of the grade and has the right to appeal to the Judicial Board of the next higher court. The evaluation is made based on the personnel file of the judge concerned.

If the grade is below “very good”, an evaluation is repeated the following year.

A graduation below “good” may result in financial disadvantage.

If the judge’s evaluation is rated as “fail” for two successive years, the judge is told to apply for retirement by law and is retired by law if she/he does not comply. Data regarding the number of “fail” grades are not available, but it does not happen very often at all.

Cases of a lower grading may also lead to disciplinary proceedings, which may result in dismissal (see “Mechanisms of dismissals of judges” below).

Judges may ask for a review of their professional evaluation and of course it is possible to appeal against the evaluation to the judicial boards at the higher courts of appeal.

Because of the involvement of judicial boards, representatives of judges are included in the panels in charge of professional evaluations within the career system, and they are also - see below - in charge of disciplinary proceedings.

¹⁹ At any level of jurisdiction in the case of any new formal appointment. Otherwise evaluation stops.

There is a similar system for evaluating prosecutors (they are not affected by the “Judge Office Law” but by the “Public Servant Office Law”), but it is a formality because no action is taken.

3.2 Career structure and pay scales

A judge usually starts at the district court or as one of the judges for the whole area of a court of appeal (like a “fire-brigade”). The career may also start (or continue) at the regional court, but the salary is more or less the same as that at the district courts (even for beginners). The first real career break (with higher salary) is appointment to one of the courts of appeal. And of course some of the best judges are appointed to the Supreme Court. It is also a kind of high-point to a career to become a (vice-) president of a regional court or a court of appeal or head of a district court (with increased salary).

It is generally possible to “switch“ between being a judge and a public prosecutor. This is done by simply applying for a vacant post (but is not very common at the higher career levels).

The high-point in the career of a judge may also be an appointment as a judge of the Constitutional Court or the Administrative Court.

3.2.1 Preliminary remarks

Firstly it should be noted that there are relatively few public prosecutors in Austria (219 at the 1st of April 2003, see par. 9.6) spread over years of birth and at various levels of career (offices of public prosecution, of senior prosecution and Attorney General in addition to the (heads of) public prosecutors, appointed to the Ministry of Justice), compared to the number of judges appointed at the district court, regional court, court of appeal and the Supreme Court (1732 at the 1st of April 2003, see par. 9.6). As a result, comparative statistics would not be significant. For this reason, all further data, results and analyses (especially on the subject of career and disciplinary cases) are given for judges appointed to the district court, regional court, court of appeal and the Supreme Court only, and do not focus particularly on the (vice-) presidents of the regional courts ²⁰.

3.2.2 Income

The following graphic overview can be given²¹:

²⁰ In addition, information regarding judges is much easier and efficient to investigate and analyze than that of public prosecutors.

²¹ Please note that these figures are derived from the gross income (§ 66 Judge Office Law), calculating tax according to information supplied by the Federal Ministry of Finance. Actual net

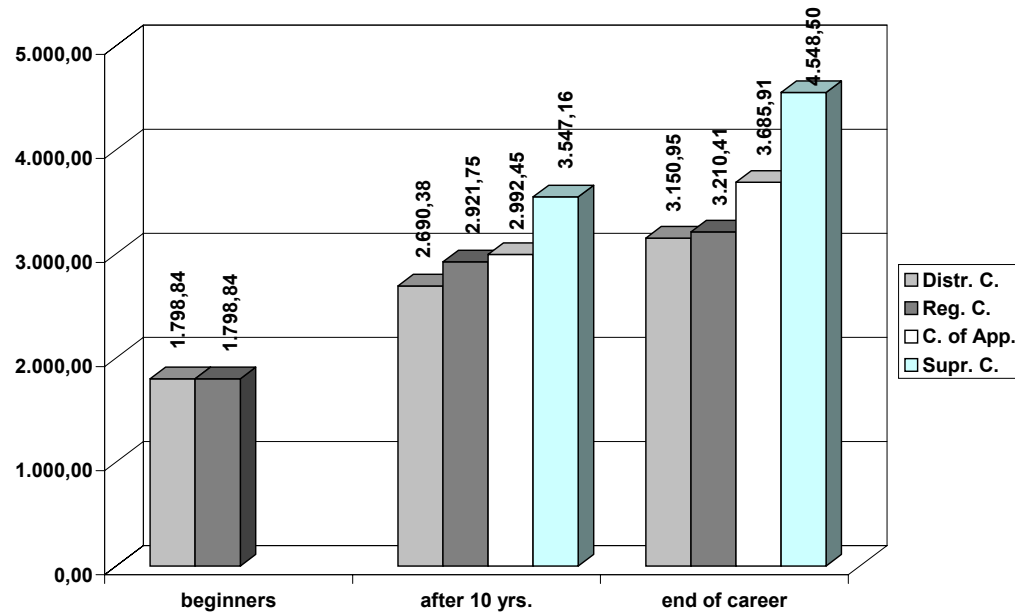


Figure 1-2. Appr. netto income 2004 in € (14x/year)

As shown above, there is only a slight difference between a judge's income at a district court and a regional court. The judge's income at a court of appeal and of course at the Supreme Court is higher, especially at the end of the career.

To sum up, with regard to the judicial system and the pay structure (both see above) it could be said that there are three levels of career within the judicial system (number of appointed judges²² in brackets): 1. District/Regional Court (783/867), 2. Court of Appeal (178) and 3. Supreme Court (60).

3.2.3 Climbing in thin air

The number of posts/appointed judges at different levels²³ alone does not however answer the question "How difficult is it for an individual judge to climb up the career ladder?" and "How many judges reach the top in terms of career?" For example it would be possible for every judge (100%) to achieve an appointment to the Supreme Court (only 3% of the total number of posts) if they each became a Supreme Court judge only in the final year of their working lives,

income may differ because of individual circumstances (children, only income in family, long distance to the office...).

²² Total heads (incl. "Karenz", "Mutterschutz" and Ministry), Sept. 1st 2003.

²³ See also table in par. 9.1 and 9.2. in appendix.

because there would be a rapid turnover of Supreme Court judges. So the answer to the questions can only be found by looking at age of judges (fewer colleagues of same age will usually result in the chance of climbing higher up the career ladder) and the average length of stay of an individual judge at a particular career stage.

Tables of the relevant data (also in absolute terms) can be found in par. 9.1 and 9.2²⁴.

It can be seen that the young judges are to be found in the district and regional courts, whereas at the age of 38+, a career may start at the court of appeal and may often continue in the mid forties at the Supreme Court. Data concerning the 62+ group are not particularly significant, because of the low number of judges still active at that age.

While we have been talking about the age of beginning a career, an additional remark needs to be made regarding retirement. In general, judges of the district courts retire earlier (beginning at the age of 60) than their colleagues at higher career levels (nearly 40% of judges at the age of 64 are those appointed to the Supreme Court).

So, in conclusion, it can be said that on average 21.96% of the judges for every year of birth are appointed to a career level at a court of appeal or the Supreme Court, 8.4% of the judges of every year of birth are working at the Supreme Court (bearing in mind that the percentage of available posts is slightly more than 9% at the Courts of Appeal and 3% at the Supreme Court). So on average one judge in five for a particular year of birth is appointed to one of the courts of appeal between the age of 40 to 45, one judge in two of that sample (note the significant decrease in percentage of judges at the courts of appeal who are over 50 years old) is then appointed to the Supreme Court between the age of 45 to 50.

For remarks on the percentage of women in the judiciary service in general and also at different career levels, see below.

3.3 The relationship between the evaluations of professional performance of judges and prosecutors and their career prospects

As far as promotion is concerned, only the best candidates, based on evaluations carried out by the judicial boards²⁵ and consonant with principles of job seniority, are selected and appointed to the next level. Given that the evaluation described above is carried out by judicial boards which are made up of people who are one level above those who are evaluated, the judicial boards “know their judges and their work” very well. Members of the judicial boards regularly serve as judges

²⁴ Very special thanks to my colleague Florian Palzer for providing me with data and tables for this analysis!

²⁵ See above, note 14.

at the court of appeal, so they have adjudicated in appeals which were adjudicated in first instance by those who are being evaluated. Thus, in practice, selecting the most suitable applicant from the candidates does not present a serious problem for the judicial boards.

Since the work of the court of appeal does not only consist in judiciary work, but also involves administration, when it comes to selection for positions at the court of appeal it would appear that preference is given to applicants who are also interested in administration. This can be explained by the fact that the administration of justice is not only carried out by the Federal Ministry of Justice (a rather small ministry; the heads of the departments of the ministry are public prosecutors), but also in the main by the judges of the courts of appeal.

The question, “how many applicants are there for how many posts?” cannot be answered easily. This is because, in practice, not every judge who might be interested in a particular post actually applies. For example, in cases where court covers a small area, the candidates know what their chances of being appointed relative to their colleagues are. In other words, when several vacant posts will need to be filled in a relatively short space of time, the candidates know their ranking-position from the selection procedure for the first vacant post and therefore may decide not to apply again in the near future. In these cases there are usually 5 to 10 applicants. On the other hand, especially when there have been no vacant positions at a particular court for a long time, up to 30 candidates may apply.

3.4 Results

3.4.1 In general

Finally it can be said that the career structure in the Austrian judiciary service is very functional because of the close contacts with the independent judicial boards; it is predictable because there are many attainable posts available in a career pyramid which is balanced in terms of age and levels; and it is fair because of its transparent system of evaluation and appointment.

3.4.2 No relationship between the content of professional evaluations and the assignment to specific judicial roles in Austria

Because all judges receive overall training, there is no pre-established assignment of judges to a specific branch of the law (of course some judges work in particular branches and become specialised over the years). There is no relation between the content of professional evaluations and the assignment to specific judicial roles other than that described above (2.3.).

4. THE DISCIPLINARY SYSTEM

4.1 Disciplinary courts

Disciplinary proceedings against judges (and judge office candidates) are dealt with in disciplinary courts at the court of appeal and at the Supreme Court. They consist of a senate (panel) of five judges: a chairman, his/her deputy and three other judges. The members are elected for one year by the judicial board of the court concerned. Public prosecutors, on the other hand, are dealt with by disciplinary commissions according to the rules of “Public Office Law” (see par. 4.5). The effective competence of the Disciplinary Court/Commission is the same in both cases (judge/prosecutor).

The preliminary investigations and disciplinary investigations are carried out by an investigating commissioner (“Untersuchungskommissär”), who is a member of the disciplinary court. Of course this commissioner is not allowed to adjudicate in the same case in which he/she has been the commissioner. The disciplinary procedure has to start with a formal decision of the disciplinary court (“Einleitungsbeschluss”, § 123 Judge Office Law) to initiate the (formal) disciplinary investigation and (later) to proceed with the case, which is then dealt with orally in a disciplinary hearing.

The Austrian legal system is unique in that the function of charging is carried out by the disciplinary court itself. So the disciplinary proceedings follow along the lines of the proceedings of an inquiry. Public prosecutors also participate in disciplinary proceedings; their role is to represent the official interests of public service (with rights of appeal to the Supreme Court against decisions of the disciplinary court). The judge being investigated may be defended by another judge or a defense attorney.

Disciplinary hearings take place at the court of appeal in Vienna for judges from the area of the court of appeal of Graz and vice versa; at the court of appeal in Linz for judges from the area of the court of appeal of Innsbruck and vice versa; and at the Supreme Court for Supreme Court judges and the presidents and vice-presidents of the courts of appeal.

The constitution of the disciplinary courts and the selection of the chairman is carried out by the judicial boards of that particular court of appeal. As they are administering justice, the disciplinary courts are independent.

4.2 Disciplinary law

The disciplinary system and its proceedings are set out in the Judge Office Law (“Richterdienstgesetz”). The Austrian disciplinary law for judges does not recognise specific elements of a breach of conduct. Any breach of conduct

regarding a judge's duties or the canons of professional etiquette may be disciplined. Most disciplinary cases are brought because the judge is not getting through the work quickly enough²⁶. Both in-service judges and retired judges are covered under the disciplinary law.

4.3 Disciplinary sanctions

Judges who breach their professional obligations can be disciplined in two ways: they may either be given a disciplinary sentence ("Disziplinarstrafe") or an administrative penalty ("Ordnungsstrafe") depending on kind of offence, its intensity and the general circumstances surrounding the offence. Administrative penalties ("Ordnungsstrafen") take the form of:

- a warning ("Ermahnung")
- an admonition ("Verwarnung").

The intention of administrative penalties is to acknowledge the judge's offence and to safeguard future performance of official duties.

Disciplinary sentences can take the form of:

- a reprimand ("Verweis"),
- withholding the four-yearly salary rise (max. for three years),
- a drop in salary (max. -25% for three years),
- the transfer of the judge to another location without being able to claim travel or moving expenses
- retirement with decreased pension
- dismissal.

It might happen, depending on the circumstances, that although there has been a breach of professional conduct, no disciplinary sentence is given, because a verdict of guilty - without any penalty - will be sufficient to prevent further offences.

The sentenced judge may appeal to the Supreme Court against decisions of disciplinary courts. There is no appeal against the decisions of the Supreme Court (nor, if the Supreme Court acts as disciplinary court of first instance!).

The judge under investigation may be suspended for the duration of the procedure.

4.4 Disciplinary cases

Analyzing the disciplinary proceedings against judges between 1990 and 2002, the following results are found²⁷:

²⁶ It should be pointed out that judges do not work fixed office hours, but are given a calculated number of files to work on up to a full working capacity. Judges themselves are free to decide when and where they work, but they have a time limit for working on a file. Not working on a file, for example, for three months is a disciplinary matter.

²⁷ Lack of data: Graz 1990, 1991 and 1999.

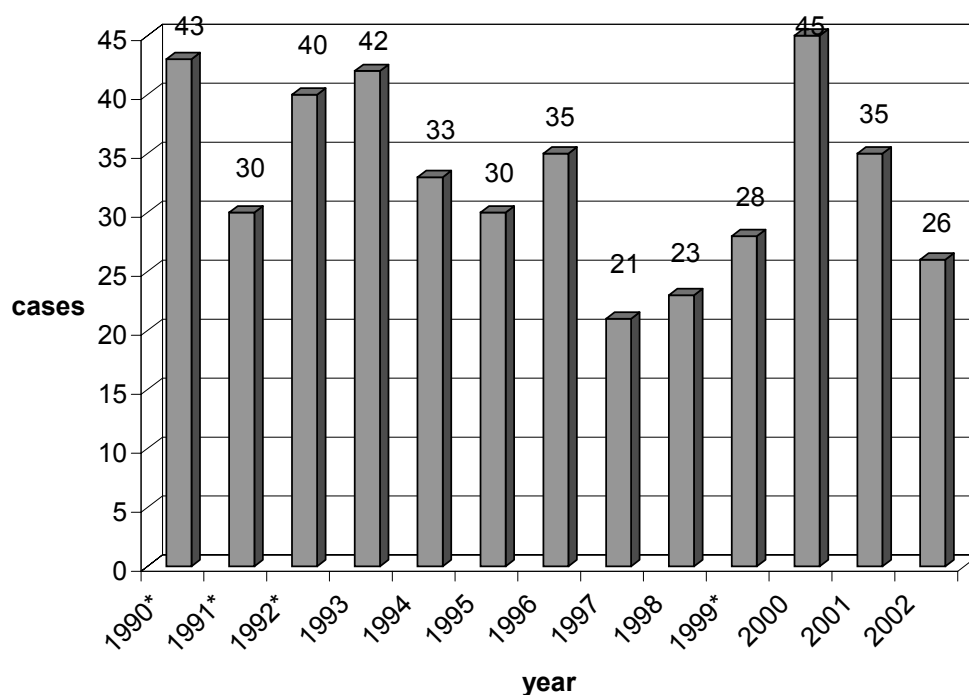


Figure 1-3. Disciplinary cases decided

There were between 21 and 45 disciplinary proceedings a year, approximately 33 on average. This means that out of an average number of 1700 judges in this period, approximately one judge in 52 (equivalent to 1,94%) was involved in disciplinary proceedings every year.

The total of 431 proceedings ended in the following ways:

- 191 cases were dropped (44%)²⁸,
- 9 verdicts of not guilty (2%),
- 0 cases of verdict of guilty - without any penalty (§101 Abs. 3 RDG),
- 55 warnings or admonitions (13%),
- 33 reprimands (8%),
- 21 salary rise withheld (5%),
- 26 drop in salary (6%),
- 6 transfers to another location without being able to claim travel expenses (1%)
- 4 judges retired with decreased pension (1%),
- 3 dismissals (1%),

²⁸ Including those instances where the case was brought against a judge by the party who lost the trial.

– 83 ended in another way (19%).

So in 231 cases (53,6%) the proceeding ended in a sentence. Therefore approximately one judge in 96 (equivalent to 1,04%) a year was disciplined in a disciplinary proceeding.

Looking at the disciplinary proceedings region by region²⁹ (193 Vienna, 35 Graz (missing data), 125 Linz, 78 Innsbruck), the relatively high number of disciplinary proceedings in the area of the court of appeal of Linz is apparent: however, 82 of them ended with the case being dropped (53 Vienna, 8 Graz (missing data), 48 Innsbruck).

Disciplinary proceedings do not last very long: 76% end within 12 months:

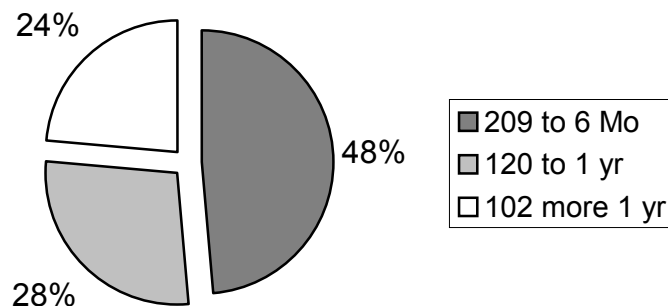


Figure 1-4. Duration

4.5 Public Prosecutors

The disciplinary system for public prosecutors is regulated differently and comes under the “Beamtendienstrechtsgesetz” (BDG) 1979. § 98 BDG 1956 stipulates that for each “Highest Office Authority (“Oberste Dienstbehörde”), which is, for example, the Ministry of Justice for the whole judiciary, a disciplinary commission has to be set up. It consists of a chairman, deputies (both categories are lawyers) and other members, half of whom are appointed by the unions of Civil Servants, the others by the Minister. The cases are dealt with by panels consisting of a chairman or his/her deputy and two other members, one of them appointed by

²⁹ Usually the proportion of any figures between the four Courts of Appeal is approx. 5 (Vienna) : 2 (Graz) : 2 (Linz) : 1 (Innsbruck).

the unions (§101 BDG). The only possible sanctions are a reprimand, a fine (up to half the monthly salary), financial punishment (up to five monthly payments) and dismissal (see § 92 BDG 1979). Warnings may be given before a disciplinary proceeding is started.

The decisions of the disciplinary commissions may be appealed against before the Higher Disciplinary Commission at the Federal Chancellery.

5. SOME INDIVIDUAL ISSUES

5.1 Mechanisms for dismissals of judges

A dismissal may be the result of a disciplinary sentence, sometimes as a consequence of a negative professional performance (see above). A dismissal is never an immediate consequence of the negative evaluation of a judge, which might lead to a disciplinary proceeding. However, if the judge fails his/her evaluation again within the next two years, the judge is told by the president of the Court of Appeal to apply for retirement. If he/she does not apply, the judicial service court will be in charge of the matter.

Physical or mental health of a judge does not lead to dismissal but to retirement (or temporary suspension), if he/she is absent from service for more than one year because of his/her health conditions or not fulfilling the requirements for being appointed as a judge any more. In this case, the judge is told by the president of the Court of Appeal to apply for retirement. If he/she does not apply, the judicial service court will be in charge of the matter.

There are approximately eight cases of retirement of judges and prosecutors a year due to physical or mental ill health.

5.2 Extra-judicial activities of judges

Judges or prosecutors may perform extra-judicial activities. Judge Office Law recognises two types: “Nebenbeschäftigung” (§ 63) and “Nebentätigkeit” (§ 63a). For the distribution of judges and prosecutors in the various extra-judicial activities see par. 9.3 and 9.4.

5.2.1 “Nebenbeschäftigung”

This is an extra activity outside the judicial function, where the activity will not affect the judicial function. If this cannot be guaranteed, it is forbidden to execute a “Nebenbeschäftigung” (some are explicitly forbidden by law, for example being a

member of the executive board of a profit-making company). Commencement, type of activity and scope have to be notified to the president of the court of appeal.

5.2.2 "Nebentätigkeit"

This is an extra activity outside the judicial function, for which the judicial function is a condition (for example an appointment to a commission established by public law in the area of social security or data-protection, of which one of the members has to be a judge, "Schiedskommission"). The president of the court of appeal has to be notified and to approve this activity.

Both activities can occur in connection with international/European organizations (member of U.N., O.L.A.F., European Parliament, etc.), in national organizations (member of Parliament; Government – as Minister or Undersecretary of State or head of a cabinet in the Ministry of Justice or in other Ministries; etc.), local organizations (member of regional/municipal assemblies - in charge of various branches of local government; President of Region; Mayor of small and large cities) or other activities (consultant to parliamentary commissions; member of the legislative department of various Ministries; member or assistant of the Judicial Council, etc.).

This does not affect the professional evaluation and the career of judges.

5.3 Extra-judicial activities of public prosecutors³⁰

The regulation of extra activities for public prosecutors differs from those for judges: The Office Law (BDG 1979) also recognises two types, but defines them in a slightly different way: "Nebentätigkeit", regulated in § 37 BDG 1979 (Office Law) and "Nebenbeschäftigung", defined in § 56 BDG 1979 (Office Law).

5.3.1 "Nebentätigkeit"

"Nebentätigkeit" is an extra activity for the authorities which is distinct from the normal duties of the prosecutor.

5.3.2 "Nebenbeschäftigung"

"Nebenbeschäftigung" of public prosecutors is an extra activity outside the official functions (and any "Nebentätigkeit"), which will not be affected by the extra activity (e.g. teaching at a university of applied science).

Any profit-making "Nebenbeschäftigung" (especially those concerning juridic persons under private law) have to be reported to the office authorities

³⁰ See also table in par. 9.4. in appendix.

immediately. Any activities interfering with the official duties must be forbidden by the office authorities.

5.4 Percentage of women³¹

The overall percentage of women in the judiciary service has risen to 49.17% (01.01.2003, +0.97% since 2002). The percentage of female judge office candidates, which stands at 67.89% (01.01.2003, +1.36% since 2002) is of note.

While the percentage of women in the “Higher Service” section, consisting of judges, public prosecutors and judge office candidates, in the area of the court of appeal of Vienna is 51.51%, the percentage in the other areas are: Graz 35.19%, Linz 35.71% and Innsbruck 28.62%. Nevertheless it should be noted that the total percentage of women of 41.51% in the corps of judges and prosecutors (and also judge office candidates) combined is lower than that of other non-judicial personnel (High Service: 50.67%, Skilled Service: 70.30%, Middle Service: 81.25%, Subsidiary Service: 80.10%). While the overall percentage of women has increased by 7.45% in the last 12 years, the percentage of non-judicial personnel (“Higher Service”) has risen by 19,18% over the same period of time.

Looking at the “career levels” of courts of appeal and the Supreme Court, the following data can be extracted: in 2001³², out of 170 judges at the four Austrian courts of appeal, 32 (19.76%) were women. The percentage of women at the Supreme Court is also only around 20%.

These rates are 20% less than the average in other levels of judiciary. Because of this, a special program called “Frauenförderungsplan” (“Program to promote women”) has been instituted. The aim of the program is to promote women to those higher levels and positions in judiciary. Put simply, the main goal is a percentage of 50%. If the percentage is below 40%, concrete steps have to be taken to raise the number by promoting female candidates, if they are as well-qualified as their male counterparts. In future, the percentage of women will be monitored, including a forecast for the next six years.

³¹ See also graphs in par. 9.5. in appendix.

³² Source: Gleichbehandlungsbericht des Bundes 2002.

6. THE SYSTEM OF CURRENT FURTHER TRAINING FOR JUDGES AND PUBLIC PROSECUTORS³³

6.1 Organization

In Austria the further training of judges and public prosecutors is based on a balanced system of decentralized and centralized training modules designed by the judiciary. Various judicial authorities are engaged in training matters: the presidents of the four courts of appeal, who contribute the most to the judicial training programs, the Judges' Association with its expert groups in specific areas of the law, Public Prosecution Offices and the Ministry of Justice itself, which annually creates and organizes training seminars, workshops and conferences for judges and public prosecutors.

The Judges' and Public Prosecutors' Training Unit at the Ministry of Justice also acts as a coordinator by checking all the training proposals submitted and by laying down the training programs for the following period in the light of discussions with the Further Training Advisory Body (see next point).

The annual training program is published as a booklet and can be found in the homepage of the Austrian Ministry of Justice.³⁴

Close cooperation between all judicial authorities concerned and overall coordination by the Ministry of Justice guarantees a continuous well-balanced annual training program, which meets the demands of judges and public prosecutors of all branches, regions and stages of appeal.

A Judges' and Public Prosecutors' Training School or Academy with a special building does not exist. Conceptional work in training matters and stimulation for future developments in training issues nevertheless are carried out by the Judges' and Public Prosecutors' Training Unit in the Ministry of Justice. This unit defines training topics of current importance, lays down the training programs and supports scientific work and general developments in training matters. The unit therefore is said to be an "Invisible Judges' and Public Prosecutors' Academy".

6.2 Further Training Advisory Board

The "Further Training Advisory Board" has been conceived as a body which assists the Judges' and Public Prosecutors' Training Unit in all training matters.

The members of the Further Training Advisory Board (8 people) are judges' and public prosecutors' representatives of the four courts of appeal, the public

³³ Based on: "Further Training for Judges and Public Prosecutors in Austria" by Constanze KREN, Director, Head of Training Unit for Judges and Public Prosecutors, Federal Ministry of Justice.

³⁴ (http://www.justiz.gv.at/broschueren/download/inservicetraining_6_04.pdf).

prosecution offices, the Supreme Court and representatives of the professional associations of judges and public prosecutors.

Regular consultations of the Advisory Board are held twice a year: they define and fix the content and extent of the next annual training program and discuss general training needs and matters for future development. Additional meetings are held as the occasion demands.

6.3 Budget

Training costs are paid by the Ministry of Justice. Approximately. 730,000 Euro per year is set aside to cover accommodation and travel costs for participants and trainers, training fees etc.

6.4 Extent/Range/Scope

The Judges' and Public Prosecutors' Training Program offers about 120 seminars, workshops and conferences a year, organized by the judiciary. As the seminars differ in length - most of them are planned for two or three days - this results in about 300 training days a year. Given that there are about 25 participants at each seminar on average, the total amount of training is 7500 training days a year.

In addition, judges and public prosecutors participate in training events organised by other institutions (private or public). They may be sent there by the judiciary as delegates or, in some cases, may attend on their own initiative and expense, depending on the relevance of the particular training topic for their actual duties in the court.

6.5 Current Topics of Continuous Training

In order to train judges and public prosecutors to carry out their professional duties as well as possible, an extensive range of training issues concerning legal questions and other skills is provided. The annual training programmes for judges and public prosecutors offer regular seminars on specific legal matters such as civil law, criminal law, procedural law, EU law, commercial law, family law etc.

Among these, international training measures have become an important aspect. The improvement of the judicial co-operation within the European Union and a growing co-operation with other countries in matters of judges' and public prosecutors' training have led to initiatives for international conferences in co-operation with the judiciaries of other countries. As a result, Austrian judges and public prosecutors are frequently sent as delegates to participate in international conferences, organized by other countries.

Inter-disciplinary seminars are provided as well: they concern historical, social and psychological aspects, medical matters, technical matters as well as matters of current concern in society, like equal treatment of men and women, the fight against organized crime, human trafficking, violence, child abuse, racism, xenophobia and other forms of discrimination, etc.

In addition, a variety of seminars teaching “complementary skills” are organized, including personality development, conflict management, training in argumentation, training in questioning children, dealing with the mass media, management training, training in judicial administration, personnel management etc.. These aspects of training reflect the growing expectations of the citizens in judges’ and public prosecutors’ social skills.

To support didactics and methodology within in-service training, a series of train-the-trainer-seminars for judges and public prosecutors acting as trainers is regularly organized, which contributes to the professionalism of trainers and the learning outcomes for participants.

6.6 Participation

In Austria the continuous training of judges and public prosecutors is not compulsory. There is nevertheless a general obligation for judges to update their knowledge and skills, which is written down in the judges' law. This means that there is a general duty to develop knowledge and skills, but no direct mandate to join a particular seminar or lesson.

6.7 Figures

In relation to the appointed judges and prosecutors each judge/public prosecutor participates in about 3 to 4 training days a year on average.

Thanks to a new professional bench-marking system, established by the Judges and Public Prosecutors’ Training Unit, detailed information regarding training data, concerning extent, issues, costs, participation etc. can be found in the brochure “Annual Report about Judges’ and Public Prosecutors’ Further Training”, which has recently been published for the first time covering the year 2000. Further editions will follow. The Annual Training Report serves as an important instrument for personnel and institutional management and for reforms and development in the field of further training for judges and public prosecutors (for the report and the annual further training program, see <http://www.justiz.gv.at>)³⁵.

³⁵ Contact: Constanze Kren, Director, Head of Training Unit for Judges and Public Prosecutors, Federal Ministry of Justice, Neustiftgasse 2, A-1070 Vienna, Austria; Tel: +43 1 52152/2230, Fax: +43 1 52152/2727 or. 2868; E-Mail: constanze.kren@bmj.gv.at.

6.8 Accommodation

Most of the seminars are held on court premises or in seminar hotels. A special Judges' or Public Prosecutors' Academy with its own training premises does not exist.

6.9 Trainers

Judges and public prosecutors who are best-qualified in their specialist fields of work as well as lawyers, university professors and other legal experts act as trainers for legal topics. In other, non-judicial areas, especially for training in professional skills, experts from the respective professions are chosen as trainers.

6.10 The training of trainers

In order to improve the general quality of in-service training for judges and public prosecutors, trainers may attend train-the-trainer seminars. These seminars deal with didactic and methodological aspects, training methods, teaching techniques, teaching relationships between trainer and trainee, communication theory, personality development etc. and include theory and practice, video-training, feed-back etc.

6.11 Quality Control:

At the end of each seminar participants are asked to fill in an evaluation form. Every participant is thereby asked to give an (anonymous) opinion on the structure of the seminar, its practical effect, the quality of the trainers, their ability to deal with concrete questions from the participants etc. The questionnaire also invites participants to indicate any additional training needs or ideas the writer has for future training programs.

Through the use of these feedback sheets, the opinion of the participants on the seminar attended and any general further training needs can be identified and taken into consideration by the organizers for the next training period. The Training Unit in the Ministry collects and distributes these evaluations to the other organizers for purposes of synergy.

7. SOME ADDITIONS

7.1 Judicial councils

There are no such councils in Austria. The concept is dealt with in the “Österreich Konvent” (see also Section 8).

7.2 The position of the Judge in Austria in general

The Austrian judge’s relationship to the Federal Republic is dealt with under public law. Therefore he/she is, in respect of service and pay regulations, a Federal official.

In being appointed, the judge is given the independence necessary for the exercise of the judicial office. Independence means that nobody can give orders to the judge in this function, neither individually nor generally, neither regarding concrete nor abstract orders. Independence, however, does not mean that the judge is above the law. Independence and obedience to the law are metaphorically two sides of the same coin.

The independence is guaranteed by irrevocability and intransferability. These means that judges, apart from the case of retiring after the legal age, can be removed from their posts or be involuntarily transferred to a different post only in the cases and in the forms prescribed by the law and only as a result of a formal judicial decision.

The special constitutional guarantees for judges are not aimed at creating a category of privileged officials, but they are to be considered exclusively in terms of maintaining the judiciary as a separate branch of the State’s supreme power.

This special constitutional position is due to the judge only within the exercise of his/her judicial office. In the exercise of judicial office the judge deals with all business within his/her legal competence, with the exception of matters of administration of justice, which by law are not decided in senates or commissions. If a judge is also entrusted with administrative matters, for instance as the president of a regional court, this domain is not free of orders. The task of justice administration is to guarantee the personal and material conditions for the working of the tribunals by applying the principles of legality, of expedience, of good management and of economy. All officials of the justice administration have to ensure that judicial independence is not affected.

8. CRITICISMS AND REFORM INITIATIVES

The prestige of Austrian judges in the eyes of the Austrian public is very high. There are no public criticisms levied in our country with reference to the various aspects of the judicial system mentioned above.

Except for the above mentioned reform of the Code of Criminal Procedure for conducting preliminary investigations or preliminary inquiries, there is a general discussion on the court system and its levels in the recently established "Österreich-Konvent", <http://www.konvent.gv.at/index.html>. This convention will prepare a new Austrian constitution for a cheaper, more transparent and a citizen-friendly administration.

Otherwise there are no major reform initiatives regarding the training and evaluation system of judges and prosecutors currently underway.

There are however several projects to make judiciary more efficient and faster ("Electronic files", "Electronic trials" in orders for payment) and to reorganize the training programs (E-Learning, networked based electronic learning - especially for orientation information which is circulated to people taking up new positions).

SOURCES:

- Spehar/Fellner: Richterdienstgesetz (RDG) und Gerichtsorganisationsgesetz (GOG), Kommentar, 3. Auflage, Manz Verlag, Wien 1999;
- Danzl: Kommentar zur Geschäftsordnung für die Gerichte I. und II. Instanz, Manz Verlag, Wien 2002;
- Fasching: Kommentar zu den Zivilprozessgesetzen, 2. Auflage, Manz Verlag, Wien 2000;
- Stohanzl: Jurisdiktionsnorm und Zivilprozessordnung, 15. Auflage, Manz Verlag, Wien 2002;
- Fabrizy: Die österreichische Strafprozessordnung, Kurzkomentar, 9. Auflage, Manz Verlag, Wien 2004;
- Brochure of the Austrian law professions: Dr. Wolfgang Fellner, Dr. Anton Paukner: "Die Organisation der Rechtsberufe in Österreich", JMZ 600.00/25-III.1/2002; available at www.bmj.gv.at/Infobroschuren/;
- "Betriebliches Informationssystem der Justiz (BIS-Justiz) 2002, die Leistungsstatistik der österreichischen Gerichte im Berichtszeitraum 1. Jänner bis 31. Dezember 2002", published by the Austrian Ministry of Justice, Vienna 2003;
- "Personalanforderungsrechnung (PAR) im Bereich der Richter und Richterinnen sowie der Rechtspfleger und Rechtspflegerinnen der Gerichtshöfe erster Instanz für das Jahr 2002 (PAR-LG 2002)", JMZ 573.10/21-PR.6/2003, Austrian Ministry of Justice, April 2003;
- "Personalanforderungsrechnung (PAR) im Bereich der Richter und Richterinnen sowie der Rechtspfleger und Rechtspflegerinnen der Bezirksgerichte für das Jahr 2002 (PAR-BG 2002)", JMZ 573.10/20-PR.6/2003, Austrian Ministry of Justice, April 2003;
- "Soll-Ist-Vergleich zum Stichtag 1.4.2003", JMZ 234.00/9-PR.6/2003, Austrian Ministry of Justice;
- For general Austrian statistics: Statistik Austria (ÖSTAT), December 31st 2002, www.statistik.at
- Tax calculation: Federal Ministry of Finance at: <http://www.bmf.gv.at/steuern/steuerberechnung/BruttoNettoRechner.htm>

All public available information about the Austrian Judiciary (including schemes of the judicial system) can be found at: www.justiz.gv.at = www.bmj.gv.at;

Austrian laws and judiciary is available free at: www.ris.bka.gv.at

The (other) public courts of Austria have their own website with further info:

VwGH (Administrative Court): www.vwgh.gv.at (containing also the “Tätigkeitsbericht für das Jahr 2002” with statistic informations)

VfGH (Constitutional Court): www.vfgh.gv.at

9. APPENDIX

9.1 Judges at different levels of career (2003; abs. amounts)

Table 1-1. Judges at different levels of career (2003; abs. amounts)

Age (2003)	Year of birth	Distr. Court	Regional Court	Court of App.	Supreme Court
27	1976	1			
28	1975	3	3		
29	1974	9	12		
30	1973	16	8		
31	1972	18	15		
32	1971	29	18		
33	1970	32	25		
34	1969	34	32		
35	1968	42	33		
36	1967	36	45		
37	1966	51	58		
38	1965	37	44	1	
39	1964	37	46	2	
40	1963	32	31	7	
41	1962	25	29	7	
42	1961	25	25	7	
43	1960	22	33	16	
44	1959	20	29	12	1
45	1958	25	21	14	4
46	1957	23	23	13	4
47	1956	14	15	10	3
48	1955	29	28	4	1
49	1954	19	25	3	1
50	1953	11	25	2	4
51	1952	10	21	3	2
52	1951	19	11	1	
53	1950	19	17	6	1
54	1949	17	18	7	7
55	1948	14	33	4	1
56	1947	26	24	10	1
57	1946	19	23	10	3
58	1945	8	21	3	4
59	1944	15	24	8	2
60	1943	16	15	8	5
61	1942	12	14	7	2
62	1941	7	12	4	2
63	1940	5	6	6	6
64	1939	4	2	4	5
65	1938	2	3	2	1

9.2 Judges at different levels of career (2003)

Table 1-2. Judges at different levels of career (2003)

Age	Year of birth	District Court	%	Regional Court	%	Court of Appeal	%	Supreme Court	%	Total heads
27	1976	1	100,00							1
28	1975	3	50,00	3	50,00					6
29	1974	9	42,86	12	57,14					21
30	1973	16	66,67	8	33,33					24
31	1972	18	54,55	15	45,45					33
32	1971	29	61,70	18	38,30					47
33	1970	32	56,14	25	43,86					57
34	1969	34	51,52	32	48,48					66
35	1968	42	56,00	33	44,00					75
36	1967	36	44,44	45	55,56					81
37	1966	51	46,79	58	53,21					109
38	1965	37	45,12	44	53,66	1	1,22			82
39	1964	37	43,53	46	54,12	2	2,35			85
40	1963	32	45,71	31	44,29	7	10,00			70
41	1962	25	40,98	29	47,54	7	11,48			61
42	1961	25	43,86	25	43,86	7	12,28			57
43	1960	22	30,99	33	46,48	16	22,54			71
44	1959	20	32,26	29	46,77	12	19,35	1	1,61	62
45	1958	25	39,06	21	32,81	14	21,88	4	6,25	64
46	1957	23	36,51	23	36,51	13	20,63	4	6,35	63
47	1956	14	33,33	15	35,71	10	23,81	3	7,14	42
48	1955	29	46,77	28	45,16	4	6,45	1	1,61	62
49	1954	19	39,58	25	52,08	3	6,25	1	2,08	48
50	1953	11	26,19	25	59,52	2	4,76	4	9,52	42
51	1952	10	27,78	21	58,33	3	8,33	2	5,56	36
52	1951	19	61,29	11	35,48	1	3,23		0,00	31
53	1950	19	44,19	17	39,53	6	13,95	1	2,33	43
54	1949	17	34,69	18	36,73	7	14,29	7	14,29	49
55	1948	14	26,92	33	63,46	4	7,69	1	1,92	52
56	1947	26	42,62	24	39,34	10	16,39	1	1,64	61
57	1946	19	34,55	23	41,82	10	18,18	3	5,45	55
58	1945	8	22,22	21	58,33	3	8,33	4	11,11	36
59	1944	15	30,61	24	48,98	8	16,33	2	4,08	49
60	1943	16	36,36	15	34,09	8	18,18	5	11,36	44
61	1942	12	34,29	14	40,00	7	20,00	2	5,71	35
62	1941	7	28,00	12	48,00	4	16,00	2	8,00	25
63	1940	5	21,74	6	26,09	6	26,09	6	26,09	23
64	1939	4	30,77	2	15,38	2	15,38	5	38,46	13
65	1938	2	28,57	3	42,86	1	14,29	1	14,29	7
		783	41,47	867	45,92	178	9,43	60	3,18	1888

9.3 Extra-judicial activities of judges (01. Oct. 2002)

Table 1-3. Judges and Judge Office Candidates

	Branch and amount of Nebenbeschäftigung/Nebentätigkeit										Total	
											1.10.02	1.10.01
	1	2	3	4	5	6	7	8	9	10		
Supreme Court	23/9	9/-	-/12	-/-	1/-	-/-	-/5	-/62	-/-	4/1	37/89	32/78
CoA Vienna	88/7	29/-	-/30	9/-	33/-	4/-	-/-	-/95	2/-	35/-	200/132	187/117
CoA Graz	28/5	1/-	5/24	3/-	7/-	1/-	-/-	-/61	-/-	9/-	54/90	40/101
CoA Linz	43/1	1/-	3/21	5/-	7/1	1/-	-/-	-/74	1/-	18/-	79/97	70/109
CoA Innsbruck	31/4	4/-	2/21	1/-	3/-	2/-	-/6	-/62	-/-	8/-	51/93	53/81
Total 1.10.02	213/26	44/-	10/108	18/-	51/1	8/-	-/11	-/344	3/-	74/1	421/501	
Total 1.10.01	185/25	48/-	-/139	21/-	56/-	8/-	-/13	15/309	3/-	46/-		382/486
								together:			922	868

Branches (relating to headers):

1. Teaching;
2. Science;
3. Disciplinary Commissions;
4. Business functions;
5. Translators and consultants
6. Politicians;
7. Judges outside the Austrian ordinary judiciary (Liechtenstein, Constitutional Court, etc.);
8. Commissions;
9. Administration;
10. Others.

9.4 Extra-judicial activities of public prosecutors (01. Oct. 2002)

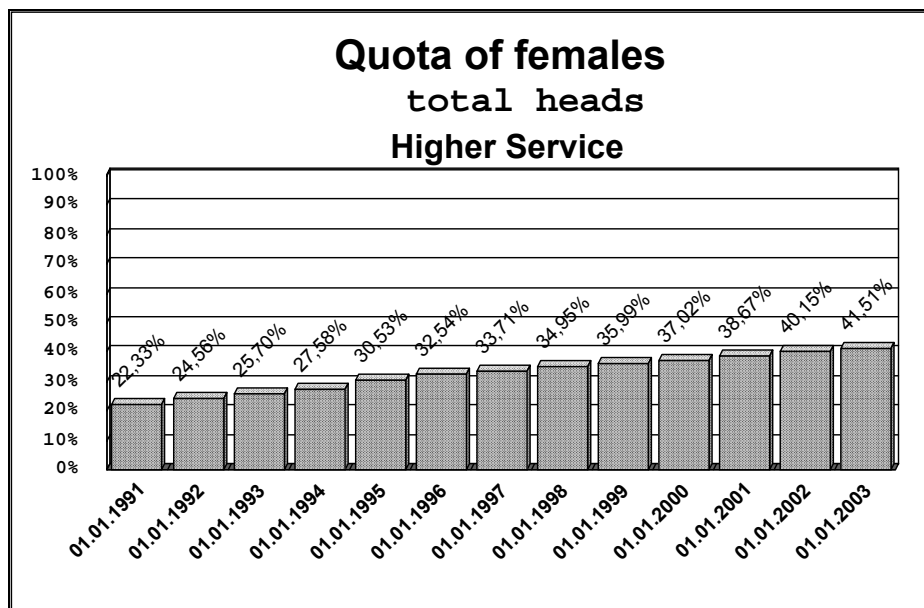
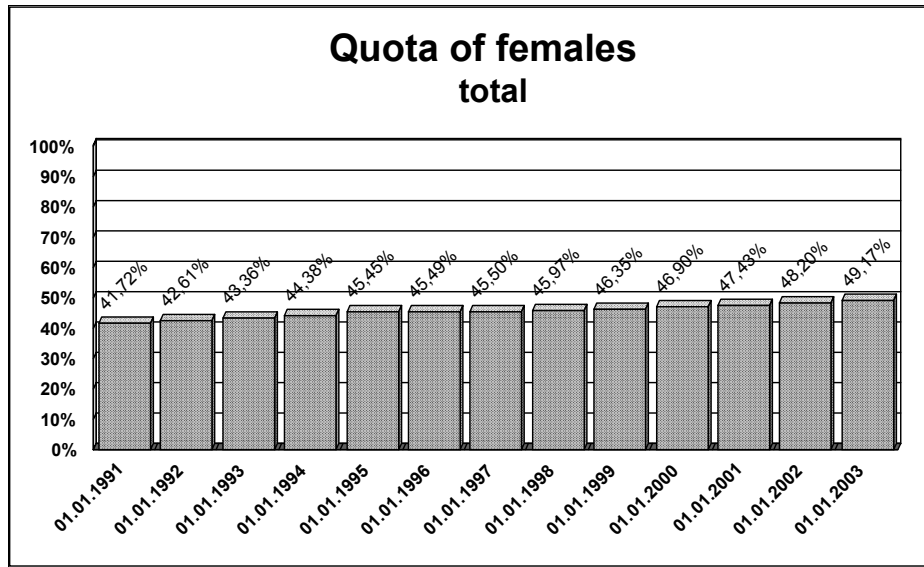
Table 1-4. Public Prosecutors

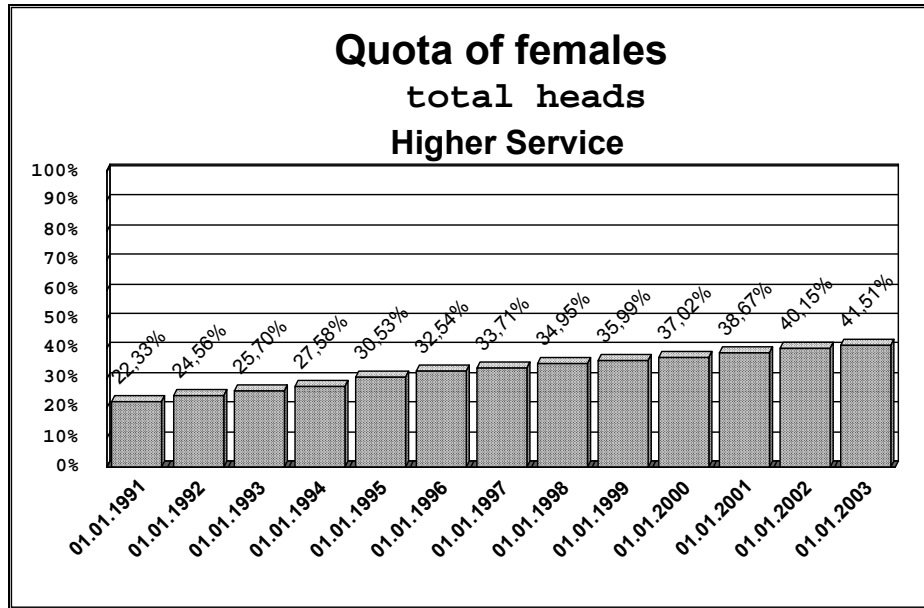
	Branch and amount of Nebenbeschäftigung/Nebentätigkeit										Total	
											1.10.02	1.10.01
	1	2	3	4	5	6	7	8	9	10		
General Attorney	3/1	3/-	-/5	-/-	1/-	-/-	-/-	-/-	-/-	1/-	8/6	10/6
Senior PPO Vienna	5/1	1/-	-/-	-/-	1/-	-/-	-/-	-/1	-/-	2/-	8/2	9/1
Senior PPO Graz	-/1	-/-	-/-	-/-	-/-	-/-	-/-	-/-	-/-	-/-	-/1	-/1
Senior PPO Linz	-/-	1/-	1/2	-/-	-/-	-/-	-/-	-/-	-/-	-/-	2/2	-/-
Senior PPO Innsbruck	3/-	-/-	-/-	-/-	-/-	-/-	-/-	-/-	-/-	-/-	3/-	2/-
Total 1.10.02	11/3	5/-	1/7	-/-	1/-	-/-	-/-	-/-	-/-	3/	21/11	
Total 1.10.01	12/3	5/-	-/5	-/-	2/-	-/-	-/-	-/-	-/-	2/		21/8
										together:	32	29

Branches (relating to headers):

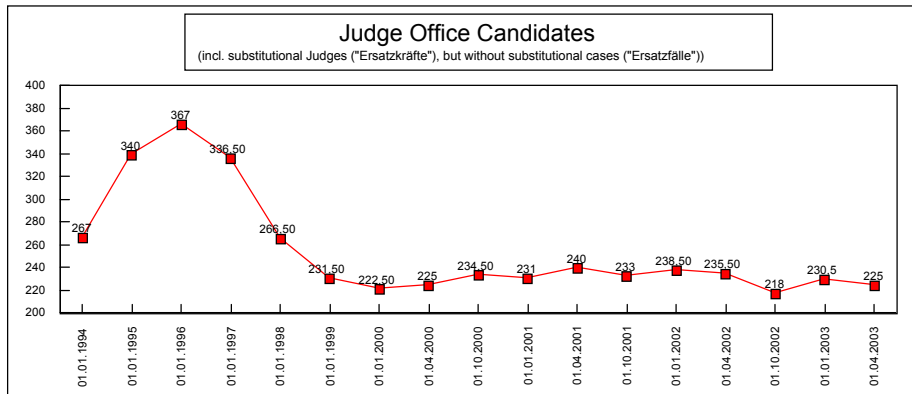
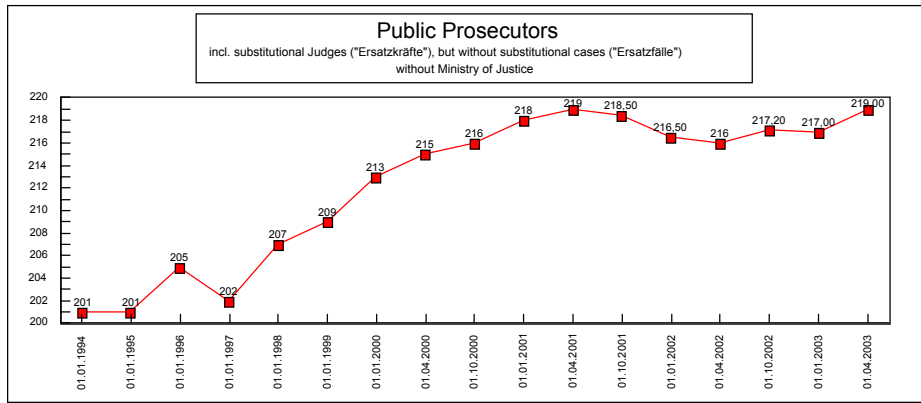
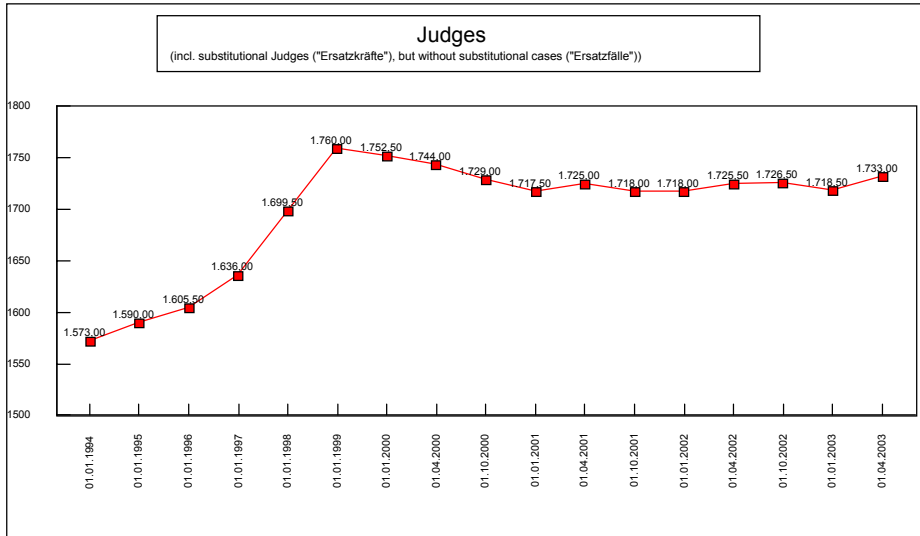
1. 1. Teaching;
2. Science;
3. Disciplinary Commissions;
4. Business functions;
5. Translators and consultants
6. Politicians;
7. Judges outside the Austrian ordinary judiciary (Liechtenstein, Constitutional Court, etc.);
8. Commissions;
9. Administration;
10. Others.

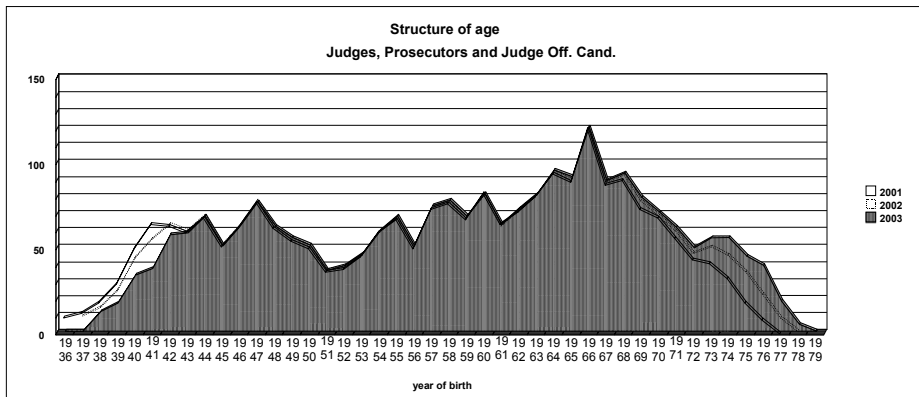
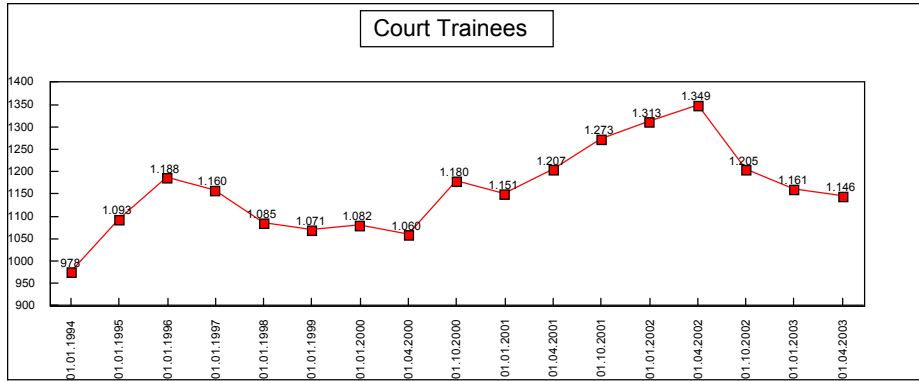
9.5 Quota of females in the Austrian judiciary



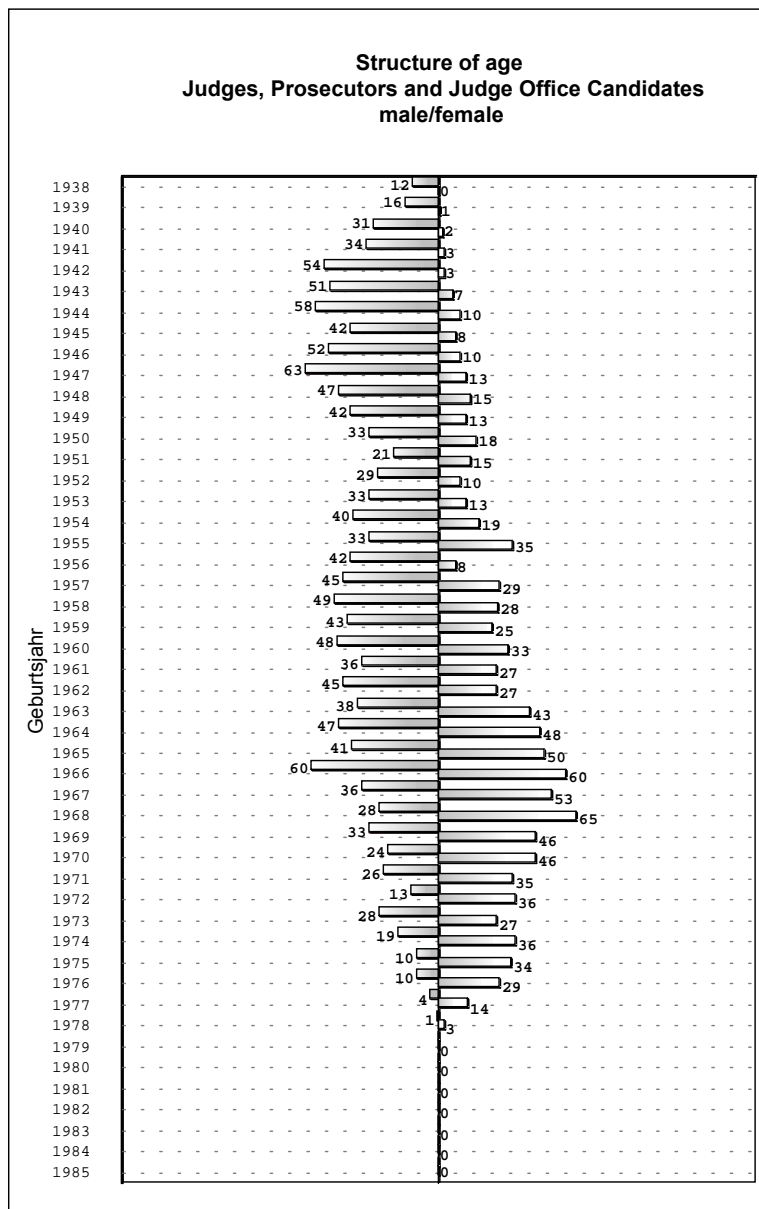


9.6 Personnel statistics





9.7 The general structure of age may be seen below:



Remarkable frequent is the group of persons born between 1943 and 1950 (1947 with 326 persons) and between 1960 and 1968 (Max.: 1965 with 464 persons). The form of graphic (male/female) especially shows the increase of

females within judiciary service since the women, born in 1963 (concerning quota of females see below).

9.8 Appointed Judge Office Candidates and judges - Statistics

Table -1-5. New appointed "first round" judges

	Court of Appeal				Total 1
	Wien	Graz	Linz	Innsbruck	
1995	31	14	17	11	73
1996	54	14	6	11	85
1997	71	16	16	10	113
1998	86	12	16	10	124
1999	35	13	14	4	66
2000	27	8	13	10	58
2001	23	6	19	8	56
2002	45	15	8	6	74
2003 (to Sep 01)	30	11	11	7	59
Total 2	402	109	120	77	708
%	56,78%	15,40%	16,95%	10,88%	100,00%

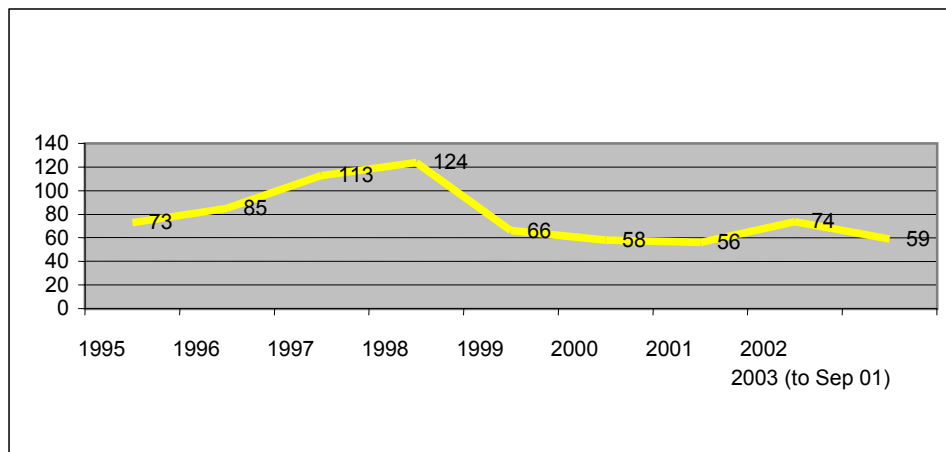


Figure 1-5. New appointed "first round" judges (absolute amount)

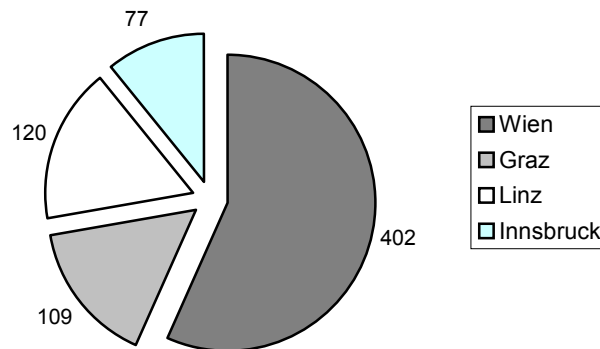


Figure 1-6. New appointed "first round" Judges 1995 -Sep. 2003

As shown above, the regional deviation of the new appointed and selected judges is in accordance to the court of appeal's size.

Chapter 2

THE RECRUITMENT, TRAINING, EVALUATION, CAREER AND ACCOUNTABILITY OF MEMBERS OF THE JUDICIARY IN FRANCE

Roger Errera¹

This report deals exclusively with ordinary courts and their members (judges and prosecutors). It excludes, mainly for reasons of space, a number of other courts:

- Courts empowered to try the President of the Republic (Haute Cour de justice) or ministers (Cour de justice de la République) and composed totally (Haute Cour de justice) or in part (Cour de justice de la République) of members of Parliament.
- The Conseil constitutionnel.
- Administrative courts, both general ones, i.e. the Conseil d'Etat, the administrative courts of appeal and the tribunaux administratifs, and specialized ones, e.g. the Commission des recours des réfugiés.
- Financial courts, such as the Cour des comptes and the Chambres régionales des comptes.
- Courts composed totally (the commercial courts) or in part of non-professional judges, such as labour courts (conseils de prud'hommes), juvenile courts², land lease courts and Social security courts.

¹ Former Senior Member (Conseiller d'Etat) of the French Conseil d'Etat. Former member of the Conseil supérieur de la magistrature. Member, in 1982, of the Committee in charge of preparing a reform of the status of the judiciary. He also chaired, in 1983-1984, the Committee on the press and the judiciary.

² The "tribunal des enfants", with jurisdiction for minors, is composed of a professional judge and two lay members.

The French judiciary (the official term is “le corps judiciaire”) is composed of both sitting judges (magistrats du siège) and State prosecutors (known collectively as “le parquet”). Recruitment and training are the same for both categories. Switching from one position to the other is allowed. The same basic rules, contained in a 1958 statute, revised several times³, apply. The main difference is that judges may not be removed or transferred without their consent (except as a result of disciplinary action) and that, under Art. 5 of the Statut de la magistrature, prosecutors are part of a hierarchy headed by the Minister of Justice.

This report is structured in four parts:

- 1. The general organization of the courts
- 2. Recruitment and training.
- 3. Career
- 4. Ethics, discipline and accountability.

1. THE GENERAL ORGANIZATION OF THE COURTS

Two elements will be discussed: the general structure of the judiciary and the management of the courts.

1.1 The general structure of the judiciary.

There are three levels of jurisdiction in both civil and criminal law:

The first instance consists of the tribunal de grande instance (TGI). There are 181 TGIs. A lower court, known as tribunal d’instance and composed of a single judge, has jurisdiction for minor cases⁴.

The second instance consists of the appeal courts. There are 35 of them.

The Cour de cassation is the supreme court. It deals with appeals on points of law only (cassation).

1.2 The management of the courts.

The management of the courts is characterized by the division of power, which has three aspects:

- Each court has two heads: the president for the judges, and the chief prosecutor for the prosecutors. They share the general management of the court.
- Administrative staff come under the supervision of the clerk of the court (greffier en chef).

³ Ordonnance du 22 décembre 1958 sur le statut des magistrats, hereafter «Statut».

⁴ Appeals against the judgments of these courts may be brought before courts of appeal.

- In addition, a regional administrative service (SAR), which has jurisdiction for all courts within a court of appeal, has been created at the level of the court of appeal. It is usually headed by a clerk, and in two courts of appeal a member of the judiciary.

This division of power does not always facilitate matters and has been criticized on occasion.

2. RECRUITMENT AND TRAINING

The French judiciary is mainly organized along the career model: one usually enters it at a young age (mid-twenties) and remains in it until retirement at 65 (68 for certain positions at the Cour de cassation).

Recruitment and training will be analysed separately.

2.1 Recruitment

The recruitment is through two channels: A) the main intake are graduates of a special State-run school, the Ecole nationale de la magistrature, hereafter ENM, and B) there is also a substantial and diversified external intake .

A) The main intake: The ENM.

The ENM is responsible for the initial training and in-service training of all members of the judiciary, known collectively as "magistrats". Admission is through a stiff competitive examination (concours). There are three such examinations:

- a) The first examination is open to people under 27 in possession of 4-year University degree in any subject. The conditions for applying are as follows: French nationality; possession of civil rights, of good moral character; physical suitability and fulfilment of military obligations (the draft was abolished years ago). The figures from 1983 to 2002 are indicated below. It should be noted that the number of positions offered varies and that there is an increasing proportion of women (one half in 1975, 73.99% in 2004). The percentage of successful candidates was slightly over 10% in 2004.

Table 2-1. ENM – First competitive examination. Number of successful candidates (1983 – 2004). (The numbers in brackets refer first to the number of women and second to the number of men admitted)⁵

Year	Successful candidates	Women	Men
1983	198	119	79
1984	194	114	80
1985	180	144	66
1986	195	116	79
1987	185	107	78
1988	156	99	57
1989	135	81	54
1990	150	92	58
1991	139	88	51
1992	120	83	37
1993	87	62	25
1994	98	66	32
1995	126	85	41
1996	121	80	41
1997	124	85	39
1998	156	116	40
1999	162	103	59
2000	164	121	43
2001	190	145	45
2002	220	182	38
2003	228	182	46
2004	223	165	58

b) The second competitive examination is open to civil servants (*lato sensu*) who have served for at least four years in this capacity. The general conditions, other than those relating to age and qualifications, are the same. The figures are shown in table 2-2.

Two remarks are in order: until very recently women were a minority, and fewer and fewer people seem to be interested in this examination.

c) The third competitive examination was introduced in 1996 and has been in place since then. It is open to individuals who, for eight years, have been active either professionally or as an elected member of a local council, or as a non-professional member of a court, and who were not, at the time, civil servants or members of the judiciary. Here are the relevant figures:

⁵ J.Vincent, S.Guinchard, G.Montagnier and A.Varinaud, *Institutions judiciaires Organisation. Juridictions*. Gens de justice, Dalloz, 7th ed., 2004, p.621-2.

Table 2-2. ENM- Second competitive examination. Number of successful candidates (1983 – 2004). (The numbers in brackets refer first to the number of women and second to the number of men admitted)⁶

Year	Successful candidates	Women	Men
1983	32	13	19
1984	36	11	25
1985	35	10	25
1986	50	19	31
1987	36	14	22
1988	30	10	20
1989	35	14	21
1990	39	13	26
1991	29	15	14
1992	30	11	19
1993	13	2	11
1994	12	2	10
1995	19	7	12
1996	17	8	9
1997	15	8	7
1998	19	5	14
1999	18	10	8
2000	17	9	8
2001	18	8	10
2002	12	7	5
2003	15	4	11
2004	18	11	7

Table 2-3. Third competitive examination. Number of successful candidates (1996-2004). (The numbers in brackets refer first to the number of women and second to the number of men admitted)⁷

Year	Successful candidates	Women	Men
1996	7	5	2
1997	6	3	3
1998	10	3	7
1999	5	4	1
2000	8	5	3
2001	6	4	2
2002	5	3	2
2003	7	4	3
2004	6	4	2

The net result of these three separate competitive examinations is that more than 200 people enter the ENM each year.

⁶ Id., pp.622-3.

⁷ Id., p.623.

Moreover, certain people may enter the ENM without passing an examination if they meet certain specific conditions in addition to the general ones mentioned above:

- They have a 4-year law degree and have 4 years' experience in an activity (legal, social, or economic) qualifying them to enter the judiciary.
- Or they hold a doctorate in law and university degree in another subject.
- Or they have taught or done research in a university and hold a university degree in law.

To be admitted, candidates must be vetted by the "commission d'avancement", the committee in charge of promotion within the judiciary⁸, which will be discussed below. From 1995 to 2004, 216 people entered the ENM via this procedure.

The three competitive examinations mentioned above follow, on the whole, the same format, with a few exceptions, due to the specific character of the second and third categories. The first part is a written examination and is anonymous. For example, students taking the first examination must sit four papers:

- One on "social, legal, political and cultural aspects of the present world" .
- One on a topic of civil law.
- One on criminal law, or on public and European law.
- An administrative report on a legal problem, on the basis of a file⁹.

Those who pass the written part then have an oral, which consists of:

- A general conversation with the panel.
- 4 oral examinations: one on commercial or administrative law; one on criminal or public and European law, depending on the choice in the first part; one on judicial organisation, administrative courts, criminal, civil and administrative procedure.
- An examination in foreign languages.
- Athletics.

The examination board is usually made up of members of the judiciary, University professors, a member of the Conseil d'Etat and other people. It issues an annual report on each of the examinations, which contains two kinds of useful information: firstly, statistical information on the number of candidates, the number who actually took the exam (many simply do not show up) and the number who passed it, with the distribution between women and men, and the kind of University degree held by the successful candidates; secondly, a number of general

⁸ «Statut», Art.18-1 and 18-2.

⁹ E.g. a note on a draft European Directive or on a proposed reform; the writer will have to express his opinion and advice, using a number of attached documents: drafts, domestic and international case law, national statutes in force, legal opinions, etc.

remarks on the quality of the written papers and of the answers during the oral part of the examination, topic by topic, together with recommendations.

B) The external intake.

There are several ways of entering the judiciary under the category of “external intake”, depending on whether entry is on a temporary basis (B.1) or on a permanent basis (B.2).

B.1. Entering the judiciary on a temporary basis.

There are five “routes” at the moment. A 6th one existed between 1995 and 1999.

- a) Civil servants recruited through the Ecole nationale d’administration (ENA) and University professors may be seconded to the judiciary for a non-renewable period of 5 years, after vetting by the “commission d’avancement” mentioned above. The name of this procedure is “détachement judiciaire”¹⁰. Between 1995 and 2004, 30 people entered the judiciary in this way.
- b) One may enter the Cour de cassation either as a judge or as a member of the “Parquet”, i.e. as an Avocat général for 5 years, “en service extraordinaire”¹¹. The conditions are, in addition to those already mentioned above, at least 25 years of professional experience and a special qualification for membership of the Cour de cassation¹². Between 1995 and 2004, 11 people entered the Court in this way, after vetting (approval – “avis conforme”) by the Conseil supérieur de la magistrature. (For details regarding this institution, hereafter CSM, see below.)
- c) There is a third route for temporary judges (“magistrats temporaires”)¹³. They may be appointed as judges of the lower courts (TGI) by the Ministry of Justice after approval of the CSM. They must be under 65 and be qualified by their experience and their competence. The idea was to recruit individuals with sufficient professional experience (such as court clerks, civil servants, barristers or members of other legal professions). They have to be vetted first by the “commission d’avancement.” It is considered a part-time occupation and they are allowed to have other private activities. This route was created in 1995. It has had only limited success: from 1995 to 2004, 16 people were recruited in this way.

¹⁰ Id., Art.41 to 41-9.

¹¹ The Parquet of the Cour de cassation is composed of Procureur général, Premier Avocat général and around two dozen Avocats généraux; with few exceptions, all are career magistrates; however some Avocats généraux might be appointed from the outside.

¹² Id., Art.40-1 to 40-7.

¹³ Id., Art.41-10 to 41-16.

- d) Members of the lower courts and of courts of appeal who have reached the age of retirement (65) may, if they wish, stay on for another three years, but not as president of the court or chief prosecutor¹⁴.
- e) Two recent statutes of February 26, 2003¹⁵ and another issued in January 2004 concern “juges de proximité”. These are part-time lower court judges, and are either former members of the judiciary or of the legal professions, or people with at least 25 years’ experience in the legal field. They are appointed for seven years, a non-renewable term, after vetting by the CSM and receive special training. As of January 2005, 308 were already at work, while 180 were being trained¹⁶.

B.2- Entering the judiciary on a permanent basis.

There are two ways: direct appointment and appointment through a competitive examination.

a) Direct appointment¹⁷.

People fulfilling a number of conditions relating to the length and nature of their professional experience (e.g. former court clerks or civil servants, etc) may be appointed after vetting by the “commission d’avancement”, which has the power of veto. From 1986 to 2004, 575 people were recruited in this way. The annual intake is around 30.

b) Competitive examination.

The normal format can be summed up as follows: people fulfilling certain conditions regarding minimum and maximum age, University degrees and professional experience sit a series of written and oral examinations. A fixed number of positions are offered. A small proportion is admitted into the judiciary, after being graded by an independent panel, whose decision is final.

Some of these competitive examinations have sometimes been (hastily) organized, hence they are known as “concours exceptionnel”, and have been authorised by a special statute. Thus a statute of February 24, 1998 authorized the appointment of 100 people for each of the years 1998 and 1999. 187 were appointed. Since 2001¹⁸, these competitive examinations have been organized on a regular, permanent basis, which makes more sense, both in terms of policy and from the point of view of the prospective candidates, and was an overdue and

¹⁴ Statutes of January 7, 1988 and February 26, 2003.

¹⁵ “Statut”, Art. 41-17 to 41-24.

¹⁶ For an evaluation of this reform, see P. Chevalier et T. Moussa, “Le décret relatif à la juridiction de proximité”, JCP. 2003. I. 181; «Dossier: la justice de proximité», Gaz. Pal, October 29, 2003, pp. 3-34; D. Guével, “Les débuts difficiles de la juridiction de proximité”, Gaz. Pal. October 15-16, 2004. See also the CSM’s opinion on the rules applying to the “juges de proximité”, in CSM, Rapport annuel d’activité, 2002-2003, p. 161. The CSM rightly stressed the possibility of conflicts of interest affecting the impartiality of these judges.

¹⁷ «Statut», Art. 22 to 25-3.

¹⁸ Statute of June 25, 2001; see “Statut”, Art. 21-1.

welcome reform. The conditions of age and of professional experience vary according to the level of the positions offered. The results so far are as follows: 73 appointed in 2002; 84 in 2003; 30 in 2004.

Two additional remarks are in order in relation to the external intake. In a number of decisions, the Conseil constitutionnel, which must vet the constitutionality of all statutes relating to the “statut des magistrats”, has established a number of principles:

There is, *per se*, no constitutional obstacle to the creation, by statute, of different forms of external intake.

The number of positions offered is limited in relation to the overall number of members of the judiciary, and may not be more than a specified proportion of the number of appointments made during the previous year for the same position. The proportion must be stated in the statute itself.

The statute must state precise conditions as to the capacity of the candidates (former professional experience, legal knowledge) to perform judicial functions, in order to ensure that two basic constitutional principles are observed: the independence of the judiciary and equality before justice.

Those who have passed the examination must receive adequate and specific training at the ENM.

Final appointment is subject to the vetting of the CSM.

Future regulations covering those to be appointed to courts of appeal will be stringent in relation not only to the legal competence of candidates but also as regards their competence in issuing judgments, in order to guarantee the quality of judicial decisions, equality before justice and the correct functioning of the courts¹⁹.

2.2 Training

The task of initial and continuous training belongs to the ENM, which is an “établissement public” (public agency) . The government appoints its director which, until now, has always been a member of the judiciary.

The ENM is in charge of three kinds of training, which will be commented on separately: A) The training of those entering the judiciary through the ENM ; B) the training of those recruited through the external intake ; C) in-service training .

A) Training of those entering the judiciary through the Ecole nationale de la magistrature.

Almost half a century after its creation in 1958-9, an assessment is possible. Before the 1958 reform, entry into the judiciary was through a competitive examination, followed by an internship at a prosecutor’s office or in a court. The

¹⁹ See Conseil constitutionnel, décisions n°98-396 DC, February 19,1998; N°2001-445 DC, June 19, 2001 and the recent decision of January 20, 2005, on the statute extending the jurisdiction of the “juges de proximité”.

quality of the training offered was uneven. There were few contacts between the new entrants. The contents of the examination was also criticized for its lack of breadth. The idea of creating a special school was discussed during the 1950s. In 1958, the Government prepared a draft statute. Most members of the higher ranks of the judiciary were against it: the only real “school” for future judges, it was held, were the courts. A parallel was drawn with the training of doctors in hospitals. Some law schools also objected. Others said that a special school for future judges would create a new “mandarinate”. Identical training for all could even be a “danger to the State”²⁰.

It is clear today that the very existence of such a school and the kind of training it provides have led to substantial achievements in three fields:

- a) The existence of a special school is based on two ideas: the first is that the judiciary is a specific profession which presupposes specific training. The second is that such a school allows individual as well as collective reflexion on the nature of the profession, on the way it is exercised and on the role of the judiciary in society. Common schooling for two years also creates useful links between individuals as well as a kind of “esprit de corps”, which is, within limits, valuable.
- b) There are many organic links between the ENM and the judiciary: its directors have always been, so far, members of the judiciary. (My own view is that it would be a good thing if, one day, other people were also appointed). Members of the judiciary form a clear majority of its Board. (After having sat on it for 8 years, I think that more diversity is overdue). All permanent teachers and instructors are members of the judiciary (Same remark applies). In lower courts as well as in the court of appeal, one or two members, chosen by the ENM, are in charge of overseeing the training of the future judges during their internship there, guiding and evaluating them.
- c) The ENM is active at an international level. It contributes to the training of the judiciary of foreign countries either through special courses organized in Paris, or by sending judges and prosecutors abroad to act as instructors or advisers in the training of local judges.

This being said, further progress is needed in three directions: More teachers should be recruited from outside the judiciary. The ENM, its instructors and its students should have more contacts with other State institutions training future civil servants. Finally, the teaching of judicial ethics should be extended²¹.

One question remains: if most members of the judiciary are recruited at a very young age, without any prior professional experience, how can one be sure that

²⁰ Cf.A.Boigeol, Histoire d’une revendication: l’Ecole de la magistrature.1945-1958. Cahiers du Centre interdisciplinaire de Vaucresson, N°7, June 1989 ; Revue de l’ENM,N°2 : «L’Ecole a 30 ans».

²¹ On the training provided by the ENM see the CSM’s remarks in CSM, Rapport annuel d’activité, 2002 – 2003, p 86 ff.

they have the right qualities relating to character, capacity to decide, organisational skills, working in a team and leadership? The contents of the competitive examinations do not relate to these issues (Could they?). The question is a pertinent one. There are several answers. Two of them are obvious: firstly, no system of recruitment is without its defects nor can it ensure that all the candidates who are accepted are and will always be fully fit for the job. Secondly, mistakes can happen in two opposite directions: the wrong people may be admitted or excluded. Finally, one of the ways which might make errors less frequent is to diversify the composition of the panel and, once a person is admitted, to extend the range of evaluation of his or her capacities. This is indeed done at the ENM (See below).

Training at the ENM takes two years and seven months. It is divided into 4 parts:

- a) During the first two months the students, known as “auditeurs de justice”, are interns in institutions other than the judiciary: local councils, private companies, State administrations, international organisations, NGOs, etc.
- b) Back at the ENM, located in Bordeaux, the students attend a number of courses and seminars over a period of seven months. The aim is to teach them what judicial work consists of in practice. The curriculum is a combination of specialized seminars and of general teaching, for example on the status of the judiciary, judicial ethics, etc. Students are evaluated by each seminar leader or instructor.
- c) The third part consists in a one-year internship in a court. The objective is that they use and apply there the knowledge they have acquired at the ENM. They are closely involved in the practical, daily work of the courts: they prepare civil or criminal cases, hear witnesses, have contacts with the police and the Gendarmerie, write draft judgments, prepare hearings, act as rapporteurs, etc. They are carefully evaluated by local judges and prosecutors, who act as local correspondents of the ENM. The results of the evaluation, which takes place every three months, are communicated to the students so that they are aware of their individual strengths and weaknesses. The students also spend two months with a barrister.
- d) Back at the School the students take the final examination, called “examen de classement”, the result of which will, together with the evaluation of their year at the Ecole and of their internship, determine the order in which they will choose their position. This final examination is graded not by the ENM but by an independent panel (appointed by the Ministry of Justice but independent from it). This panel is empowered to decide that an auditeur will stay one more year at the ENM or that an auditeur is unfit to enter the judiciary. The panel may also make recommendations as to the nature of the first position to be held by the auditeur, i.e. that certain positions should not be held by him in view of his personal characteristics.

Table 2-4. Decisions of the panel imposing a student to stay one more year at the ENM or declaring him unfit

Year	One more year	Unfit
1997	5	0
1998	6	1
1999	1	0
2000	5	0
2001	5	3
2002	7	2
2003	4	4
2004	0	1

After choosing their first assignment the students will spend 4 months in what is called a “stage de pré-affectation”. They will be interns in the same position as that of their first assignment, but in a different court.

B) Training of those recruited through the external intake.

Valuable and necessary as the external intake is, those recruited in this way have to receive specific additional training, which is provided by the ENM. In addition, when vetting future “juges de proximité”, mentioned above, the CSM may direct them to follow a special training course, the outcome of which will determine their final admission to the judiciary.

C) In-service training.

In-service training is an integral part of both the career of members of the judiciary and of the activities of the ENM.

- Each judge or prosecutor is entitled to a minimum of 5 days of training every year.
- In-service training is compulsory for those recruited through the annual competitive examination introduced in 2001 and mentioned above. It lasts for a total of three months, spread over the 6 years following their initial appointment.
- Every year the ENM publishes in advance the program of in-service training for the following year, in order to allow time judges to apply. The program offers a variety of topics and of formats: one week sessions, seminars, conferences. There are many different topics and they cover not only legal and judicial disciplines and activities, but also a number of contemporary issues. Special sessions are devoted to the implementation of recent reforms in civil and criminal law²². Other sessions are organized for those whose position has changed, for example those appointed, for the first time, as heads of a court. All sorts of people from different walks of life are invited by the ENM to run sessions and present papers. Persons of various professional qualification are appointed by the ENM to direct the various sessions or to present and discuss

²² See ENM, Programme de formation continue, 2005, 2004.

papers: members of the judiciary, of the bar, civil servants, academics, managers, foreign experts.

In-service training has been one of the most successful activities of the ENM.

3. CAREER

French Judiciary is composed of 3 career levels ;

- grade 2 – beginning ;
- grade 1 – to access to grade 1, one has to be mentioned in the promotion list established by the *commission d'avancement*
- top level (*hors hiérarchie*): sitting judges of Cour de cassation ; Heads of Cour of appeal ; Chamber president and *avocats généraux* in these courts; presidents and higher ranking member of Paris TGI; Heads of 21 TGI (statut art.2-3). Access to top level is decided by the CSM.

The existence of a national body of more than 7000 people subject to the same body of legal rules (the “statut de la magistrature”) means in practice that during a given year a very high number of individual decisions relating to appointments, assignment, promotion and discipline have to be taken. They involve the general management of the judiciary and represent a power. The issue of the attribution and the effective use of this power is therefore a political one, and must be discussed as such.

This chapter is divided into two parts. Part 1 contains an overview of the division of power. Part 2 discusses the main issues relating to the status and career of the members of the judiciary.

3.1 The division of power: an overview

In France, this power is at present divided between several authorities and bodies: the executive; the Conseil supérieur de la magistrature (CSM) and the judiciary itself.

A) The executive.

a) The President of the Republic.

Under the Constitution, the President is responsible for guaranteeing the independence of the judiciary. No specific power is involved. The President signs all decisions relating to the appointment and promotion of members of the judiciary and presides, *ex officio*, over the CSM and appoints one of its members.

b) The Minister of Justice:

The Minister of Justice prepares and administers the budget of the ministry and is partly responsible for the management of the courts, although management is becoming more and more decentralized. The Minister is, *ex officio*, vice-president of the CSM and puts forward proposals to the CSM relating to the appointment of all local prosecutors (except those at the level of courts of appeal and the Cour de cassation) and of sitting judges, except those who preside over courts, and judges of the Cour de cassation.

The chief prosecutor of the Cour de cassation and those of courts of appeal are appointed by the Executive (by the President of the Republic following a deliberation of Council of Ministries upon the proposal of the Minister of Justice) without consultation of the CSM.

B) The Conseil supérieur de la magistrature (CSM).

This body, which is described in the Constitution, is composed of 16 members :12 judges and prosecutors elected by their peers²³ and 4 lay members. Three of them are appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate. The fourth is a senior member of the Conseil d'Etat, elected by his or her peers. The other three lay members are usually chosen from among law professors, former members of the National Court of audits (Cour des comptes) and, generally, people with some experience of public affairs. In fact the real proportion of lay members is not 25 but 40%. The reason for this is that the CSM is divided into two sections, one section for sitting judges and one for prosecutors. Each section is composed of 6 members of the judiciary and the 4 lay members. The term of appointment is 4 years and is non-renewable.

The powers of the CSM are as follows:

- Sitting judges:
 - the CSM puts forward the names of those to be appointed as presidents of lower courts (TGIs) and courts of appeal, and judges of the Cour de cassation, directly to the executive. For the most important positions, the Minister of Justice does not send proposals to the CSM. The CSM itself chooses from among the applicants. It may even nominate someone who is not a applicant but who, in its opinion, fulfills all the requirements.
 - All other sitting judges are appointed upon the proposal by the Ministry of Justice and the approval (“avis conforme”) of the CSM , which thus has the power of veto.

²³ There are two electoral colleges: one for sitting judges and one for the parquet; there are 4 levels: Cour de Cassation: 2; heads of court of appeal: 2; heads of TGI: 2; members of TGI and of Court of appeal: 3.

- Prosecutors:

All prosecutors (except those mentioned above) are appointed after proposal by the Ministry of Justice. The CSM expresses an opinion on the proposal, which, if negative, is not binding (“avis simple”). Although the Minister has the power to override a negative opinion and has sometimes done so, he or she usually endorses the opinion of the CSM.

The CSM assists the President of the Republic, who is the guarantor of the independence of the judiciary under Art. 64 of the Constitution.

- The CSM also sits as a disciplinary Board.
- It visits the courts on a regular basis.
- It may send an opinion (“Avis”) on a general issue to the President of the Republic or to the Minister of Justice.
- It publishes a yearly report which describes in detail its activities and working methods, and contains special studies as well as all disciplinary decisions

The CSM plays no role in the following areas: the organisation of the recruitment of the judiciary and the competitive examinations mentioned above; the training organized by the ENM; the appointment of its director and the choice of the instructors; the evaluation of members of the judiciary; the drafting of judicial reforms; the processing of complaints against the judiciary.

C) The judiciary .

Two points need to be mentioned here:

- The majority of the members of the CSM belong to the judiciary and are elected by their peers. Judges’ college plays an important role in this election.
- The committee in charge of promotion (“commission d’avancement”), already mentioned several times, has important powers: no judge or prosecutor may be promoted without its approval, leading to a mention on the promotion list (“tableau d’avancement”). Several “routes” of the external intake are also dependent on its approval. Hence the importance of its composition: 16 of its 19 members are members of the judiciary elected by their peers²⁴, the other members are *ex officio* the Head of the Cour the cassation and the Procureur general of the Cour the cassation and the Chief Inspector of the Judiciary. The remark formulated above also applies to this election. The President of the Cour de cassation and its Chief Prosecutor belong to it *ex officio*.

The repartition of the members of the judiciary between the different grades was as follows in 2004²⁵:

- Upper grade (Hors hiérarchie): 640 (8,7%);

²⁴ There are 3 levels for the election: Cour de Cassation: 2 members; Cour of appeal: 4 members; lower courts: 10 members.

²⁵ Source, CSM, Rapport d’activité, 2002-2003, Journal officiel, 2004,p.27-28.

- First grade: 3713 (50,7%);
- Second grade: 2959 (40,4 %)

The net result is that a significant part of the power mentioned above has been devolved to the judiciary, or, more precisely, to the representatives elected by the judicial college.

Table 2-5. Salary of the members of the judiciary (as of January 1, 2004)

Grade	Scale	Amount	Time spent in each scale	Length of optimal career
(ENM)	* 358	1330,72		
	* 451	2372,57	one year	
	* 495	2604,05	one year	one year
Second grade	*545	2867,09	2 years	2 years
	*581	3056,48	2 years	4 years
	*618	3251,12		6 years
	* 657	3456,29	18 months	7 years
	* 695	3656,20	18 months	8, 5 years
	* 733	3856,11	18 months	10 years
	* 782	4113,88	18 months	11,5 years
	* 820	4313,79	2 years	13 years
	* A1 (880)	4629,42	1 year	15 years
	* A2 (915)	4813,56	1 year	16 years
	*B1/A3 (962)	5060,81	1 year	
	* B2 (1003)	5276,50	1 year	18 years
First grade	*B3/BB1 (1057)	5560,57	1 year	19 years
	* BB2 (1085)	5707,88	1 year	
	* BB3/C1 (1114)	5860,43	1 year	
	* C2 (1138)	5986,69	1 year	
	* C3/D1 (1163)	6118,21	1 year	
	* D2 (1216)	6397,03	1 year	
	* D3/E1 (1269)	6675,85	1 year	
	* E2 (1319)	6938,89		
	*F	7196,66		
	*G	7891,07		

3.2 Main issues relating to the status and career of the judiciary

These issues relate to A) the composition and powers of the CSM ; B) the practical working relationship between the CSM and the Ministry of Justice; C) the evaluation of judges and prosecutors ; D) activities outside of the judiciary ; E) extra-judicial activities of members of the judiciary in addition to their judicial work .

A) The composition and powers of the CSM.

a) Composition:

As is natural for such a body, several problems arise. Two will be discussed here:

- Should the President of the Republic and the Minister of Justice be, *ex officio*, its president and vice-president, as is the case at present under Art. 65 of the Constitution? The President of the Republic is, under the Constitution, the “guarantor” of the independence of the judiciary. Assuming that this independence needs a “guarantor”, which is very doubtful, why should it be the President of the Republic? Under the present system the President has a number of specific powers: all appointments are signed by him or her and countersigned by the Prime Minister and the Minister of Justice. This means that the President may refuse to sign a particular decree and to endorse an appointment. In addition, the agenda of all formal sessions of the CSM is signed and therefore must be approved by the President, which means that he or she may ask that a particular appointment or promotion be removed from it²⁶. In my view, there is no reason why the President of the Republic should preside over the CSM. Despite the fact that the presence of the Minister of Justice in the CSM would be useful, there is no reason why he or she should automatically act as president or vice-president. Consequently the CSM should elect its president. If such a reform were to be contemplated, which is not the case today, a constitutional revision would be needed to implement it. In 1993, the Committee in charge of making proposals for the revision of the Constitution wrote in its Report that if the President of the Republic remained President of the CSM there was no reason why the Minister of Justice should continue to act as vice-president²⁷.
- Should the majority of members of the CSM be taken from the judiciary, as is the case today? One thing is clear: the combination of the election, by their peers, of the members from the judiciary and of the existence and the influence of judges’ colleges has consequences on the degree of independence of this body in that it limits this independence. A draft revision of the Constitution, put forward in 1998, argued that the CSM should be composed of 21 members, with ten members - a clear, but significant minority - taken from the judiciary. The revision never took place. My view is that the time has come to alter the composition of the CSM so that the judiciary are no longer in the majority. The choice and method of appointment of lay members should however be given very careful attention.

b) Powers.

Two issues will be addressed:

- Should the opinion of the CSM on the appointment of prosecutors be binding for the Government, as it is in the case of judges? The main reason against this

²⁶ Such a power has been very rarely used.

²⁷ Comité consultatif pour la révision de la Constitution présidé par G.Vedel, Propositions pour une révision de la Constitution, La Documentation française, 1993, p.73.

lies in the provisions of the “Statut des magistrats”, which applies to prosecutors. Unlike sitting judges, they do not enjoy “inamovibilité”. Under Art. 5 of the “statut”, mentioned earlier, prosecutors work under the direction and the supervision of their hierarchical superiors and come under the authority of the Minister of Justice. Neither by statute neither by the nature of their functions can their position be totally assimilated to that of judges.

- Should the jurisdiction of the CSM be extended to include such areas as the processing of complaints or answering questions relating to ethics asked by judges? As regards the first point, an affirmative answer is conceivable. It would however, necessitate a substantial increase in the human and material resources of the CSM. On the second point, there are good reasons for answering negatively. Given the role of the CSM as a disciplinary board (it sits as a court for judges) answering ethical queries from members of the judiciary might be incompatible with its disciplinary responsibilities. In a 2003 opinion, the CSM expressed the wish that such queries from members of the judiciary and the Minister of Justice should be addressed to the CSM. Certain members of the CSM would be in charge of processing queries but would not then sit in on cases relating to a particular situation on which they had previously expressed an opinion²⁸. I have great reservations as to the feasibility and usefulness of such a reform. It might lead to a dilution of responsibilities, in a domain where the contrary is necessary.

B) The practical working relationship between the CSM and the Ministry of Justice.

A brief and concrete analysis of how the CSM does its work when it vets appointments and assignments might be useful, whether in giving an opinion on proposals or in making proposals itself.

a) Giving an opinion on proposals.

Two or three times a year, sometimes more, the Minister of Justice sends all members of the judiciary a list of the proposed appointments, promotions and assignments, up to several hundred at times. For each position, all candidates are listed (all judges must indicate to the Ministry annually what their wishes are) according to seniority. The candidate proposed by the Ministry is indicated. Other less lucky candidates may, if they wish, write to the Ministry and the CSM in order to explain why, in their opinion, they are in a better position. A number do so. The rapporteur of the CSM in charge of each appointment will study the file of the proposed candidate²⁹. He or she will compare it with that of other candidates who

²⁸ CSM, Rapport d’activité 2002-2003, Editions des Journaux officiels, 2004, p.171.

²⁹ Each member of the judiciary has a personal file, located in the Ministry of Justice. This file contains only all official documents relating to his or her career, including the periodic evaluation.

have sent observations or have more seniority. The CSM will discuss the matter and take a vote. Before the vote, informal contacts with the Ministry of Justice may take place and additional information be sought. When the CSM's opinion is negative, and this is binding for judges, the CSM does not have the power to replace the name of the proposed candidate with that of another one. The appointment simply does not take place (this happens in around 3% of the cases). The Minister, having taken note of the CSM's veto and of its grounds, especially when, in the opinion of the CSM, another candidate should have been proposed, will very frequently make a corresponding proposal next time. On other occasions, the opinion will be a positive one, but will be accompanied by the wish that next time another valid candidate is not forgotten or neglected. This kind of informal and reciprocal information, accompanied by some sort of "negotiation" has its uses. The CSM takes into account the nature of the position offered, the results of the evaluation of the proposed candidate and his or her person qualities. The annual Report contains a summary of the negative opinions.

When the proposal relates to certain positions, for example the prosecutor in an important court, a number of candidates will be interviewed by the CSM, before the discussion mentioned above takes place.

b) Proposals by the CSM.

When the CSM itself makes proposals for the higher sitting judge positions mentioned above, it is in possession of the list of applicants. The CSM is, however, not bound by this list and may, if it deems it appropriate, ask someone who is not a candidate whether this person would agree to be proposed. This has happened. The same procedure will then take place, but interviews will be more systematic.

C) Evaluation of members of the judiciary

I shall discuss the legal setting of the evaluation (a), before presenting an overview of the system (b).

a) The legal setting of the evaluation.

It is to be found in the "Statut des magistrats" (Art. 12-1) and in a decree of January 7, 1993.

The basic rule and its scope:

Evaluation is compulsory, under Art 12-1 quoted above; the only exceptions are the presidents and chief prosecutors of courts of appeal and members of the Cour de cassation (Art 39, para 3). It takes place every two years. However, according to the case-law of the Conseil d'Etat, another evaluation may take place before the two years is up if justified by particular circumstances and the interests of the judiciary. Its scope relates exclusively to the professional activity of judges and

prosecutors. However the Conseil d'Etat has held that the authors of the evaluation are entitled to take into account elements relating to the behaviour of the individuals concerned, including facts external to the exercise of their professional obligations, inasmuch as these facts may demonstrate, for example, a breach of the "obligation de discrétion", which is part of their obligations under Art. 10 of the "Statut" (see below). In the same way, factors relating to the private life of a judge may justify disciplinary action if they have repercussions on that judge's activities or on the reputation of the judiciary.

Procedure.

The authority responsible is the head of the court of appeal: the president for sitting judges and the chief prosecutor for prosecutors (Art. 19 of the 1993 decree). There is full transparency. Every element relating to the evaluation must be communicated in advance to the individual. The contents of the evaluation are described in detail in Art. 20 of the decree: the evaluation by the head of the court of appeal is accompanied, for judges, by the opinion of other judges and a description by the individual concerned of his or her activities. It is always preceded by a personal conversation, summarized in the evaluation. The whole set of documents is shown to the individual and then sent to the Ministry of Justice, to be put into that individual's personal file.

A dissatisfied judge may challenge an evaluation before the "Commission d'avancement" mentioned above, whose opinion will be in the file. This rarely happens (for example it happened 4 times in 1999).

Judicial review of evaluation before the Conseil d'Etat.

The Conseil d'Etat checks whether the facts mentioned in the evaluation are exact and, once this has been done, uses such concepts as error in law (when the grounds used by the author of the evaluation are not lawful), manifest error of appreciation or abuse of power. A blatant contradiction between the general evaluation of the judge and the detailed evaluation, item by item, may affect the legality of the evaluation.

b) An overview of the system.

I shall discuss here the aims of evaluation, then try to evaluate its practice and finally comment on the attitude of the CSM towards evaluation.

The aims of evaluation:

Why evaluate members of the judiciary? There many arguments to justify evaluation: the judiciary perform a public service and are part of a State institution. It is thus fully appropriate to evaluate how they perform their duties, always bearing in mind that they belong to the judicial system, which has to be considered as a whole. We live in an age where the expectations of society at large towards the

judiciary are, in view of its increased power, higher than before. Evaluation is a legitimate part of the accountability of the judiciary.

It allows individuals to be aware of how their way of performing their duties is perceived and appreciated, and to be better informed of any shortcomings. It may help an individual correct mistakes and make the right career choices. It also allows the authorities responsible for the management of the system to be aware of the qualities and defects, and, more generally, of the person qualities of members of the judiciary, in order to prepare and take appropriate decisions. In the French system, these authorities, described above, are the Ministry of Justice, the CSM, the Commission d'avancement and the heads of courts.

An evaluation of evaluation :

Evaluating individuals, especially members of the judiciary, is neither an easy task nor an exact science. In order to achieve the ends mentioned above and to be fully accepted, understood and performed by those in charge of it, several conditions must be met. They include

- The use of a plurality of criteria, in order to achieve a balanced appreciation.
The evaluation form used in France contains four categories of criteria.
- General professional ability, for example, capacity to decide, to listen and exchange views with others, to adapt to new situations;
- Legal and technical skills: capacity to use one's own knowledge; capacity to preside;
- Organisational skills: capacity to lead a team, to manage a court;
- Other: working capacity; professional relations with other institutions.

A plurality of evaluators:

Plurality has a two-fold dimension. Firstly in time: evaluation takes place every two years and is done, over the years, by different people in different places. This allows those who read and use the evaluations to put them into perspective and to compare them with other evaluations, taking into account the diversity of the authors. The second dimension is the following: the final evaluation is the responsibility of one person, the head of the court of appeal. But this evaluation is done in consultation with other people, whose opinions appear in the file: heads of the lower court, other colleagues with whom the individual works. This is very important both from a psychological and a professional point of view.

The main pitfall to be avoided is the use of stereotyped and repetitive remarks, including, at times, a kind of blandness, the main shade being grey, which do not show exactly the nature of the person qualities of the individual, where he or she should not be assigned and what should be done to correct any shortcomings. Evaluation is hard work, and not only in terms of quantity. In order to evaluate how individuals perform their duties, one must be aware of their overall workload and of its distribution. Comparisons between individuals then become possible and

meaningful. In other words, a sound and efficient system of evaluation cannot be separated from a reflexion on the quality of justice in general³⁰.

c) The CSM and the uses of evaluation.

The responsibilities of the CSM and its methods of work have been described above. In addition to the consultation of files and personal interviews, the CSM uses other sources of information such as visits to the courts, when its members have private meetings with judges. When reading evaluation forms, the CSM takes fully into account a number of variables such as the assignment of judges, the nature of the situations in which they find themselves, their person qualities, etc.

D) Activities outside the judiciary

As is the case with civil servants in general, the “statut des magistrats” allows members of the judiciary to take leave of absence while still remaining members of the judiciary³¹. The legal aspects have been analysed in a recent Report of the CSM³². In 2004, 561 people, out of a total of more than 7000, were “outside the courts”: 224 were working in the Ministry of Justice, and 251 were working in Administrations or other public bodies or in private bodies of public interest, in France or abroad. Some of them remained in the Justice sector, for example as Directors in the Ministry of Justice or, Director, deputy Director and instructors at the ENM. Others are to be found in the Ministry of Foreign Affairs (Legal Division) and in the Ministry of Finance. Some belong to international courts, such as the International Criminal Court, the International Criminal Tribunal for Former Yugoslavia, the ECJ (European Court of Justice) and the CFI (Court of First Instance). 81 others were on leave of absence in order to pursue a private activity.

While special rules apply in the case of civil servants, under the supervision of a special committee³³, in order to ensure respect for basic ethical rules, no such rules and no special committee exists here. The CSM’s control is, by law, extremely limited. One of its recent Reports regretted this situation and suggested an increase in its powers³⁴.

³⁰ See *The Challenge of Change for Judicial Systems. Developing a Public Administration Perspective*, M.Fabri and .M.Langbroek, Eds, IOS Press, Amsterdam, 2000; *The Administration of Justice in Europe.Towards the development of quality of justice*, IRSIG, Bologna,2003; M.L.Cavrois, H.Dalle and J.P.Jean, *La qualité de la justice*, La Documentation française, 2002. *L’administration de la justice en Europe et l’évaluation de sa qualité*, M.Fabri, J.P.Jean, P.Langbroek and H.Pauliat, eds, Paris, Montchrestien, 2005.

³¹ For a general study see A.Boigeol, *La magistrature ‘hors les murs’ .Analyse de la mobilité extra-professionnelle des magistrats*. Institut d’histoire du temps présent.

³² CSM, *Rapport d’activité 2000*, p.27ff

³³ See *Commission de déontologie de la fonction publique de l’Etat, Accès des agents publics au secteur privé. Rapport Annuel,1997 on.*, and J.Furstenberg, *La déontologie de l’accès des fonctionnaires aux entreprises publiques*, La Documentation française, 1998.

³⁴ CSM, *Rapport d’activité 2000*, p.63, n.38.

E) Extra-judicial activities by members of the judiciary in addition to their work.

The present rules may be summed up as follows³⁵:

- Prohibited activities: any professional or salaried activity; any activity which might affect their dignity or their independence.
- Activities subject to authorization: teaching,
- Activities allowed: scientific, literary or artistic ones.

These rules are liberally interpreted: teaching in law schools or other institutions has increased, as has legal writings in books and journals. What is relatively new, and has raised some eyebrows inside and outside the institution, has been the publication of books by judges or prosecutors in the form of professional autobiographies, comments on cases, or sometimes outright self-publicity.

4. ETHICS, DISCIPLINE AND ACCOUNTABILITY OF THE JUDICIARY

Judicial ethics and the accountability of the judiciary have been for some time the subject of public debate in France. Expectations regarding the judiciary have increased for many reasons: the increase of its powers, the fact that courts decide more and more frequently on the liability of all kinds of people – politicians, members of the business community, civil servants, members of the professions, etc. Another element is the end of de facto or legal immunity.

Three points will be discussed: 1:the formulation of ethical rules; 2:information regarding the rules; 3:disciplinary policy .

4.1 The formulation of ethical rules.

There are several possible ways of dealing with the issue, based on different philosophies and judicial cultures. One of them consists in stating, in the statute applying to the judiciary, a few general principles. This is what the “statut des magistrats” does, in a general and minimal way, in three of its articles³⁶. In 1999, the Minister of Justice proposed a revised and more precise definition of the professional duties of members of the judiciary. The text mentioned notions of impartiality, integrity, diligence and reasonable delay, as well as ”any behaviour which might alter (the public’s) trust in the independence and the impartiality of

³⁵ «Statut», Art. 8.

³⁶ See Art. 6 (text of the oath), 10 (prohibition of political deliberations and of any political “démonstration” incompatible with the restraint dictated by their duties, and of cessation of work) and 43 (“Any violation by a member of the judiciary of his/her duties, of honour and of the scrupulousness of his/her functions is a disciplinary fault”).

the judiciary³⁷. One welcome clause dealt with activities which are prohibited to members of the judiciary in the 5 years following their departure (permanent or temporary) from the judiciary, thus filling the gap mentioned above. This was a welcome and an overdue reform, taking fully into account the case law of the CSM, the Conseil d'Etat, and the European Court of Human Rights in cases relating to Art. 6-1 ECHR. This proposal was not, unfortunately, sent to Parliament.

Another solution consists in a detailed list of guidelines and principles, leading to the establishment of a code of conduct³⁷. A third kind of instrument, the most appropriate in my opinion, is exemplified by the Canadian Principles of Judicial Ethics³⁸. It contains recommendations and is not a code or a list of prohibited behaviour and should not be used as such. The recommendations do not state norms defining judicial misconduct. The document is divided into five parts: independence; integrity; diligence; equality; impartiality. Each part contains three elements: statement; principles; commentaries. The commentaries come from various sources such as books, journals, domestic and foreign case law. Half of the text is devoted to impartiality.

4.2 Information on ethical rules

However they are formulated, the ethical rules applying to the judiciary should be widely disseminated throughout the judiciary so that each of its members, wherever they may be, is fully aware of its contents: statutory rules; domestic and European case law, legal writings. This has not been done as yet in France. A corpus containing the case law of the CSM and of the Conseil d'Etat, but not that of Strasbourg court, has been assembled by the Ministry of Justice. It has been distributed so far to members of the CSM and to heads of courts of appeal, and no further, thus remaining a somewhat confidential document. The latest Report of the CSM contains a recommendation relating to this matter and suggests that the CSM takes responsibility³⁹. Such an initiative is overdue.

In addition, the best way to ensure knowledge and awareness of basic judicial ethics rests in initial and in-service training. On both counts, what is done by the ENM must be developed and extended in scope. The creation of an advisory

³⁷ See, e.g., The Bangalore Code of Judicial Conduct, drafted by the Judicial Group on Strengthening Judicial Integrity. This document is based on the law and practice of a number of Commonwealth countries and of the USA. Cf. the comments of the Consultative Council of European Judges, November 14, 2001, CCEJ (2002) (Mis) 3, Annex IV. For another illustration, see the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence (1998); The UN Fundamental Principles on the Independence of the Judiciary (1985). For an excellent general reflexion, see G.Canivet and J.Joly-Hurard, *La déontologie des magistrats*, Dalloz, 2004.

³⁸ Canadian Judicial Council, Ottawa, 1998.

³⁹ CSM, Rapport d'activité 2002-2003, p.162 ff.

council which could give advice to judges or to their superiors upon request has recently been discussed. I have great reservations as to the wisdom of such an innovation: what would be the practical and legal weight of its advice once formulated, especially if, later on, disciplinary action were initiated? Could a judge invoke it in his or her defence? Or the Minister or heads of courts for not initiating such an action? There is an obvious risk of confusion and of dilution of responsibilities⁴⁰.

4.3 Disciplinary policy.

A consistent disciplinary policy is not simply the mere sum of disciplinary actions initiated and of their outcome, or of the absence of them. It presupposes, from those empowered to initiate it – in France the Minister of Justice and, since 2001, the heads of courts of appeal – and from those who decide on it (The CSM for judges, and the Minister for prosecutors, although the Minister generally follows the CSM's advice) a general and well informed conception of what a disciplinary policy is and should be. Are these prerequisites met today in France? There are many reasons to doubt it. Until 2001, the initiation of disciplinary action was the monopoly of the Minister of Justice. This was an unsound situation, both because the Minister is a member of the Government and because the use, or absence of use, of such a power was and still is discretionary, inevitably inviting suspicion⁴¹. It is to be hoped that heads of courts of appeal will not be reticent in using their new power.

The section of the Ministry of Justice responsible for disciplinary matters, i. e. actually in charge of assembling the case and preparing the written submissions, does not seem, so far, to have the adequate resources.

As regards the CSM's procedure and decisions, things have improved greatly: hearings are public and the decisions fully reasoned, and reported in the CSM's annual report, a considerable innovation. Judicial review before the Conseil exists both against the CSM's decisions when it sits as a disciplinary court for sitting judges (cassation) and the Minister's decisions in the case of prosecutors.

Under art.45 of the Statut of magistrates there are 8 sanctions (from the lower to the most serious one):

1. reprimand inserted into the file;
2. transfer to another position in a different location;
3. the exclusion from specific judicial functions;
4. lowering of the salary;
5. temporary exclusion -for one year maximum- with or without total/partial deprivation of the salary;

⁴⁰ See the Report of the Commission de réflexion sur l'éthique dans la magistrature, 2003.

⁴¹ CSM, Rapport d'activité 2000, p.100.

6. lowering of rank;
7. compulsory retirement;
8. dismissal with or without maintaining of the pension;

How often is disciplinary action used? Here are the statistics of the penalties (actually given) decided over the past 10 years⁴²

Table 2-6. Disciplinary penalties.

years	No. of penalties
1994-95	14
1996-97	9
1997-98	34
1998-99	9
1999-2000	6
2000-2001	13
2002- 2003	2

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⁴² CSM, Rapport annuel.

Chapter 3

RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN GERMANY

Johannes Riedel¹

INTRODUCTION²

Germany is a federal state. Judicial authority in Germany is shared between the Federation ("Bund") and the sixteen "Länder" (states, provinces). Under article 92 of the Grundgesetz (constitution), judicial power is exercised by the Federal Constitutional Court (Bundesverfassungsgericht), by the other federal courts provided for in the Grundgesetz itself, and by the courts of the Länder. Federal courts are the Federal Constitutional Court in Karlsruhe and the five highest courts of the Federation, i.e. the Federal Court of Justice in Karlsruhe (Bundesgerichtshof, civil and criminal cases), the Federal Labour Court in Erfurt (Bundesarbeitsgericht,

¹ The author has been working as a judge in courts of law in Bonn and Cologne and in the judicial administration for about 20 years and thereafter as a civil servant in the Ministry of Justice of North-Rhine/Westphalia in Düsseldorf in the function of head of the department for legal education, training of the staff of courts, prosecutions and penitentiaries, continuing education, international activities, coordination of legal politics and also in the function of director of the state law exam office. While every attempt has been made to collect reliable data, the great diversity of rules, regulations and their practical application in the German judicial administrations and the fact that many procedures are under review has made it nearly impossible to give a detailed up-to-date account. Although the author is confident that the overall picture is correct he is well aware of the risk that some of the details reported may not or no longer give the exact state of the relevant practice.

² cf. Heyde, *Justice and the Law in the Federal Republic of Germany*, Heidelberg, 1994, p. 7 et seq., and table 1.

labour cases), the Federal Administrative Court in Leipzig (Bundesverwaltungsgericht, administrative law cases), the Federal Social Court in Kassel (Bundessozialgericht, social security and social insurance cases) and the Federal Finance Court in Munich (Bundesfinanzhof, tax cases). The five highest courts of the Federation are courts of last instance, generally hearing appeals on points of law only. By contrast, the courts of first instance in all five branches are courts of the Länder. Likewise, the higher regional courts (regional courts of appeal, Oberlandesgericht, Landesarbeitsgericht, Oberverwaltungsgericht, Landessozialgericht) existing in all branches except in tax cases are administered by the Länder. Thus, the German judicial system is peculiar in that the courts of first and second instance, in general, are the responsibility of the Länder whereas the final courts of appeal are the responsibility of the Federation. Cases usually begin at a Länder court of first instance, may go through a (Länder) regional court of appeal and eventually may end up in the relevant federal court. Therefore, the system provides a single jurisdiction quite unlike the system in the United States of America with both state and federal courts of first instance and of appeal. Judges in the courts for which the Länder are responsible are employed by the Länder whereas those appointed to the federal courts are employed by the Federation. The main features of the German system of jurisdictions are shown in table 1. In addition, both on the federal as well on the Länder level, a number of other courts – mostly for certain professions – do exist; they can be disregarded for the purposes of this study.

In this study, emphasis is put on recruitment, evaluation and career of judges in what in Germany are called the "ordinary" courts of justice, i.e. the courts hearing civil, family and criminal cases. These are the courts where about 75 percent of all judges are employed; administrative court judges make up about 11 percent, social and labour court judges about 5 percent each and tax court judges about 4 percent. The ratio of "ordinary" court judges and prosecutors is about 3 to 1. The overall number of judges in Germany is approximately 20,000 and the total number of prosecutors about 5,000.³

The following account is an attempt to report the present situation and the rules and regulations applied in the German Länder and in the federal judicial administration. The great diversity of these rules and regulations and of their practical application as well as the fact that many procedures are under constant review, however, presents the risk that some of the details reported may not or no longer give the exact state of the relevant practice.

³ cf. table 2.

1. RECRUITMENT OF JUDGES AND PROSECUTORS

1.1 System of selection

1.1.1 Competent body for appointment

Germany, as a rule, has career judges, which means that judges spend all or most of their working life in the judiciary. Their career usually begins at a court of first instance and therefore in the employment of one of the Länder. Consequently, it is the Länder administrations that have to organise the system of primary recruitment for the judiciary. Within the Länder the Ministry of Justice usually organises this process; in some of the Länder, appointments for the social and labour courts come within the scope of the Ministry of Labour and Social Affairs. In half of the 16 Länder judicial electoral committees (Richterwahlausschüsse) participate in the process of recruitment and appointment (for further details and the composition of these committees see below).

1.1.2 Prerequisites, preconditions, qualifications

The general criteria for appointment to any public office – and this includes any position in the civil service and any judicial office - are laid down in article 33 paragraph 2 Grundgesetz. According to this article all German citizens have equal access to public office according to their aptitude, qualifications and professional ability. This guarantees equal access to a judicial office for everyone. In addition, section 9 of the (federal) German Judiciary Act⁴ prescribes that judicial tenure may only be given to a person who is

- a German national in terms of article 116 Grundgesetz,
- prepared to at all times uphold the free democratic basic order within the meaning of the Grundgesetz,
- qualified to hold judicial office (according to sections 5 to 7 of the act),
- able to provide the social competence necessary for the office.

These criteria are binding on the bodies competent to decide on recruitment and appointment. Any alleged violation of equal access to public office is open to judicial review before the administrative courts.

⁴ Deutsches Richtergesetz (DRiG) of April 19, 1972, Bundesgesetzblatt 1972 I p. 713, as amended per June 7, 2004, Bundesgesetzblatt 2004 I p. 1054; the relevant amendment concerning legal education was by the act to reform legal education of July 11, 2002; the amendment introduced the requirement of "social competence".

In addition, the Länder have laws providing for preferential treatment of female applicants to public service. These have been enacted to implement the principle of equality of men and women - with regard to access to employment, vocational training and professional advancement. In cases where applicants of both sexes are equally eligible with regard to aptitude, qualifications and professional ability preference will be given to appointment or promotion of female applicants if in the office concerned fewer women than men are employed, unless grounds in the person of a male applicant are overriding.

The **professional qualification** to hold judicial office is regulated in section 5 of the (federal) German Judiciary Act. Section 5 states that in order to qualify to become a judge you have to study at university, pass a first exam, do an apprenticeship and pass a second state examination.

The course of study at university lasts (on average) four years.⁵ Subjects of study have to include central fields of civil law, criminal law, administrative law, constitutional law, procedural law plus legal theory and the historical, sociological and philosophical foundations of law, including the relevant aspects of European law. In addition to the compulsory subjects, students must also study further legal subjects of their choice ("Schwerpunktbereiche", for example, international law, European law, insurance law, media law etc.).⁶ The course of study is concluded by passing a first examination which – following the reform of the year 2002 – will from 2006 onwards be held in two parts, an exam on compulsory subjects before a state exam board and an exam on subjects of choice before the law faculty. Students also have to carry out short periods of practical training while they are enrolled as university students, lasting altogether three months.

University education is largely theoretical. Studies concern the knowledge of important codes and acts and court decisions. Students rely mainly on textbooks. Casebooks are rare, because the emphasis of the courses lies more on principle than on precedent. Practical implications of legal principles are not covered in depth; procedural law is dealt with only briefly. In spite of this emphasis on theory, a decisive element of university education in law is training in the methods of "solving" a case, a legal problem. Strict logical thinking, exact interpretation of statutes, precise deduction from principles ("Subsumtion") lie at the centre of this methodical training. In addition, it is the aim of the recent reform to place more emphasis on practical aspects of the law, above all on the way a practising lawyer deals with legal problems, how he perceives the case and how he can act to

⁵ s. 5a DRiG, cf. note 4, supra

⁶ Before the 2002 reform of legal education which will come into force only gradually after July 1, 2003, apart from compulsory subjects students had to study subjects of their choice which were then part of the exam set by a state exam office. The aim of the reform is to put more emphasis on profile building both for universities and for students and so the exam in subjects of one's own choice will, in future, be held by the law faculties themselves ("universitäre Schwerpunktbereichsprüfung", cf. s. 5, 5d DRiG, note 4, supra)

influence the outcome of legal disputes. According to the law on legal education in the Land North-Rhine/Westphalia⁷, essential fields of study include, for example,

- the law of contract, tort, chattels, real property, consumer credit,
- an overview of family law and the law of succession upon death,
- an overview of exemplary parts of mercantile law, of company law, of labour law,
- core subjects of criminal law,
- an overview of criminal procedure,
- constitutional law, general principles of administrative law including procedure, the law of local government,
- European law and an overview of private international law.

This covers a wide range of legal fields. In addition, what may belong to "principles" or "overview" in any given field is open to discussion. Universities or examination boards do not have strict or binding curricula. Students are free to choose the time when they want to enter the first state examination. It is understandable that given the wide scope of subjects of study, many students fear that they are not well prepared and hence delay entering the examination. Burdened by such doubts, almost all law students decide to attend a private tutorial, usually with a lawyer who specialises in offering additional courses to repeat the knowledge he thinks is essential for passing the examination. In spite of these problems, more than half of the students enter their first exam after about 4 years of study.⁸ The reason for this is that students who enter their first examination after only four years at university are entitled to an extra attempt if they fail the examination.⁹

The (first) state examination is held by a state-administered examination office which is usually attached to a higher regional court. Examiners are university professors, judges and - occasionally - other practising lawyers. In most of the Länder, examiners are appointed for a period of three to five years by the Ministry of Justice or by the president of the higher regional court, the appointment

⁷ s. 11, Gesetz über die juristischen Prüfungen und den juristischen Vorbereitungsdienst (Juristenausbildungsgesetz Nordrhein-Westfalen) of March 11, 2003, in force since July 1, 2003 (Gesetz- und Verordnungsblatt - GVBl - für das Land Nordrhein-Westfalen 2003 p. 135), as amended per November 30, 2004 (GVBl 2004 p. 752); all the other Länder have passed similar legislation in order to regulate the details left open by the federal act of July 11, 2002, cf. note 4, supra.

⁸ This applies to the present system with a first and second state exam; exams under the new system will be held only after July, 2006, cf. notes 4, 6, supra, but it is to be expected that this will remain unchanged. Whether the introduction of the Bachelor-Master-system in Germany will also include legal education and whether it may eventually lead to yet another system with shorter courses of study will remain to be seen.

⁹ s. 25 JAG, cf. note 7, supra; as a rule, the examination can be repeated once if the student fails; with the so-called "free shot" attempt, students are offered a third try.

following a proposal of the director of the examination office. The examination consists of 6 or 7 written (supervised) tests and an oral examination.¹⁰ Supervised written tests deal with cases or legal problems with (mostly) undisputed facts. The oral examination usually lasts four hours and covers various subjects, again discussing simple legal problems. A group of up to six students is examined by a panel of three examiners. The panels of examiners for the oral examination are arranged by the director of the examination office; as a rule, one of the three examiners is an expert in civil, one of them in criminal and the third an expert in administrative law. As regards the section of the first examination which, in future, will have to be held by the law faculties in their and their students' fields of specialisation ("Schwerpunktbereiche"), it will be open to the law faculties to decide on the details. As it appears at present, most faculties will require students to write some kind of thesis and at least one supervised test; in addition, there will be an oral exam.

After the first exam there is a period of practical training, literally called preparatory service, followed by the second state examination. It is the rather unique concept of the German legal education system that it is essential for all future lawyers (i.e. judges, prosecutors, barristers / solicitors) to do this preparatory service and to pass the second state exam. The reason for this is that the professional qualification to hold the office of a judge as laid down in s. 5 of the German Judiciary Act, a qualification which is finally acquired by passing the second state exam, is at the same time the professional qualification necessary to be admitted to the Bar or to be employed as a lawyer in the civil service.¹¹

The duration of preparatory service is 2 years, and it entails various different stages of training. Students are employed by the state (the judicial administration) as civil servants in training and are paid a small monthly allowance while in preparatory service. They have to spend a few months each in a court for civil law suits, in a criminal court or a prosecutor's office, in a local or government administration, with a practising lawyer (barrister/solicitor) and at other places of their choice. In North-Rhine/Westphalia¹², trainees have to spend

- a) 5 months with a court for civil law suits at first instance,
- b) 3 months with a prosecutor or in a criminal court,
- c) 3 months with an administrative office (usually on the local level),
- d) 10 months with a practising lawyer (solicitor, barrister),

¹⁰ s. 10 JAG, cf. note 7, supra.

¹¹ "Befähigung zum Richteramt", cf. s. 4 Bundesrechtsanwaltsordnung (BRAO) of August 1, 1959, as amended per July 11, 2002 (Bundesgesetzblatt 2002 I p. 2592) by the act to reform legal education and later amended per May 5, 2004 (Bundesgesetzblatt 2004 I p. 718).

¹² under the new law after the reform of 2003, cf. s. 35 JAG, note 7, supra; the emphasis that the reform is putting on training for private practice is shown by the fact that, under previous regulations, the stage with a practising lawyer was only 4 months whereas in the future it will be 10 months; federal law prescribes at least 9 months, s. 5b para. 4 DRiG, cf. note 4, supra.

- e) 3 months at a place of choice - where training is offered in a special subject of his or her choice.

The aim of education in these various stages is to instruct trainees in the practical skills concerning the application of the law. Students are supposed to learn how to draft judgements, to weigh and evaluate evidence, to write indictments, to produce written pleadings. The idea also is that a trainee should accompany the lawyer who is instructing him during daily work as often as possible. He should work under the instructor's supervision and take over some of the workload so that he can, for example, learn how to examine witnesses (which under German procedural rules is mostly done by the judges), how to plead in court (an art which is rarely exercised) and how to meet clients.

Practical training in these stages is accompanied by courses¹³ which are given by experienced practitioners (mostly judges but also prosecutors and other lawyers). These courses cover practical questions. Their purpose is to make students familiar with the methods of analysing and deciding court cases, especially teaching them to find the issues of fact which are relevant to the decision of the case. In future, courses will have to bring more emphasis on a lawyer's practical skills in private practice, in order to take account of the goals of the reform of 2002 / 2003. Courses also serve the purpose of preparing students for the final state examination and to ensure an equal standard of practical training because the quality of individual instruction during practical stages may differ a lot.

The second and final examination is again held before a state office that is usually attached to the Ministry of Justice of the Land. In contrast to the first examination, mostly practising lawyers and only few law professors serve as examiners, the overwhelming majority being judges of all courts (civil courts, administrative courts, labour courts, even tax courts), but increasingly members of the Bar are volunteering to sit as examiners. The importance which is attached to this examination may be shown by the fact that a large number of court presidents regularly serve as chairpersons of the panels of examiners. Again, examiners are usually appointed by the Ministry of Justice on the basis of a proposal of the director of the examination office.

The subjects of this examination are by and large identical with those of the first exam, they include however procedural law at a much deeper level. Papers and questions are usually set not from the abstract point of view of a legal scholar but almost invariably from the point of view of the court that has to give the decision in a case or of the practising lawyer who has to deal with a given situation for his client. Again there are written (supervised) tests and an oral examination. Written tests usually require the drafting of a judgement, of an indictment and, to an increasing extent, of a pleading or application - given from the barrister's point of view. Oral examinations (five to six candidates being examined by a panel of three

¹³ s. 43 JAG, cf. note 7, supra.

examiners, selected by the director of the examination office) begin with a short speech which the candidate has to give on a simple practical case, again mostly from a practising lawyer's point of view. The candidate is presented with the case on the morning of the examination and is allowed one hour of preparation; the speech should not last more than ten minutes and should end in a proposal for a practical decision.¹⁴ After every candidate has given his speech, the following oral examination takes place in the form of a discussion covering everyday practical situations, for example, simulating the visit of a client to a solicitor, a procedural situation during a trial in court, a factual or legal problem that may arise in local administration. In short, in all phases of this examination, candidates do not only have to show their abstract knowledge of the law but also their ability to work with the law in a practical situation and to weigh and choose between a number of options which seem to be open to them.

At the end of all this, those who are successful are qualified to hold any position as a lawyer (i.e. judge, prosecutor, barrister). By that time, the average age of a student is about 28 to 30 years. Their chance of being appointed as a judge or employed as a lawyer in the civil service, however, depends not only on their passing these two law examinations but also on how well they have passed them. Only a better than "average" performance in the examinations, for example, may open the opportunity to becoming a judge; in spite of the meaning of the word "average", only about 15 % of all students receive marks that are called "above average". The rate of failure in the final exam lies around 15 % with an additional rate of failure of about 30 % in the first exam.¹⁵ The remaining 70 % "average" lawyers have to look for jobs in industry or go into private practice. With the number of successful law students rising steadily (in former West Germany from 4653 in 1981 to 7522 in 1991 and to about 10,800 in the whole of Germany in 2002)¹⁶ there is an ever-increasing number of self-employed lawyers in private practice who have a hard time earning their living. At the end of 2004, nearly 130,000 lawyers were admitted to private practice in Germany.

¹⁴ s. 51 paragraph 3 JAG, cf. note 7, supra; conditions vary a bit in detail among the Länder but are generally comparable.

¹⁵ Statistics of 2003, cf. tables 3 and 4; numbers vary quite a lot from Land to Land. The reasons for this are manifold and open to discussion and further research. Likely explanations are the quality of school training, the quality of law faculties, standards and demands in law exams but also social and economic background in certain regions. Exam results are increasingly being challenged. In North-Rhine/Westphalia, about 5 percent are being challenged in a pre-trial administrative review proceeding (Widerspruchsverfahren) which requires examiners to reconsider their marks. About 1 percent of all exam results are eventually reviewed in court. Less than 0.1 percent are successful - success meaning that either the papers have to be marked again by the same or by other examiners or that the candidate has to be offered another chance to write an exam paper or to do the oral exam.

¹⁶ cf. table 5.

1.1.3 Further prerequisites

Federal law does not provide for any further prerequisites. As far as can be seen, no further requirements are laid down by the laws of the Länder either. Apart from the professional qualification acquired by the two law exams (Befähigung zum Richteramt within the meaning of section 5 of the Judiciary Act) no further professional experience is necessary. There is no policy of recruiting judges from the ranks of other legal professions although, for the purposes of appointment for life, time spent in other legal professions may be taken into account.¹⁷ There is no minimum or maximum age although, of course, when appointing future career judges, the duration of future working life until the compulsory retirement age of 65 may be taken into account. Likewise applicants for the judiciary - like all applicants for the civil service - have to provide a health certificate in order to allow a prognosis whether the retirement age is likely to be reached in their case. On the other hand, the law requires preference to be given to handicapped persons in cases where they have met all other criteria at a level equal to that of other applicants. Finally, as is the case with all applicants to the civil service, they should be of good moral standing, i.e. they have to provide a report from the registry of criminal convictions and they have to make a declaration as to whether and in what way they are indebted. It can be assumed that if these matters give rise to objections they will not be appointed.

1.1.4 Procedure of recruitment and selection

As has been shown, the process of recruitment and appointment of career judges is in the hands of the Länder judicial administrations. In some of the Länder, this matter is dealt with in full by the Ministry of Justice whereas in other administrations the authority to decide on recruitment and on the (first) appointment has been transferred to the president of the higher regional courts (i.e. the Länder courts of appeal). In some administrations candidates can apply at any time, and selection proceedings are held continuously throughout the year as vacant positions have to be filled, whereas in other cases applicants for judicial office are sought by job advertisement (Ausschreibung – public tender). Job advertisements are intended to ensure that applicants have equal opportunities of access to public office and that at the same time the most suitable applicant can be selected from as large a group as possible. Where proceedings are commenced without prior advertisements it is assumed that those interested in the judiciary will try to acquaint themselves with the procedure that has been adopted and apply on their own initiative; it is expected that this is the group most interested and most suitable for judicial office.

¹⁷ s. 10 paragraph 2 DRiG, cf. note 4, supra

In half of the 16 Länder, judicial electoral committees (Richterwahlausschüsse) also participate in recruitment. These committees are parliamentary committees. Their members are appointed for a parliamentary election period and, as a rule, chosen by a parliamentary vote, some times on the basis of nominations of relevant professional groups (e.g. the judiciary, the bar). The recruitment is only valid with the concurring votes of the competent minister and the electoral committee. There are some differences between the electoral committees of each Land in regard to composition. They consist mainly of members of the respective Land parliament or persons commissioned by them. Members of the judiciary and lawyers may be included:

Baden-Württemberg 15 members:

6 members of the Land parliament,
6 judges (permanent members),
2 judges (of the jurisdiction concerned),
1 lawyer
Chairperson: minister (no voting right)

Berlin 12 members:

6 members of the Land parliament (Senat),
5 judges
1 lawyer
Chairperson: minister

Brandenburg 12 members:

8 members of the Land parliament,
2 judges (permanent members),
1 judge (of the jurisdiction concerned),
1 lawyer
Chairperson: minister (no voting right)

Bremen 11 members:

5 members of the Land parliament (Bürgerschaft),
3 ministers (Minister of Justice and 2 other ministers)
3 judges

Chairperson: minister competent for the court concerned¹⁸

¹⁸ The expression "Minister competent for the court concerned" derives from the fact that in the Federation and in some Länder social and labour jurisdiction come within the scope of the Ministry of Labour and Social Affairs.

Hamburg 15 members:
 6 members of the Land parliament (Bürgerschaft),
 3 ministers (Minister of Justice and 2 other ministers)
 3 judges
 2 lawyers
 Chairperson: minister appointed by the Land government

Hessen 13 members:
 7 members commissioned by the Land parliament,
 5 judges
 1 president of the Bar
 Chairperson: Minister of Justice (no voting right)

Schleswig-Holstein 12 members:
 8 members of the Land parliament,
 2 judges (permanent members),
 1 judge (of the jurisdiction concerned),
 1 lawyer
 Chairperson: Minister of Justice (no voting right)¹⁹

Thüringen 12 members:
 8 members of the Land parliament,
 3 judges
 1 president of the Bar
 Chairperson: Minister of Justice (no voting right)²⁰

Generally speaking, both in proceedings where only the Ministry of Justice or the higher regional court are involved as well as in those where electoral commissions have to decide together with the Ministry of Justice, some kind of evaluation of the credentials of candidates is taking place. Because of the different nature of these proceedings, the process of evaluation may vary. Invariably, the criteria listed above will have to be taken into account. These are:

- General criteria (German citizen, health, moral standing)
- Professional qualification (state exams, Befähigung zum Richteramt)
- Social competence

¹⁹ Where the electoral committee decides on recruitment for the labour or social jurisdiction, there are 4 more members of the Land parliament, 1 representative of the employers and 1 representative of the employees.

²⁰ The committee in Thüringen is only involved in appointments for life or promotions, not in cases of first recruitment.

The information available as to the extent to which professional qualifications and "soft criteria" like social competence are weighed in this process will be discussed below (1.2).

1.1.5 Details of the procedure of recruitment and selection

Recruitment proceedings invariably start with an application by the respective candidates. From then on, proceedings differ greatly in detail, and this irrespective of whether a judicial electoral committee is involved or not. In most of the Länder candidates have to appear before a recruitment commission and present their application, and it is on the basis of the vote of this commission that the competent authority (the ministry or the president of the higher regional court) decides on recruitment where no judicial electoral committee is involved. Recruitment commissions are set up on the administrative level, usually by the Ministry of Justice; in general, they are composed of high ranking civil servants of the Ministry of Justice and / or court presidents. Proceedings before these recruitment commissions vary greatly. In some of the Länder, such commissions have not been established and it is the respective authority itself that decides, mostly on the basis of the documents supplied and in the light of an interview with the candidate. In those cases where the Länder have electoral committees, recommendations as to which candidate should be selected are quite often given to the electoral committee. Such recommendations may be based on the vote of a recruitment commission, they may be given by the president of the higher regional court on his own account or there may have been a formal process involving another commission, in some cases consisting of judges. In addition, details of recruitment procedure may vary even within a Land - from judicial branch to judicial branch (i.e. ordinary courts, administrative courts etc.), from district to district and in relation to the courts vis-à-vis the prosecution office. The following list shows only the major aspects of respective procedures. Unfortunately, there has so far been no evaluation of the value of these various procedures. In all the Länder, regulations on equal opportunity for female applicants (gender mainstream rules) require the person who has to observe and control the application of these regulations (Gleichstellungsbeauftragte, such offices exist in all administrations) to take part in the proceedings at some stage.

Baden-Württemberg

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam including all assessments during the two years' practical training and an interview with the head of the personnel department of the ministry. The idea of introducing more detailed procedures (assessment centres, cf. Nordrhein-Westfalen, below) has been rejected because results of the present

scheme have been satisfactory and the time consumed and costs produced by such procedures are considered higher than the expectation of achieving better results.

*Bayern*²¹

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an interview with the head of the respective personnel department of the court. The idea of introducing more detailed procedures (assessment-centres, cf. Nordrhein-Westfalen, below) has been rejected because the efforts occasioned by such procedures were considered higher than the expectation of achieving better results.

Berlin

Extensive interviews are conducted by the president of the higher regional court and the court's head of the personnel department. The court then reports on the basis of these interviews and the relevant documents to the Ministry of Justice which then passes the proposal on to the judicial electoral committee. Before introducing more detailed procedures consideration would have to be given to the weight attached to the results of such procedures with respect to the vote of the judicial electoral committee.

Brandenburg

Extensive interviews are conducted by the president of the higher regional court and the court's head of the personnel department. The court then reports on the basis of these interviews and the relevant documents to the Ministry of Justice which then passes the proposal on to the judicial electoral committee.

Bremen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and interviews. An electoral committee is, however, involved.

Hamburg

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and interviews. An electoral committee is, however, involved.

Hessen

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is, however, involved.

²¹ cf. Meisenberg, Deutsche Richterzeitung 2003, p. 227.

Mecklenburg-Vorpommern

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.

*Niedersachsen*²²

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview in the Ministry of Justice.

Nordrhein-Westfalen

The higher regional courts in Nordrhein-Westfalen employ different systems. All of them have formed commissions which usually consist of the president of the higher regional court, the head of the personnel department, a president of a regional court (usually the court where the vacant position has to be filled) and the person responsible for equal opportunity matters (Gleichstellungsbeauftragte). Proceedings, however, differ:

- in the court in Düsseldorf, candidates have to go through
 - a 10-minute interview on the role of a judge,
 - a 5-minute role play concerning a situation at a court trial
 - a 20-minute general interview designed to obtain an impression of the candidate's personality
 - a 10-minute role play
 - a 30-minute group discussion
- in the court in Cologne, candidates have to
 - give a 10-minute speech without referring to notes on a subject of their choice (which may have been prepared)
 - go through a 30-minute "working test" where they are confronted with 10 different files or documents and they have to decide what to do with them next
 - go through a 45-minute standardised interview (presentation, structured and standardised questions)
- in the court in Hamm, the most elaborate system has been employed.²³ It takes a full working day and consists of
 - a 45-minute group discussion on a given - legal - topic; the participants (usually 6) are divided into two groups of three who have to present the

²² cf. Kramer, Deutsche Richterzeitung 2003, p. 226.

²³ For a detailed description of this system given by the president of the higher regional court in Hamm cf. Debusmann, Deutsche Richterzeitung 2003, p. 263. A system like this is, in German, labelled with the English word "assessment centre". This technical term has come in use during the last decade, originating apparently from recruitment proceedings in commerce and industry and being increasingly used in staff recruitment in the administration. The general discussion on the value of "assessment centres" cannot be reported here. Main points of debate are the expenditure of (human and financial) resources and expected results as well as whether specific training of applicants for the purpose of performing well in assessment centres might blur results.

differing views (pro and con); after about 20 minutes, the discussion is usually interrupted and guided in a different direction, the groups of three may then be dissolved

- after this, candidates have to assess in writing their situation during the group discussion; meanwhile each member of the committee individually assesses the performance of the candidates
- three of the candidates are given interviews in the morning while the other three candidates undergo a "working test"; in the afternoon, they then switch
- the interview in its first part lasts about 30 minutes and is conducted by one member of the commission (but in the presence of all members) whereas in the second part all members may ask questions; the interview is standardised (structured and standardised questions); after the first part of the interview, there is a short break during which candidates are asked to give their written assessment of this part
- the practical "working test" consists of 15 different files or documents with which the candidates are confronted and where they have to decide what to do with them next
- after all this, the individual assessments given by the members of the commission are presented to the commission; the results of the "working test" are considered by a judge and presented to the commission; the commission decides in the light of the candidate's total performance throughout the day, and the candidate is then informed of this decision.

An evaluation of these different systems is planned but has yet to be conducted.

Rheinland-Pfalz

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews with the presidents of the respective higher regional courts and the head of the personnel department of the Ministry of Justice. Results are considered satisfactory; therefore more time-consuming procedures like assessment-centres are not being considered.

Saarland

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview with the secretary of state in the Ministry of Justice, the head of the personnel department of the ministry and representatives of the staff council.

Sachsen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews.

Sachsen-Anhalt

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.

Schleswig-Holstein

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is, however, involved.

Thüringen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam, including the assessments during practical training before the final exam, and an extensive interview.

1.1.6 Judicial review

Regardless of all these various systems of selection employed, all decisions by the competent authorities are - at least in theory - subject to judicial review. An unsuccessful applicant can challenge the decision to recruit somebody else on the basis that his right under article 33 of the constitution (Grundgesetz) has been violated. It is accepted that it follows from article 33 that authorities are under a duty to recruit the person who is best qualified for the vacant position. On the other hand, because strict criteria do not exist, it is equally accepted that there is a certain prerogative for the authorities to decide on which criteria they are going to place the most emphasis. Applicants have a right to be treated fairly and equally in the proceedings and also have a right to be informed of the intended decision on selection. This is to enable them to seek judicial review before the decision is implemented because, once another candidate is appointed and the vacant position has been filled, the recruitment procedure is closed. Damages could only be awarded in money but not in the form of another appointment because with respect to any other position, an open recruitment and selection procedure under article 33 would have to take place again.²⁴

²⁴ Details of this rather complex legal field of law suits of or among competitors for public appointment (mostly for higher appointments, i.e. promotions) cannot be fully described in this survey. As most of these cases concern promotions, the general principles and reference to some case-law are supplied below, 3.6. As far as recruitment and initial appointment are concerned, it seems that as yet no case has been brought before the courts; the most likely reason for this is that candidates who are not accepted seek employment elsewhere (e.g. in private practice) rather than to take the judicial administration to court over the refusal of initial appointment; see further below 1.2, at the end.

1.1.7 Prosecutors

Practice of recruiting prosecutors (Staatsanwälte) is quite similar to that of career judges as explained above. Like the judiciary, the prosecution offices are mainly organised, and prosecutors are employed, by the Länder. On the federal level the Federal Prosecutor General (Generalbundesanwalt) and his or her staff are employed by the Federation and appointed by the federal government or the Federal Minister of Justice. The Federal Public Prosecutor's Office acts as investigating and prosecuting authority in certain cases involving state security; it also provides the Federal Court of Justice with comments on appeals in criminal cases. All other duties of the prosecution lie with the prosecutors of the Länder, with offices at the regional court level and at the level of the higher regional courts (public prosecutor's office and public prosecutor general's office, Staatsanwaltschaft, Generalstaatsanwaltschaft).

Career prosecutors are appointed by the Minister of Justice and usually the prosecutor general is involved in the recruitment proceedings. Judicial electoral committees are not established. Preconditions, qualifications and the process of selection are very much comparable to that of judges.²⁵ As far as can be seen, elaborate selection systems like the one in the higher regional court in Hamm do not exist, but it can be assumed that detailed and sometimes structured interviews are a prevalent mode of selection.

1.1.8 Federal Judges

The judges of the highest federal courts (Bundesrichter) are elected jointly by the electoral committee of the Federation and the Federal Minister competent for the court concerned, in general the Minister of Justice. The electoral committee of the Federation consists of the respective Länder ministers (16) and 16 members of the Federal Parliament (Bundestag) or persons commissioned by parliament (article 95 para 2 Grundgesetz). The Federal Minister competent for the type of court concerned chairs the sessions of the electoral committee but has no voting right. Each individual member of the electoral committee has a right to present candidates, and it follows from this that a strict recruitment procedure does not exist. There is, however, participation of the judiciary through a body representing the judges (presidential council or "Präsidentialrat", i.e. a council for judicial appointments at the respective federal court which represents the judges of the

²⁵ It is interesting to note that the legal requirements are laid down in the German Judiciary Act, s. 122, cf. note 4, supra, which provides that only a person qualified to hold judicial office according to sections 5 to 7 of the act can be appointed as prosecutor.

court).²⁶ This council gives an advisory opinion on the personality and the aptitude of the candidate and this opinion has to be presented to the electoral committee.²⁷

1.2 Evaluations made in the recruitment process

Invariably, it is the aim of the various recruitment and selection proceedings to ensure that the most suitable applicants are selected. In trying to reach a broader basis for their selection decisions some of the Länder have attempted to define further criteria in addition to the general criteria and the general professional qualifications as laid down by the law and explained above. Whereas in the past recruitment of judges has generally taken place on the basis of the results of the final state exams it is now increasingly accepted that further abilities and skills are necessary to make a good judge, and this has been underlined by inserting the requirement "social competence" in section 9 of the Judiciary Act.²⁸ Some Länder administrations have drawn up lists of further criteria which have to, or should be, fulfilled by candidates. In some cases, these lists (employee profiles, "Anforderungsprofil") have been established only for higher judicial office (their fulfilment being prerequisite for a chance of promotion) whereas in other cases they include initial appointment.

Very elaborate profiles do exist in the Länder Bayern (Bavaria), Hessen (Hesse) and Niedersachsen (Lower Saxony).²⁹ North-Rhine/Westphalia is in the process of establishing a list. These profiles cannot be presented here in all their detail, but it may suffice to describe their basic structure. Requirements are listed in various classes, and it is invariably the classes "professional competence" and "personal competence or ability" that can be found; in some cases "social competence" is listed separately and also "competence to lead" may be found. Within these classes, rather long lists of detailed requirements have been put together. The draft list of North-Rhine/Westphalia, for instance, contains, inter alia, the following elements many of which can also be found in the profiles of the other Länder:

²⁶ cf. s. 54 et sequ. DRiG, note 4 supra.

²⁷ The process of election and appointment to federal courts is closer to promotion than to initial recruitment. Vacant positions, however, will not be publicly advertised, applications are quite uncommon; instead prospective candidates have to rely on being presented by a member of the electoral committee. The electoral committee decides on the basis of written evaluations, cf. 3.3, below. Decisions are subject to judicial review, cf. 3.6, below. The electoral process is subject to some critical discussion because it is not considered sufficiently transparent.

²⁸ cf. note 4 supra.

²⁹ Anforderungsprofil für Richter und Staatsanwälte, published as internal regulations by the respective Ministry of Justice.

I. Professional competence

Professional qualification

- Wide knowledge of the law
- Ability to apply the law in practice
- Ability to acquaint oneself with new legal fields
- Good judgement
- Ability to apply information technology

Understanding of judicial office

- Impartiality
- Prepared to actively uphold the values of the constitution
- Prepared to defend against undue influence
- Prepared to take responsibility for judicial decisions
- Awareness of the influence of private conduct on judicial office

Ability to present arguments and to convince

- Precise phrasing
- Ability to define issues in complex cases
- Giving reasons thoroughly, with respect to the individual case
- Openness

Ability to conduct hearings and interrogations

- Being thoroughly prepared
- Knowledge of the court files and documents
- Planning and structuring of trials
- Respect for the interests of the parties
- Understanding, sensitiveness and patience with parties
- Clear view of chances for settlements

Competence in teaching

- Prepared to instruct students in preparatory service
- Diligent correction of students' papers

II. Personal competence

General elements of personality

- Broad interests
- Natural authority
- Prepared to accept difficult duties
- Awareness of one's strengths and weaknesses
- Control of one's emotions

Sense of duty and responsibility

- Awareness of social responsibility
- Prepared to accept responsibility for the judicial administration
- Able to assess consequences of decisions
- Responsible handling of a large workload
- Openness towards lay judges and court staff

Ability to cope with the workload

- Physical and psychological fitness
- Prepared to accept additional duties
- Able to work fast under pressure and with concentration
- Maintaining standards even with a larger work load

Ability to manage and to organise work

- Set priorities
- Optimise work flow
- Able to motivate oneself and others
- Delegate work reasonably
- Take available resources into account

Ability to decide

- Decide swiftly and responsibly
- Prepared to face necessary disputes

Flexibility and preparedness for innovations

- Openness towards new technologies
- Openness towards modernisation of courts
- Prepared to work in different court structures
- Ability to develop new solutions

III. Social competence

Ability to work in a team

Ability to communicate

Ability to deal with conflicts and to mediate

- Prepared for compromises
- Fairness, positive approach in dealing with colleagues
- Constructive criticism
- Ability to mediate
- Being accepted as an authority

Awareness of service aspects

- Respect for interests and concerns of parties and witnesses
- Politeness
- Keeping to schedules
- Taking the necessary amount of time

IV. Competence to lead

- Clear instructions
- Trust in staff and colleagues
- Openness for concerns of staff

It is the aim of recruitment and selection proceedings described above to evaluate applicants with respect to elements like these and to reach a prognosis as precise as possible as to the performance of candidates in their future office. There are, however, at present no reliable data as to the weight which the Länder are giving to all or any of these elements. But it is fair to say that the group of elements

listed under "professional competence" is widely accounted for by referring to the results of the second and final state exams, sometimes including the result of the first exam and other professional qualifications. In fact, many of the Länder have set a mandatory limit for invitations to interviews or for other selection proceedings. According to a survey done in the year 2002, these limits were:³⁰

Baden-Württemberg: Minimum 8.00 points

Bayern: No minimum requirement but in practice no chance with less than 9.00 points

Berlin: No minimum requirement but in practice 9.00 points in both exams

Brandenburg: Same as Berlin

Bremen: No minimum requirement

Hamburg: Same as Berlin

Hessen: Minimum 8.50 points

Mecklenburg-Vorpommern: Minimum 9.00 points or 8.00 points with exceptional first exam

Niedersachsen: Minimum 8.00 points

Nordrhein-Westfalen: Minimum 9.00 points or 7.75 points with additional qualifications

Rheinland-Pfalz: Minimum 9.00 points

Saarland: Minimum 9.00 points

Sachsen: Minimum 8.50 points

Sachsen-Anhalt: Minimum 9.00 points

Schleswig-Holstein: Presumably like Berlin

Thüringen: Minimum 9.00 points

It has to be noted, however, that these limits have been set in the light of a job market where Länder judicial administrations can recruit candidates for the judiciary from a large group of well-qualified applicants. Even where the limit is lower than 9.00 points (which is the equivalent of the mark "fully satisfactory" reached by only about 15 % of the candidates) applicants with less than 9.00 points have to face a high number of competitors with much better marks. This means that to get selected these candidates would have to show a much better performance with respect to the other criteria of the "profiles".

The reliability of the other criteria is subject to rather intensive discussion.³¹ Regardless of the list employed and the different selection procedures in the Länder persons in charge of selection tend to maintain that their respective systems provide satisfactory results and that the number of (junior) judges who leave (or will have to leave) office before they are appointed for life is significantly low. This is hardly surprising when the group of applicants from which successful candidates are

³⁰ For the point system in German law exams see the list in tables 3 and 4; the maximum is 18 points.

³¹ cf. e.g. notes 21 and 22, *supra*.

selected is itself recruited from the top 15 % of those holding the professional qualification required by law, and there may be room for argument that, if those selected were rejected and another group out of the top 15 % were to be selected, the results might be equally satisfactory.

It is also an open question in what way the "profiles" and the elements listed in them may be subject to judicial review. In theory, as has been mentioned above, the decision on selection and recruitment can be challenged in court, and it could be envisaged that such a challenge might be based on grounds like, for instance, that a proper ranking order of these elements does not exist, that decisions are still arbitrary, that a competitor does not fulfil as many requirements as the applicant does et cetera. In practice, there are no known cases of court decisions on this subject - which is again understandable in view of the situation on the job market. An applicant who is rejected in one of the Länder may try to be appointed in another one, or he or she may decide no longer to seek judicial appointment but rather go into another branch of public service or into private practice. Because of the fact that applicants belong to the small group of highly qualified young lawyers, they will have no trouble finding a decent job and therefore have little incentive to challenge the decision on selection in court.

1.3 Numbers of candidates, of open positions, average entrance age

Exact numbers of open positions for judicial appointments at the level of the beginning of a career are not available. Likewise, exact numbers of candidates for these positions do not exist. Therefore, the ratio of applicants as against openings cannot be given.

The overall number of judges in the Länder has been rather constant in the last decade, whereas in the years immediately following German unification the task of setting up a democratic machinery of justice in former East Germany had resulted in additional openings. The number of judicial positions is included in the yearly budget of the relevant Land and thus has to be decided by the Land parliament. In spite of an increasing work load, judicial positions have not been increased; instead there have been attempts to economise and speed up proceedings (by way of amendments in the laws of procedure) and to introduce additional support through information technologies in order to allow the individual judge to deal with the work load more efficiently. It is assumed that about 5 % of successful law candidates will be recruited for the judiciary each year, which would mean about 500 appointments per year for all courts, the number being a little lower (approximately 420 to 460) for the ordinary courts of justice (both numbers excluding prosecutors).

The number of formal applications per year cannot be given. Länder like North-Rhine/Westphalia, where law exams are offered continuously throughout the year, tend to have a selection process with applications being possible throughout the year; they take applications at any time and go through them before the next round of interviews or formal selection proceedings. Länder like Bavaria, with an exam system of two or three fixed dates per year for the final exams have a major interest to recruit the best candidates immediately after each round of exams; consequently they tend to invite applications immediately and to decide rather quickly on these applications.³² In addition, because of the fact that informal "entry requirements" as described above³³ may not be widely known, there is a large number of informal applications or inquiries which never end in formal applications. It may be assumed that the number interested to work in the judiciary may lie anywhere between 15 % and 25 % of those who have passed the final exam, whereas only about two times as many candidates as there are open positions would perhaps be invited for interviews or assessment centres; this would mean that about 1 in 2 applicants who have made it to the interviews or other formal selection proceeding will in the end be appointed.

The average age of newly appointed judges (and also of prosecutors) corresponds, by and large, with the average age of the more successful law candidates which is between 26 and 29 years.³⁴

1.4 Functions in the process of recruitment

The functions of the relevant bodies (government agencies, committees, councils) in the process of selection and recruitment are described above.³⁵

1.5 Further observations on the efficacy of the recruitment system

It has been shown above³⁶ that a wide variety of systems of recruitment and selection does exist. Although their structures are reviewed continuously and this review is encouraged by the fact that different systems are employed in the Länder, these structures still have been established with a view of keeping them permanently in the sense that arbitrary changes of structures and / or proceedings are ruled out. This is caused first of all by mere economic considerations because it is more efficient to have a somewhat permanent organisation of recruitment. It is

³² cf. Meisenberg, Deutsche Richterzeitung 2003, p. 227.

³³ cf. 1.2.

³⁴ Detailed data do not exist; for the results of a survey done for the year 1999 cf. table 7.

³⁵ cf. 1.1 ("competent body for appointment" and "procedure of recruitment and selection").

³⁶ cf. 1.1.

also a consequence of the legal framework surrounding recruitment which forbids arbitrary decisions. Therefore, if an administration has opted for a specific process of selection, it has to abide to these self-imposed rules as a general mode of operation until it decides to replace them by another set of rules. It is this self-binding effect of administrative regulations and practice that demands a certain permanence of structure and proceedings. If such a practice with self-binding effect would be neglected without sound reason, there would be a risk that the decision could be successfully challenged on the mere ground that self-imposed regulations have not been obeyed. Likewise, both for economic and legal reasons, it is essential that selection proceedings are conducted speedily, because - in the interest of justice - vacant positions have to be filled promptly. In addition, there is a constitutional right to have a decision on any application to the public administration within a reasonable period of time. This also applies to job applications in the public sector. If such an application would not be decided upon within reasonable time, the applicant could take the administration to court on the mere grounds of unreasonable delay. In the circumstances of recruitment for the judiciary, one could argue that – depending on the proceedings established in the Länder – a court would hold that a reasonable time for decision would lie between 3 and 6 months.

2. INITIAL TRAINING

As has been pointed out above³⁷, it is the aim of general legal education in Germany to qualify for judicial office. General legal education, therefore, to a large extent deals with specific skills deemed necessary for judges and prosecutors, especially the drafting of judgements and of indictments which are part of the second state exam. Unlike in most other countries, in Germany young lawyers can be appointed to the bench without additional (initial) training, and it is quite common that they sit and work as judges with almost no or only a short introduction in their field of work.

Despite this, it has been accepted for decades that there is a certain need for additional training at an early phase after appointment in order to acquire a certain amount of expertise and know-how concerning the day-to-day business in court and in the prosecutor's office. Various methods have been used in this respect in the Länder.

First of all, for some period of time it was rather common to assign only a certain portion of the average work load (usually between 50 and 70 percent) to junior judges and prosecutors, the idea being that at the beginning of their career it

³⁷ cf. 1.1 ("prerequisites, preconditions, qualifications"); ss. 5 to 7 DRiG, s. 4 BRAO, cf. notes 4 and 11, *supra*.

would take them more time to deal with a given case. In addition, in some judicial administrations experienced judges and prosecutors have been asked to act as advisors or tutors for junior judges and prosecutors. In the prosecution, it is still the rule that beginners are not entitled to sign indictments but that their drafts have to be counter-signed by a superior. In the courts, however, this is not possible, because even a junior judge is performing his duties in judicial independence; this does not exclude, however, that he may ask seniors for their opinion and advice.

In the so-called ordinary courts, junior judges would, as a rule, be assigned to a panel of three judges at a regional court (*Landgericht*) which would enable them to share the responsibility of decision-making with the colleagues of the panel and at the same time gain experience by observing their work. This is not possible in courts like labour or social courts where even the newly appointed judge as the sole professional judge is presiding over a panel which also consists of two lay judges. In these jurisdictions, some courts have introduced a somewhat informal period of initial instruction, between two and eight weeks, where the newly appointed junior judge does not have cases assigned to him but during which time he can accompany and watch a senior judge in his work. This may increasingly become necessary in the ordinary courts because, due to an amendment in the codes of procedure, more civil law suits will have to be decided at first instance by single judges which may result in a substantial reduction of judicial positions in panels of three professional judges.

In addition, some of the *Länder* have introduced compulsory seminars for junior judges and prosecutors. Strictly speaking, these seminars are part of continuing education (*Fortbildung*, formation continue). It is, however, justified to discuss them here because they are limited to the time prior to appointment for life³⁸, because participation is compulsory³⁹ and because their aim is not so much to maintain and widen professional knowledge and expertise but rather to enable participants to acquire the standard skills necessary for working as a judge or prosecutor. In North-Rhine/Westphalia, e.g., different sets of seminars are offered for junior judges and for prosecutors, comprising three seminars of three days for each group. According to the syllabus of these seminars, the following subjects are dealt with:

- Organisation of the courts, co-operation within the courts and their panels, dealing with litigants, work techniques, planning of trials, understanding of the role and the office of a judge
- psychological aspects of communicating with litigants and lawyers, ascertaining the facts, examining witnesses, weighing the evidence

³⁸ For the distinction between junior judges (judges on probation, *Proberichter*) and judges appointed for life, cf. 3.1 below.

³⁹ In theory, this would mean that a person who is not taking part may not be appointed for life but would be dismissed; in practice, to the knowledge of the author of this study, no such case has occurred.

- discovering and handling conflicts, handling of a trial, time management, management of work flow, techniques of speech

So far, individual performance in these seminars has not been evaluated. The decision on an appointment for life is taken on the basis of professional evaluations taken throughout the period of three to five years after initial appointment with a view of whether the junior judge (likewise the junior prosecutor) is, in the eyes of those responsible, sufficiently qualified for permanent appointment. The rules and proceedings of these evaluations are similar to those for judges already appointed for life, as described below.⁴⁰

3. JUDICIAL CAREER

3.1 Appointment for life, retirement, salary

German professional judges are career judges who spend all or most of their working life in the judiciary. After primary recruitment they are appointed as junior judges (literally: judges on probation, "Proberichter"). According to sections 10 and 12 of the German Judiciary Act⁴¹, in order to be appointed for life, judges have to serve a minimum of three years as junior judges. During that period, they have the full rights and duties of a judge appointed for life⁴² but can be dismissed more easily than judges appointed for life.⁴³ At the latest five years after initial recruitment junior judges have to be appointed for life (by the respective Minister of Justice). This is to guarantee that, as a rule, the judiciary consists of judges appointed for life who cannot be dismissed except by way of special proceedings with safeguards for judicial independence⁴⁴. Appointment for life, as a rule, does not come with a change in actual judicial work, but the judge would normally keep his previous assignment.

Salaries vary greatly depending on rank and seniority. Judges in courts of first instance receive a monthly salary between approximately 2400 € (at the age of 31 years) and 3800 € (age 49 or older), after taxes. At the first level of promotion

⁴⁰ cf. 3.2, 3.3, below.

⁴¹ cf. note 4, supra.

⁴² Certain limitations do apply; e.g. only one junior judge can sit in a panel of three judges (s. 29 DRiG), junior judges have to be in office at least one year before they are allowed to decide in family cases or sit as presiding judges in criminal trials with two lay judges (sections 23 b para. 3 and 29 para. 1 Gerichtsverfassungsgesetz (GVG) of May 9, 1975, Bundesgesetzblatt 1975 I p. 1077, as amended per August 24, 2004, Bundesgesetzblatt 2004 I p. 2198).

⁴³ s. 22 DRiG, cf. note 4, supra.

⁴⁴ cf. 4.2, below.

salaries lie between 2800 € and 4200 €. In higher offices, salaries are fixed and do not vary with age. At the second level of promotion (cf. 3.3, below), the salary is about 4500 € after taxes. Presidents of large regional courts and judges in the highest federal courts receive about 5500 €. Presidents of higher regional courts and of the highest federal courts have monthly salaries between 6000 € and 8000 €. The income per year usually comprises 12 monthly salaries. The Federation still pays a 13th salary, some of the Länder pay less than a monthly salary as a 13th payment, others pay only 12 salaries.

Compulsory retirement age for judges is 65 years, both in the federal judiciary as well as for judges of the Länder and for prosecutors. This means that, on average, they remain in office about 35 years. On retirement, the majority of judges will have reached at least the first level of promotion (only about 5 percent a higher level). Retirement pension depends on the time served in office and on the level of promotion reached until three years prior to retirement; the limit is 75 percent of the salary for active duty, approximately between 3000,- and 3500,- € after taxes.

3.2 Professional evaluation in the course of the working life

Professional evaluation of judges and prosecutors throughout their career is the responsibility of the Länder judicial administrations. As far as can be seen, all the Länder employ systems of evaluation which are designed to provide a certain ranking of the judicial staff as a basis for decisions on promotion. It is not possible to describe these systems in all their details and variations. Their basic structure, however, is as follows:

The occasion of evaluation is either general or specific. Most of the Länder have regulations providing for evaluation of judges (and prosecutors) in regular intervals, usually every four or five years.⁴⁵ This does not mean that the individual judge will be evaluated every four or five years, calculated from the date of his or her appointment; instead, a fixed date for evaluation of all judges is set and the evaluation periods run from then on, the idea being to assess and evaluate the full judicial staff at one fixed date and to create a certain ranking of all judges. Usually, judges over 50 or 55 years of age are or may be excluded from evaluation.

In addition to this general evaluation there may occur specific reasons for evaluation which will lie in the person of the judge who is to be evaluated. These reasons can be manifold, for instance when he applies for an open position in

⁴⁵ The legal basis for these regulations lies in the respective laws on civil service. E.g. s. 104 Landesbeamten-gesetz Nordrhein-Westfalen of May 1, 1981 (Gesetz- und Verordnungsblatt NRW 1981 p. 234), as amended per December 17, 2003 (Gesetz- und Verordnungsblatt NRW 2003 p. 814) states that civil servants should be evaluated in regular intervals; according to s. 4 para. 1 Landesrichtergesetz of March 29, 1966 (Gesetz- und Verordnungsblatt NRW 1966 p. 217), as amended per April 20, 1999 (Gesetz- und Verordnungsblatt NRW 2002 p. 148), this section, as a rule, applies also to judges.

another court, especially for a promotion, when he is (with his consent) for a limited period of time transferred to another court without giving up the position for life in the original court, when he or she is taking leave of absence (e.g. for family reasons or in order to take over work in the government administration) *et cetera*.

The person who evaluates is invariably the president of the regional court or (in case of judges of the higher regional court) the president of the higher regional court. These are by law the "superiors" of all judges in their respective court districts. Evaluation is the personal responsibility of the court presidents which means that it cannot be delegated to anyone else (except the vice-president). Considering the number of judges which may well amount to 200 or more in one regional court district periodic evaluation at a given date is an enormous task and also evaluations for special occasions which tend to be quite numerous make up a great part of the work load of court presidents. It is, however, accepted that although the decision on evaluation is their personal responsibility, they are entitled to rely on the help of assistants (judges who - with part of their working force - work in the administrative department of the courts). This is essential as in the course of preparing the evaluation it is necessary to look into court files, to read judgements handed down by the judge who has to be evaluated, to go through statistics (e.g. the number and percentage of cases decided by judgement, of cases settled etc.) and to gather other information (e.g. from lawyers, other judges - especially those presiding over the panel of which the respective judge is a member -, appeal court judges). It is also quite common that in preparation of an evaluation the president or the vice-president will sit in as spectators in a trial conducted by the judge to be evaluated.

The criteria for evaluation are laid down in general terms in regulations which can be found in all judicial administrations of the Länder. They vary in detail but in general they follow the line of lists that have recently been developed for the purpose of initial appointment or for appointment to higher judicial office in some of the Länder.⁴⁶ Professional competence (e.g. knowledge of substantive and procedural law, ability to conduct trials etc.), personal competence (e.g. ability to cope with the work load, ability to decide, openness for new technologies and developments etc.), social competence (e.g. ability to mediate, respect for concerns of parties, ability to lead constructive discussions etc.) and - especially in cases where higher appointments are in question - competence to lead (administrative experience, ability to lead and instruct teams etc.) are the main headings under which diverse and detailed criteria can be found in these regulations.

The form of evaluation varies among the Länder. In some administrations, an evaluation sheet in the form of a check list has been introduced. All the elements considered relevant are listed and boxes showing the grade of performance of the

⁴⁶ cf. 1.2, above.

respective element have to be ticked. In summing up, a general result of the evaluation has to be expressed. In other Länder, evaluations are set out in a textual report describing various elements and the respective performance; here again, a final assessment, a mark, has to be expressed at the end of the report. This is essential for the purpose of creating a certain ranking of the staff.

It follows from this that certain general categories of evaluation have to be observed. Again these vary a little among the Länder but generally the following categories are used:

- below average
- average or satisfactory
- above average or fully satisfactory
- high above average or good
- excellent or very good

It is quite common to distinguish within each of these categories between lower, medium and upper level so that, for instance, an overall result could be "above average (lower level)" or "good (upper level)". The system is similar to the system of law exams with its scale from 0 to 18 points, where for individual results points 4 to 6 are associated with the mark "sufficient", 7 to 9 with "satisfactory", 10 to 12 with "fully satisfactory", 13 to 15 with "good" and 16 to 18 with "very good" (points 0 to 3 which indicate failed exams do not show here).⁴⁷ General statistics as to the spread of these final results of evaluations have been published only by some ministries.⁴⁸ For North-Rhine/Westphalia the author of this paper estimates that the spread may be

below average	0 %
average	2 - 3 %
above average	40 - 50 %
high above average	45 - 55 %
excellent	5 - 10 %

Junior judges usually start with an "average" and then like judges recently appointed for life work their way up through an "above average (lower level)" and

⁴⁷ The list in tables 3 and 4 shows the aggregated final marks of law exams but the categories are the same.

⁴⁸ The Ministry of Justice of North-Rhine/Westphalia has published statistics of evaluations concerning junior judges and judges appointed for life (excluding those that have been appointed to higher posts), cf. Richter und Staatsanwalt in NRW, 6/2003, p. 15. According to this, in the three districts of (ordinary) higher regional courts junior judges have been assessed between 26 and 38 percent as average, between 62 and 73 percent as above average and only less than 2 percent as high above average. Among the judges appointed for life but not yet promoted only up to 3 percent have been assessed as average, between 44 and 51 percent as above average, between 47 and 55 percent as high above average and none as excellent. The estimate given in the text includes judges in higher ranks who tend to be assessed with higher marks.

so on until, with continuing professional experience, an "above average (upper level)" or higher results may be reached. It is also not uncommon that judges who have recently been promoted will get a lower final mark than before the promotion because their performance has to be seen against higher demands and less professional experience in higher judicial office.

Some times evaluations do not only end with a final result describing the performance of the judge but also with a prognosis. This is the case when evaluation takes place on the occasion of the judge seeking another position, especially a promotion. Then not only the performance in the actual position has to be evaluated but the court president also has to express his opinion as to the performance that can be expected from the applicant in the position applied for. In general, the final result concerning the performance and this "aptitude prognosis" will show the same level, for instance, if a judge's performance at the regional court is considered "high above average" his aptitude to fill a position in the higher regional court will in general also be considered "high above average". In some cases, however, different results may be expressed, e.g. a very thorough and considerate judge with a "high above average" performance at first instance may - for lack of experience in administrative matters - not be given the "high above average" aptitude prognosis if he applies for the post of vice-president of a regional court.

The general difficulty of professional evaluation of judges lies in the limits that have to be observed for constitutional reasons. It is quite clear that judicial independence as guaranteed by the constitution forbids any kind of evaluation that weighs, marks and values the correctness and quality of judicial decisions. Section 26 of the Judiciary Act⁴⁹ states that "judges are subject to service inspections only insofar as their independence remains unaffected". This means that the president of the court may, for instance, criticise a judge for his personal or professional conduct but never for the way he has applied the law in his decisions. Evaluations, therefore, have to be limited to more general observations (like e.g. the broadness of the knowledge of the law, the speediness and / or thoroughness of deciding cases, the amount of work dealt with) or - as the literal translation of the German technical term says - the "outer order of judicial business" but they may not touch the core of judicial work, the correctness of the application of the law, the intrinsic value of the decision.⁵⁰

⁴⁹ cf. note 4 supra; see Heyde, note 2 p. 79; for further reference to all the legal problems of drawing the line between judicial independence on one side and the powers of the administration (court presidents, Ministry of Justice) on the other side see the commentary by Schmidt-Ränsch, *Deutsches Richtergesetz*, 5th edition 1995, especially on s. 26 DriG.

⁵⁰ Transgressions of these limitations may be challenged in court, see below 3.6

3.3 Evaluation and Promotion

As has already been indicated, professional evaluation of judges plays a major role in their career because decisions on higher judicial appointments are largely based on the results of evaluations in regular intervals as well as of evaluations made on the occasion of applicants seeking promotion. In the judiciary of the Länder, the career of judges starts with an appointment as a junior judge, followed by an appointment for life at a court of first instance (local court or regional court).⁵¹ Promotions may then be achieved along the following lines:

- judge (appointed for life) in the local or regional court (Richter am Amtsgericht, Landgericht)
- first level of promotion:
 - judge in the higher regional court (Richter am Oberlandesgericht)
 - or** judge in the regional court presiding over a panel (Vorsitzender Richter am Landgericht; about one in three judges at the regional court are promoted)
 - or** senior judge in the local court (Richter am Amtsgericht als weiterer Aufsicht führender Richter; about one in seven judges are appointed senior judges; significantly different judicial functions do not come with this promotion in the local court)
- second level of promotion:
 - judge in the higher regional court presiding over a panel (Vorsitzender Richter am Oberlandesgericht; about one in three judges at the higher regional court have reached this level)
 - or** vice-president of a regional court (Vizepräsident des Landgerichts)
- higher levels of promotion:
 - presidents of regional and higher regional courts⁵²

The process of promotion is quite formalised. It resembles the process of initial recruitment and selection. Invariably, positions for higher judicial office in the Länder are publicly offered by job advertisement in the official gazette. Judges who apply are evaluated by their respective president on the occasion of their application. The president will then report to the president of the higher regional court who in turn will add his own evaluation and then report to the Ministry of Justice. The ministry will make up its mind as to who is best qualified for the position. It will then communicate its view to the relevant presidential council, a

⁵¹ The rules according to which judges on probation (junior judges) are appointed for life or may be dismissed are set out above, 2 and 3.1.

⁵² There are a number of additional higher judicial offices, e.g. director and vice-director of local courts which, however, can be disregarded here. Similar lines of promotion exist in labour, administrative, social security and tax courts; judges appointed to tax courts are appointed on the first level of promotion, because tax courts are established like appeal courts and their judges, as a rule, have prior professional experience in other courts or in the tax administration. For federal judges cf. above, 1.1 ("federal judges").

professional body of judges elected by their peers. The presidential council in most of the Länder has merely advisory function, but justice ministers are reluctant to overrule their opinion.⁵³ When judicial electoral committees participate in appointments and promotions⁵⁴, it is then up to the committee to decide who has to be elected and who will consequently be appointed to higher judicial office. When no such committees are involved the decision on promotion is either taken by the Minister of Justice or by the cabinet of the Land. Unsuccessful candidates have to be informed of the intended appointment in order to give them an opportunity to apply to the administrative court to review the decision prior to the appointment.⁵⁵

As regards the criteria of promotion, it is quite clear that final marks reached in the evaluations 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.⁵⁶ In the event that several applicants hold the same result of evaluation, additional criteria may be brought in. Above all this will be the period of time for which the relevant result has been achieved by the applicants;⁵⁷ further criteria are the time served in the judiciary⁵⁸, age, gender (laws ask for preferential treatment of female applicants).

⁵³ cf. s. 54 et sequ. DRiG, note 4, supra, s. 22 et sequ. Landesrichtergesetz NRW, note 45, supra; similar legislation has been enacted in the other Länder. See note 26.

⁵⁴ cf. 1.1, above.

⁵⁵ This is necessary to guarantee efficient judicial review because once the competitor is appointed, unsuccessful candidates could not reach appointment by court decision because the relevant position is already occupied by the competitor; damages are not considered an effective remedy, cf. 1.1, above ("judicial review"), and 3.6, below.

⁵⁶ cf. 3.2, above; e.g. an applicant with the result "high above average (medium level)" could, as a rule, not be promoted if an other applicant is ranked "high above average (upper level)". This rule appears to be well established by recent decisions of the federal administrative court, where the court has pointed out that selection among applicants for higher posts has to follow, above all, the results of professional evaluations including evaluations that may date back some time; other criteria which are not related to professional performance (age, rank, 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, cf. Bundesverwaltungsgericht *Neue Zeitschrift für Verwaltungsrecht* 2003, p. 1397 and 1398; Oberverwaltungsgericht Lüneburg, *Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2003*, p. 878; Oberverwaltungsgericht Berlin, *Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2004*, p. 627. Exceptions of this rule would have to be well founded in order to be upheld in judicial review; they may e.g. 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.

⁵⁷ E.g. a person holding "high above average (medium level)" for the last 8 years will generally be considered better qualified than someone who has just reached this level in the most recent evaluation, cf. also note 56.

⁵⁸ It is assumed that applicants with more time on the bench have more experience and hence are better qualified.

It is worth mentioning that the Länder have a long tradition of using an additional formal requirement at least for the first level of promotion. By way of self-binding regulations⁵⁹, they have stated that in order to qualify as a candidate for higher judicial office in the regional or higher regional courts (i.e. for promotion to presiding judge in the regional court or judge in the higher regional court) a judge has to serve for a certain period of time (usually between 8 and 12 months) in the higher regional court. During this "trial period" (Erprobung) the judge works in his full judicial capacity as a member of a panel in the higher regional court and the evaluation that the president of the higher regional court gives with respect to his work at the end of this "trial period" is of high persuasive authority for future evaluations on the occasion of applications for promotion. The idea of this "trial period", of course, is that the aptitude for higher judicial office may best be tested in a higher court; in addition, evaluation of prospective candidates by the president of the higher regional court may also serve to level differences in the evaluation practice of court presidents in the courts below. Most Länder accept that, aside from these "trial periods" in higher regional courts (which among judicial colleagues are termed "third state exam"), longer periods of work in a Ministry of Justice or as an assistant in one of the highest courts of the Federation or in the Federal Constitutional Court may also suffice to qualify as a candidate for promotion. Judges who have not passed these "third state exams" do not qualify for promotion.⁶⁰ In addition, with more and more judicial administrations establishing specific job profiles for higher judicial offices, it may also happen in the future that only a small number of judges will fulfill the formal requirements set out in these profiles.⁶¹ In general, therefore, only a promotion to senior judge in the local court may be possible without having served for a "trial period" in the higher regional court.

There is no minimum age for promotion to higher judicial office. In practice, however, appointments to higher regional courts would not occur under the age of 36, presiding judges in regional courts would be at least about 39 years old and

⁵⁹ cf. 1.5, above.

⁶⁰ "Passing" in this context means that the evaluation following this trial period will have to be positive, i.e. at least ending with high above average. The pre-requisite of trial periods has recently been challenged on grounds of infringement of judicial independence; this has not been accepted by the judicial service court of appeal in North-Rhine/Westphalia, judgement of the Dienstgerichtshof für Richter bei dem Oberlandesgericht Hamm of January 19, 2004 - 1 DGH 2/03 -.

⁶¹ These lists or job profiles are similar to the one laid out as an example above, cf. 1.2; practical experience with these profiles in promotion proceedings has not yet been made, but it is to be expected that they will be subject to judicial review and that they will create a self-binding effect on the judicial administration and also on electoral committees, cf. 1.5, above. For promotions in the general civil service, it is established that such profiles published in the job offer are binding on the administration for the process of selecting applicants, cf. Bundesverwaltungsgericht, Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2002, p. 47.

presiding judges in higher regional courts, vice-presidents or presidents of courts would be not younger than 45.

3.4 Relationship between professional evaluation and assignment to specific judicial functions

Formal relations between the results of professional evaluations on one hand and the assignment to specific judicial functions on the other hand do not exist. Within each court, the work load is assigned to the judicial staff by a special self-governing body, the presiding committee (Präsidium) which consists of a number of judges elected by the judges of the court. This committee has the task to assign judges to each adjudicating body or panel, to distribute the work load among the judges and among the various panels and to organise stand-in staff to cover illnesses and absences.⁶² The members of the Präsidium have no knowledge of the evaluations of individual judges but, in practice, it may be that they form their own opinion regarding the aptitude of their colleagues for specific tasks or that in their deliberations they may be presented with the views of the court president who is also chairperson of the Präsidium.

In the context of decisions on promotions or appointments to other judicial functions, however, the evaluation as to the aptitude for the position applied for is relevant, as has been shown above.⁶³ One would, for instance, aim to promote a judge who performs best presiding over criminal trials to presiding judge in the regional court whereas a judge who tends to produce elaborate judgments on the basis of scholarly textbook research should rather be given a position in the higher regional court.

3.5 Professional bodies and evaluation

Professional bodies (Präsidium, presidential councils) are not at all involved in the process of professional evaluations. Professional evaluations are the sole responsibility of the presidents of the courts as the "superiors" of individual judges.

⁶² cf. Heyde, note 2, supra, p.21; s. 21 a. et seq. Gerichtsverfassungsgesetz, note 42, supra; the Präsidium usually acts on the basis of proposals of the president of the court who in turn would rely on his administrative department; these administrative departments within the courts are staffed by judges (who serve in this administrative function in addition to their judicial work, which may even be obligatory, cf. s. 42 DRiG, note 4, supra) and by civil servants; they serve as assistants of the court president.

⁶³ cf. 3.2 ("prognosis").

3.6 Administrative and judicial review of professional evaluations

As has been mentioned before, all the decisions on recruitment, appointment and promotion are subject to judicial review.⁶⁴ In order to successfully challenge the decision to promote a competitor, the applicant has to show that this decision is unlawful, violating article 33 of the constitution. If, however, the result of professional evaluation of the competitor is better than that of the applicant, short of a procedural error that may have occurred it is quite impossible for the applicant to succeed, because in the light of evaluations made on the occasion of the imminent applications for promotions, the competitor appears better qualified. Therefore, in order to guarantee efficient judicial review of the decisions on promotion, it is also necessary to allow judicial review of professional evaluations. That these evaluations can be reviewed before an (administrative) court, is accepted practice.⁶⁵ The intended decision to promote a competitor, therefore, in general would need to be challenged in two steps of proceedings: first an injunction preventing the appointment of the competitor has to be sought, and it has to be shown that there is a likelihood that the professional evaluation of the applicant does not show the correct result; secondly, the evaluation itself has to be challenged.

⁶⁴ cf. 1.1 ("judicial review"), 3.3 note 55, supra; court cases between (unsuccessful) competitors and the administration (with the successful competitor being joined as a third party) have become increasingly common in the civil service but also in the judiciary and recently in the field of labour law. Statistics as to the rate of success are not available. For further reference see Lansnicker / Schwirtzek, *Die Konkurrentenklage im Arbeitsrecht*, *Neue Juristische Wochenschrift* 2003, p. 2481; Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 1990, p. 501; Bundesverfassungsgericht, *Neue Zeitschrift für Verwaltungsrecht* 2002, p. 1367; Wittkowski, *Neue Zeitschrift für Verwaltungsrecht* 1995, p. 345; Wittkowski, *Neue Juristische Wochenschrift* 1993, p. 817; numerous decisions of the Bundesverwaltungsgericht, e.g. *Neue Zeitschrift für Verwaltungsrecht* 1995, p. 91; 1997, p. 283; 2002, p. 47; 2002, p. 604; 2003, p. 1397 and 1398. With regard to judges cf. for further reference Oberverwaltungsgericht Berlin, *Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2004*, p. 627; Verwaltungsgericht Schleswig and Oberverwaltungsgericht Schleswig, *Deutsche Richterzeitung* 2003, p. 127 (concerning the vote of a judicial electoral committee on the federal level); Oberverwaltungsgericht Schleswig, *Deutsche Richterzeitung* 2002, p. 52; Oberverwaltungsgericht Sachsen-Anhalt, *Deutsche Richterzeitung* 2000, p. 57; Verwaltungsgericht Braunschweig, *Deutsche Richterzeitung* 1999, p. 477; Verwaltungsgerichtshof Baden-Württemberg, *Deutsche Richterzeitung* 1999, p. 431; Oberverwaltungsgericht Schleswig, *Deutsche Richterzeitung* 1999, p. 305; Oberverwaltungsgericht Münster, *Deutsche Richterzeitung* 1998, p. 422 and 426; Niedersächsisches Oberverwaltungsgericht, *Deutsche Richterzeitung* 1998, p. 191; Oberverwaltungsgericht Schleswig, *Neue Zeitschrift für Verwaltungsrecht* 1997, p. 613; Verwaltungsgerichtshof Kassel, *Neue Zeitschrift für Verwaltungsrecht* 1997, p. 615; Oberverwaltungsgericht Rheinland-Pfalz, *Deutsche Richterzeitung* 1997, p. 17.

⁶⁵ Not only in the judiciary but also in the general civil service as well as in labour law.

As regards the process of review of evaluations, informal and formal proceedings have to be distinguished. In addition, formal proceedings occur both at the administrative level as well as in the form of judicial review:

Informal ways of reviewing evaluations, by their very nature, do not follow strict rules. In practice, they include the exchange of opinions between the person who evaluates and the person who has to be evaluated at a time before the evaluation is written down in its final text, signed and entered into the personal file. Court presidents write a first draft of the intended evaluation once they have gathered all the material deemed necessary and once they have formed an opinion on the major elements of the evaluation. Quite often this first draft is then presented to the person who is being evaluated in order to give him or her an opportunity to raise objections, point out mistakes or draw attention to facts that have not been taken into account so far. The court president then considers these objections, maybe even discusses them with the judge and, in the light of this, decides on the final text of the evaluation.

Once the final text of the evaluation is signed, it has to be communicated to the person who is evaluated. The "superior", i.e. the president of the court, has to offer the judge the opportunity to discuss the evaluation before it is finally filed with the personal file of the judge. In addition, if the judge decides to raise (informal) objections⁶⁶ in writing – and the court president does not change the text of his evaluation – there is a duty to add the objections to the personal file of the judge.⁶⁷ As a rule, the court president would add the reasons why – in his view – he did not change the text.

The next possible step of review is the formal objection on the administrative level. Such an objection on the administrative level is necessary before judicial review can be sought.⁶⁸ If such a formal objection is lodged, it is the duty of the

⁶⁶ Informal written objections ("Gegenvorstellung") have to be distinguished from formal objections ("Widerspruch"). Whereas the former are (only) aiming at the superior with the intention of making him reconsider his decision, the latter are asking for a formal decision within the hierarchy of the judicial administration with a view of opening the way for judicial review before the administrative court or the judicial service court, see further in the text.

⁶⁷ cf. s. 104 Landesbeamtengesetz Nordrhein-Westfalen and s. 4 Landesrichtergesetz Nordrhein-Westfalen, note 45, supra. These rules – with similar legislation in all the Länder and for the Federation – concern all members of the civil service. Similar rules do apply in labour law. Their purpose is that the personal file should give a full picture of the employee, civil servant or – in our case – the judge and his working life without forcing a person who does not agree with an evaluation to recur to judicial review. The court president is not entitled to refuse discussing the evaluation with the judge concerned, cf. Bundesgerichtshof, Deutsche Richterzeitung 1981, p. 469.

⁶⁸ cf. s. 126 Beamtenrechtsrahmengesetz of March 31, 1999 (Bundesgesetzblatt 1999 I p. 654), as amended per August 21, 2002 (Bundesgesetzblatt 2002 I p. 3322). This law applies to all civil servants including the judiciary and it refers to all disputes between civil servants and their own administration. These proceedings of formal objection are governed by section 68 et sequ. Verwaltungsgerichtsordnung (Code of administrative procedure, of March 19, 1991

court president to deal with the points raised, if necessary to investigate and gather additional facts, and then to decide whether the objection gives rise to alter the evaluation – in its text or in its final result. In the event the evaluation is changed as intended by the objection, the new text will be added to the personal file.⁶⁹ If the court president decides not to change the evaluation, he has to refer the matter to his superior who has to consider it, to make further investigations if necessary and to decide on the objections. Only after the final decision of the superior, i.e. either the president of the higher regional court or the Ministry of Justice, an application for judicial review before the administrative court is admissible.

In the administrative court, evaluations may be challenged on grounds of fact as well as on grounds of law. It is well established that any negative aspect of an evaluation has to be supported by a factual basis. If the evaluation is challenged for lack of factual basis, the administration will have to support the opinion of the court president with relevant facts, e.g. statistics, reports of misconduct etc. In addition, the evaluation has to be consistent, i.e. the text or the individual elements of the evaluation have to be conclusive with respect to the final result. If, for instance, the text contains only positive remarks, a final result "average" will not be deemed to be conclusive. On the other hand, it is accepted that the process of evaluating staff involves elements of personal judgement that 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 of the superior. As a result, therefore, it is quite difficult to successfully challenge an evaluation unless the factual basis is deficient or a substantial procedural error (e.g. bias of the superior) can be established.⁷⁰

These rules apply not only to judges but to administrative and judicial review of evaluations of all employees in the civil service. In addition, evaluations of judges can also be challenged on the grounds that they violate judicial independence. The rule that judicial independence may not be affected applies to all acts of the

(Bundesgesetzblatt 1999 I p. 686), as amended per August 24, 2004 (Bundesgesetzblatt 2004 I p. 2198).

⁶⁹ The original text, the formal objection and any correspondence that may have occurred in the context would be taken from the personal file and put into another file, so that the judge would not be compromised by the original. This applies unless the judge insists to have it kept in his file.

⁷⁰ For further reference on the scope of judicial review of evaluations in the civil service cf. Schnellenbach, *Zeitschrift für Beamtenrecht* 1997, p. 172; Bieler, *Die dienstliche Beurteilung*, 1998; Eyermann, *Verwaltungsgerichtsordnung*, 10th ed. 1998, § 114 n. 69; Kopp-Ramsauer, *Verwaltungsverfahrensgesetz*, 8th ed. 2003, § 40 n. 75; Bundesverwaltungsgericht, *Deutsches Verwaltungsblatt* 1998, p. 638; Bundesverwaltungsgericht, *Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2000*, p. 366 and 621; Oberverwaltungsgericht Münster, *Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 1999*, p. 593. Statistics as to the rate of success of challenges of evaluations in court are not available.

administration, including evaluations.⁷¹ Whenever a judge feels that his independence is affected by a specific measure, he may apply to the Judicial Service Court and have the matter reviewed.⁷² Judicial Service Courts are courts or rather special tribunals with the sole jurisdiction to decide on service disputes concerning the judiciary. The scope of their jurisdiction includes questions of dismissal, disciplinary matters and also disputes with respect to an alleged violation of judicial independence.⁷³ Following a requirement of federal law, all the Länder have set up Judicial Service Courts, usually one court of first instance attached to a regional court and one court of second instance attached to a higher regional court, both with jurisdiction for the judiciary of the Land.⁷⁴ There is a right to a final appeal (on points of law) to the Federal Court of Justice.⁷⁵

Over the years, quite a considerable body of case law on alleged violations of judicial independence has emerged, and judicial service courts have tried to define the narrow line between admissible acts of the administration, especially of court presidents, and inadmissible violations of the independence of the individual judge. It is not possible to report all the details of these decisions and it is also rather difficult to deduct abstract rules from the case law.⁷⁶ With respect to evaluations it appears that remarks amounting to mere descriptions of a judge's conduct and performance will not be considered a violation of independence. It is, for instance, possible to describe how often per week the judge sits in court, the number of cases

⁷¹ cf. note 49, supra. The scope of this rule, of course, extends beyond evaluations. Its essence is that, in their judicial capacity, judges cannot be subject to decisions in the hierarchy of an administrative organisation, that they can not be subject to orders, and that any administrative restriction of the performance of a judge's duty will be unlawful. Practical applications are, e.g., that rooms and support staff (e.g. security) will have to be provided and that fixing the date and hour of court sessions as well as deciding on their duration are the prerogative of judges. On the other hand, a judge's conduct apart from his judicial work (e.g. reckless driving, criminal offences, activities which may compromise the judiciary) may be investigated by the court president who in this capacity may act like any superior of an employee in the general civil service. Likewise, where a judge neglects his duties (e.g. if he is not working although he has not been given leave of absence, if he does not keep time limits set by law to hand down judgements, if he is not punctual), this can give rise to a reaction by the president and may even lead to disciplinary actions. For details on disciplinary actions see below part 4.

⁷² cf. s. 26 para. 3, DRiG, note 4, supra.

⁷³ cf. s. 62 DRiG, note 4, supra, concerning the judicial service court at the federal level, this court being attached to the Federal Court of Justice in Karlsruhe.

⁷⁴ cf. s. 77 to 79 DRiG, note 4, supra. For North-Rhine/Westphalia cf. s. 35 et sequ. Landesrichtergesetz, note 45, supra; here, the deciding panel is formed by a presiding judge (who has to be a judge of an ordinary court but may not be president or vice-president of a court), a permanent member (who has to be a judge of an administrative court) and members who are joined on a case by case basis and who have to be judges in the court branch to which the applicant belongs. There is some discussion whether members of the Bar should be joined as judges in judicial service courts.

⁷⁵ cf. s. 79 para. 2 DRiG, note 4, supra.

⁷⁶ For further reference cf. Schmidt-Ränsch, note 49, supra.

he deals with per month or per year, the percentage of cases decided by judgement and the percentage settled in court, the average time elapsed between the date cases are first filed and the date of the first hearing in court, the time it takes on average to have a case finally dealt with, the number of cases that have been pending for over a year, the number of cases filed per year etc.. On the other hand, any remark that can be interpreted as a reprimand or even as an attempt to induce the judge to show a particular conduct in his work in future, to apply a particular mode of dealing with the cases, will be considered an undue influence on judicial decisions. This even includes general remarks like, e.g., that the judge should try to examine witnesses more swiftly, that he should try to write more concise judgments, that he should be cost conscious in his decisions on hearing evidence, that he should try to get a higher proportion of cases settled etc..⁷⁷ In general, it appears that judicial service courts are quite strict whenever they feel that there is a tendency to influence judges with a view of their future performance. This follows from the understanding that judicial independence is not an individual right or privilege of the members of the judiciary but rather a prerequisite to guarantee that the judiciary is free from influence of the legislative and of the executive branch. Independence of the judiciary, however, means that the judiciary has to show responsibility for its performance, that they have to stand to their decisions and to the way they conduct their business. Consequently, if this performance is only described in an objective manner without insinuating a change of conduct, there is no influence on future performance. Such a presentation of facts could at best lead to a judge reflecting his performance on his own account and, in his independent judicial responsibility, making up his mind if and in what way he will alter conducting his business.

⁷⁷ The general principles are described in a number of leading cases, e.g. Bundesgerichtshof, NJW-Rechtsprechungsreport 2003, p. 492, 493 ("evaluation is contrary to judicial independence if it results in directly or indirectly - even psychologically - influencing the judge to deal with or decide court cases in a certain way"; the challenge of undue influence was, however, rejected; phrases like "the judge experienced his time at the higher regional court [here: the "trial period", cf. 3.3, above] as an exam situation", "his written opinions were voluminous with numerous references to court decisions and textbooks", "his judgements were characterised by legal deductions, in some cases the link between facts and legal rules appeared not quite well established", "the judge is aware of his abilities and of his performance and knows how to draw attention to them" were considered a description of performance and personality and not deemed to be influencing future judicial work); Bundesgerichtshof, Neue Juristische Wochenschrift 2002, p. 359, 360; Bundesgerichtshof, Deutsche Richterzeitung 1997, p. 467, 468 et seq. (a description of - unfounded - complaints which the judge had brought forward against prosecutors and court staff combined with a characterisation of the judge as showing problems in social competence and deficits in his personality was upheld); Bundesgerichtshof, Neue Juristische Wochenschrift 1992, p. 46; Bundesgerichtshof, Neue Juristische Wochenschrift 1991, p. 426, 427; Bundesgerichtshof, BGHZ 90, 41, 44 = Neue Juristische Wochenschrift 1984, p. 2531; in a most recent case, an administrative court found that the phrase that more emphasis on oral rather than on written proceedings was "desirable" was violating judicial independence, Oberverwaltungsgericht Berlin, Neue Zeitschrift für Verwaltungsrecht - Rechtsprechungsreport - 2004, p. 627.

3.7 Extra-judicial activities

The principle of balance of powers demands that judges cannot at the same time perform judicial activities and work in the legislative or in the executive branch. Therefore, although judges like other civil servants may be members of political parties and be candidates for parliament, once they are elected they are suspended from judicial office for as long as they are members of parliament.⁷⁸ Membership in city councils is not considered incompatible with judicial office, whereas - in general - any work in the executive branch, e.g. the office of mayor, cannot be combined with judicial work.⁷⁹

Judges may, however, be asked to do extra-judicial work. They are obliged to do so if it concerns work in the judiciary (aside from actual court cases) and, especially, in the court administration.⁸⁰ Other tasks (like, e.g., teaching in classes during practical training) may be conferred on judges only if and as long as they agree. It is not uncommon that judges are assigned to other offices for a period of time, e.g. government ministries, national and international agencies. These assignments require the consent of the judge. During the assignment the judge keeps his status as a judge (i.e. his official title and the right to return to his position previously held in court) but he is a full member of his new office, especially part of its hierarchy. Some of these assignments may be irrelevant for career purposes whereas others can enhance career prospects.⁸¹ In rare cases, even temporary leave of absence may be granted in order to enable a judge to work for international organisations, volunteer services or even for a political party, such activities being irrelevant under career aspects.

Other extra-judicial activities of judges (and all other civil servants) are quite restricted. As a rule, they require permission of the superior (i.e. the court president, the ministry) which will only be given if the time consumed and the money earned by such activities are such that they may not affect performance of judicial duties. In addition, the overriding principle when deciding on this authorisation is that the respect and confidence of the public in the conduct of the judge (or civil servant) must be unaffected. Under these aspects, permission to administer one's own assets, to engage oneself in works of art or in scientific research or to work as a volunteer in professional bodies is usually given. For

⁷⁸ cf. s. 5 et sequ. Abgeordnetengesetz (AbgG) of February 21, 1996, Bundesgesetzblatt 1996 I p. 297, as amended per March 25, 2004 (Bundesgesetzblatt 2004 I p. 459); similar legislation exists in the Länder.

⁷⁹ In North-Rhine/Westphalia, e.g., judges who are members of the city council may, depending on the demands of their electoral office, even get a reduction in their work load of up to 25 percent. On the other hand, even membership in a local voluntary fire brigade has been considered incompatible, because members of the fire brigade can exercise executive powers.

⁸⁰ cf. s. 42 DRiG, note 4, supra.

⁸¹ e.g. assignments to ministries of justice or as an assistant to one of the highest courts of the Federation, cf. 3.3 above "criteria for promotion".

judges, giving legal advice is strictly prohibited, whereas permission to work as an arbitrator or mediator can only be given if the judge is asked by both parties or by an independent body and as long as it can be ruled out that the dispute may eventually come before him in his judicial capacity.⁸²

4. DISMISSAL, DISCIPLINARY ACTIONS, ACCOUNTABILITY

4.1 Disciplinary actions, code of ethics

The German law concerning judges and prosecutors is laid down in the German Judiciary Act which also sets certain requirements for the relevant laws of the Länder.⁸³ Technically, the law concerning judges is constructed as a special field of the general law concerning civil servants. Civil servants in the strict sense (*Beamte*), under German law, have a special status of employment. They are not partners of a contract of employment but are being appointed to their office, usually for life or for a specific period of time. Their law of employment is not part of the labour law but a specific field of administrative law, with the result that disputes concerning their employment, their status et cetera come before the administrative courts and not before the labour courts. Civil servants are under a special duty of loyalty to the state, they are not allowed to go on strike, they can be transferred to another post against their will if this lies in the interest of the administration⁸⁴ and, as a rule, they cannot be dismissed except by way of disciplinary proceedings. In the traditional concept of civil service, their salary was not considered a remuneration for work done but rather maintenance pay to enable the civil servant to maintain himself and his family according to the status of the office he had been appointed to. When looking at the law concerning the status of judges (and prosecutors), it is therefore essential to bear in mind that it is not only governed by special statutes of federal law and Länder law but in addition also by the law of civil servants.⁸⁵

⁸² cf. s. 40, 41 DRiG, note 4, supra.

⁸³ cf. note 4, 25, supra, and s. 71 DriG.

⁸⁴ This, of course does not apply to judges. Because of judicial independence, they cannot be transferred to another post without their consent. Judges appointed for life can only be transferred to another post after a final decision of the Judicial Service Court (cf. note 72, supra) and only if this measure is absolutely necessary to avoid severe impediments of the functioning of the judiciary, cf. ss. 31 and 78 number 2 DRiG, note 4, supra.

⁸⁵ It would be beyond the scope of this study to discuss the principles of these laws. It may be sufficient to point out that the relevant federal law can be found in *Beamtenrechtsrahmengesetz*, cf. note 68, supra, *Bundesbeamtenengesetz* of March 31, 1999 (*Bundesgesetzblatt* 1999 I p. 675), as

Accordingly, the law of disciplinary actions concerning judges (and prosecutors) has to be seen in the context of the wider scope of the law of disciplinary actions concerning civil servants. These statutes⁸⁶ are in general mere regulations of disciplinary proceedings but do not entail a code of ethics. The duties of a civil servant - and likewise of a judge - are to a certain extent described in the relevant statutes for civil servants.⁸⁷ Specific duties are to act impartially and just, to keep regard of the welfare of the general public, to exercise office with full enthusiasm, to be careful in political activities⁸⁸. Central duties are to keep official information confidential, not to take on any other employment or activities without specific permission, not to accept presents or bribes and to act according to the law and to accept responsibility⁸⁹ for the actions while on duty. The general clause covering all these specific duties and going beyond them is that a civil servant, at all times, should act in and outside of his office in a way which justifies the respect and the confidence of the public. In addition to these rather wide descriptions of duties, a detailed catalogue of duties and their possible violations has been developed through case law of disciplinary proceedings. Generally speaking, a distinction has to be made between wrongs done while on duty (disobeying orders or instructions, violating internal rules et cetera) and wrongs done elsewhere (traffic violations, misdemeanours, crimes). In all such cases, disciplinary actions may be taken, even in addition to criminal proceedings if the criminal conviction does not compensate the aspect that the crime had been committed by a civil servant.

Most of the duties laid out above do also apply to judges and therefore their violation by judges may result in disciplinary action. The limitations with respect to judges are twofold and come with the principle of judicial independence. First, due to their independent position, in their judicial capacity judges are not subject to instructions or orders and hence cannot be held accountable for disobeying

amended per August 21, 2002 (Bundesgesetzblatt 2002 I p. 3322), Bundesbesoldungsgesetz of August 6, 2002 (Bundesgesetzblatt 2002 I p. 3020), as amended per July 30, 2004 (Bundesgesetzblatt 2004 I p. 2027), Beamtenversorgungsgesetz of March 16, 1999 (Bundesgesetzblatt 1999 I p. 322), as amended per September 10, 2003 (Bundesgesetzblatt 2003 I p. 1798); similar legislation can be found in the Länder, cf. note 45, supra.

⁸⁶ e.g. Bundesdisziplinargesetz of July 9, 2001 (Bundesgesetzblatt 2001 I p. 1510), as amended per December 20, 2001 (Bundesgesetzblatt 2001 I p. 3926); Disziplinargesetz für das Land Nordrhein-Westfalen of January 1, 2005 (Landesdisziplinargesetz – LDG NRW -, Gesetz- und Verordnungsblatt NRW 2004 p. 624).

⁸⁷ For the following cf. note 45 supra, and, e.g., ss. 55 et sequ. Landesbeamtenengesetz Nordrhein-Westfalen. For extra-judicial activities see also above 3.7.

⁸⁸ Civil servants and judges may be members of political parties and be candidates for parliament; once elected they are suspended from office for as long as they are members of parliament, see above, 3.7.

⁸⁹ This does not necessarily mean that there is a personal liability in damages for unlawful acts; it means that the civil servant may be held accountable in disciplinary proceedings. For personal liability see below 4.3.

orders.⁹⁰ The second aspect is that the functioning of the courts has to be safeguarded against any intervention from outside. Therefore, even in severe cases, e.g. when a judge has committed a crime, he cannot (not even temporarily) be removed from his duties by a mere administrative decision of a court president or the Minister of Justice. Instead, a decision of the Judicial Service Court, at least a preliminary ruling, is required.⁹¹

The catalogue of possible disciplinary measures includes, as a rule, warning, reprimand, fine, reduction of salary, transfer to another judicial office (with lower salary) and dismissal. Disciplinary action is, in severe cases, even possible against retired judges. Court presidents are only entitled to decide on warnings or reprimands, all other measures are within the jurisdiction of the Judicial Service Courts.⁹² In addition, any disciplinary measure can be challenged in the Judicial Service Court, both on the grounds that a wrong justifying disciplinary action has not been committed as well as on the grounds that the measure violates the principle of judicial independence. In practice, minor transgressions would be dealt with by the court presidents by way of warning or reprimand, whereas in major cases almost invariably the Ministry of Justice initiates formal disciplinary proceedings before the Judicial Service Court with a view of having the judge removed from the bench.

4.2 Dismissal

Dismissal of judges (without their consent) is possible only by way of a decision of the Judicial Service Court. This applies not only in disciplinary cases but also in cases where the judge is deemed unfit to perform his duties.⁹³ These proceedings are generally quite lengthy because they involve obtaining medical evidence which can be difficult if the judge concerned does not co-operate. By interlocutory order the Judicial Service Court may suspend the judge from his office pending the dismissal proceedings.

Dismissal by way of disciplinary proceedings or due to physical or mental illness are the only ways of dismissal from judicial office without consent. Negative professional evaluation in itself which does not result in a violation of duties can at no time result in dismissal. In practice, however, it is difficult to imagine such a case. Continuing negative evaluations (average or below average) would invariably mean that the judge is either not capable (for health reasons) or not willing to perform according to minimal standards. Both alternatives could then lead to dismissal proceedings, however lengthy they may be.

⁹⁰ For the limitations of judicial independence cf. notes 49 and 71, *supra*.

⁹¹ cf. s. 51 Landesrichtergesetz NRW, note 45, *supra*; as to the judicial service courts cf. notes 73 and 74, *supra*.

⁹² cf. s. 48 Landesrichtergesetz NRW, note 45, *supra*

⁹³ cf. s. 34 DRiG, note 4, *supra*, and s. 61 Landesrichtergesetz NRW, note 45, *supra*

4.3 Accountability

The term accountability in this context is understood not in the sense of in-service responsibility for violation of duties with the result of possible disciplinary proceedings. The question of accountability can also be raised meaning whether judges (and prosecutors) can be held financially accountable for violation of their duties. Such a personal liability of judges and prosecutors is, under German law, the very rare exception.

Article 34 Grundgesetz provides that, if a civil servant violates the duty which he in his official capacity owes to a third party this third party may hold the state liable in damages. This means that the citizen only has to show that there has been an unlawful act, that a duty owed to the citizen has been violated, that negligence has been involved on behalf of the person or persons acting for the state, that the citizen's individual rights have been violated and that a damage has occurred from all this. It is not essential to name the individual civil servant or to prove his individual fault and his guilt as long as it can be shown that somewhere in the administration a culpable wrong that has caused the damage has been committed.⁹⁴

Article 34 Grundgesetz has to be seen in context with section 839 of the Civil Code⁹⁵ which introduces a number of limitations to the liability of the state (e.g. contributing negligence of the citizen, especially if he has not used available remedies like judicial review). With respect to judicial decisions, section 839 para. 2 prescribes that damages for wrongful court decisions can be sought only if the judge in making the decision has committed a crime. This would mean that the judge would have to commit intentional miscarriage of justice. This has been alleged only in a very small number of cases and, so far, positive court rulings have not been known. The idea behind this is that court decisions should be reviewed in the appeal process and not in other proceedings; once they are final, the matter should be put to rest and not be open to review under the head of a law suit for damages,⁹⁶ with the sole exception of intentional miscarriage of justice. From this,

⁹⁴ In criminal proceedings, there are provisions for compensation even if no culpable wrong is involved. Damages resulting from criminal prosecution which have not resulted in convictions or from criminal judgements which have later been overturned on appeal have to be compensated according to a special law, Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen of March 8, 1971 (Bundesgesetzblatt 1971 I p. 157), as amended per December 13, 2001 (Bundesgesetzblatt 2001 I p. 3574).

⁹⁵ Bürgerliches Gesetzbuch of January 2, 2002 (Bundesgesetzblatt 2002 I p. 42), as amended per May 5, 2004 (Bundesgesetzblatt 2004 I p 718).

⁹⁶ This is why the ruling of the European Court of Justice in the Austrian matter Köbler (judgement of September 30, 2003, C-224/01, Neue Juristische Wochenschrift 2003, p. 3539) is considered remarkable in Germany. It may, however, be argued that the ruling does not touch the above-mentioned principle but is instead founded on the more general principle that European law has to be enforced - if necessary - by way of damages even if national courts have misinterpreted it in a final decision.

it follows that individual liability of judges for their decisions does, in practice, not exist.

The exception of section 839 para. 2 does not, however, apply to delays and other violations on the mere occasion of dealing with a court case. It is therefore quite feasible and not uncommon that the judicial administration is sued for damages for delays in court proceedings, more often however in other proceedings like company registers or land registries. In these cases, the possibility of an individual liability of judges or other court officers does arise. Article 34 Grundgesetz only provides that the claimant has to sue the state rather than the civil servant. It does not prohibit the state (in his capacity as employer of the civil servant or of the judge) to seek compensation for the damages paid to the citizen. This right is laid down in the law concerning civil servants⁹⁷ and it is limited to cases of intent or gross negligence. Thus, in cases of "simple" negligence the civil servant or the judge cannot be held accountable in damages.

In practice, cases where the state seeks compensation from his civil servants are rare.⁹⁸ With respect to judges or prosecutors, it is highly unlikely that a significant number of such cases may have occurred because, even if a violation of a duty may have resulted in damages, it is unlikely that gross negligence has happened. In practice, therefore, accountability seems to be reduced to cases of intentional violation of duties, which is more common where trust moneys have been misappropriated by civil servants but which only occasionally may happen in the person of a judge who is continuously neglecting his duties and knowingly causing delays.

5. CONTINUING EDUCATION

5.1 Organisation

It follows from the nature of the German federal system that organising continuing education of judges and prosecutors is more difficult than in countries with a centralised system where central institutions for initial and continuing education exist. In Germany, continuing education is organised on the national level, on the level of the Länder and also on the regional level.

On the national level, the German judges' academy (Deutsche Richterakademie) was created some thirty years ago. This institution with academy buildings in Trier (close to the European Rights Academy) and in Wustrau (Land Brandenburg) is run jointly by the Federal Ministry of Justice and by the judicial

⁹⁷ cf. s. 84 Landesbeamtengesetz NRW, note 45, supra; s. 78 Bundesbeamtengesetz, note 85, supra.

⁹⁸ To the knowledge of the author, detailed statistics do not exist.

administrations of the Länder. The Federation and the Länder each pay half of the costs of the academy. The program of seminars offered by the academy is decided upon by a committee consisting of representatives of all the Länder, of the Federal Ministry of Justice and of the professional associations of judges and prosecutors. This committee meets twice a year and decides on the basis of proposals which have been collected in advance by its members. A decision is also made on the distribution of the work-load concerning the organisation of the seminars among the judicial administrations (ministries of justice). This includes finding speakers, collecting the applications of those who want to take part and admitting participants. In practice, this means that over hundred seminars per year are being organised by persons in at least 17 different offices (of the ministries of the Federation and of the Länder). The substantial organisation of the seminars is not done by the staff of the academy. The staff of the academy is only responsible for the clerical work involving the actual running of the academy and of the seminars once they have commenced (e.g. travel arrangements, payments of travelling costs to speakers et cetera). The seminar program is published well in advance before the beginning of each year, and generally participation is possible on a quota basis whereby a certain number of openings is allotted to each participating judicial administration. As a result, each administration has to collect applications and to decide whom to nominate for the available space.

At the time of its creation, the Deutsche Richterakademie certainly was a very modern and innovative institution which, for the first time, met the demands of judges and prosecutors and their need to have some kind of continuing education on a nation-wide basis with the additional advantage of establishing contacts to colleagues from other Länder and maybe even other jurisdictions. Meanwhile, at least in the opinion of the author of this study, the present organisation of the academy shows certain deficits which, at least in comparison to similar national institutions in other countries, seem to call for substantial changes. Shortcomings can, e.g. be found in the following:

- the program committee is too large and the process of deciding on the program is too slow
- the program has to be planned too far in advance; this makes it difficult to include topics of actual interest
- program planning is not done by a central institution; this encourages uncritical repetition of established seminars by less experienced planners
- expertise in program planning cannot be developed in smaller judicial administrations; it may be doubted whether resources (staff and finances) are used efficiently
- expertise in co-operation on the European level (including the use of funds) cannot be developed
- recruitment of participants on the quota system and involving all the judicial administrations is ineffective

- evaluation of the effect of seminars is impossible (evaluation so far has to be restricted to immediate feed-back by participants).

Continuing education is also offered by the Länder. Many ministries of justice have created programs of seminars with a view of adding further themes to those offered by the Deutsche Richterakademie and/or with a view of enabling a greater number of their judicial staff to participate in continuing education. Many of these seminars are on technical topics concerning new developments of the law but an increasing number deal also with information technology, organisation of the work flow, interaction between judges and other court staff et cetera. North-Rhine/Westphalia has its own academy⁹⁹ building with a permanent staff that have the task of creating a program of continuing education (which is then to be approved by the Ministry of Justice) and also of organising the respective seminars. In addition, the academy building is used for conferences, assessment centres and seminars for other court staff including seminars for those who are involved as trainers and/or examiners in legal education and in initial training. Other judicial administrations with no academy organise such seminars in hotels or in academy buildings of other government administrations. The advantage of this system is that specific needs for further training (e.g. where new legislation is being enacted) can be met more quickly than by the Deutsche Richterakademie.

On top of this, at least in North-Rhine/Westphalia, some of the money available for continuing education has been allotted to the higher regional courts and the prosecutor generals in order to enable them to meet further needs for continuing education which may have surfaced on the regional level. The ratio behind this is that such measures can be designed more precisely and that they may be more cost-efficient, e.g. by saving time and costs of travelling to an academy. This system faces problems caused by reduction of funds for continuing education, because only rather small sums which cannot be effectively used can be allotted.

Computer based training and distant learning models have, so far, been used only in a few cases and it seems too early to try to assess the results. Apparently, judges and prosecutors consider it very difficult to follow such measures of further education concurrently with trying to deal with the high work load of their daily work. Instead, they seem to prefer to leave their office for a few days and attend a seminar not only in order to enhance their knowledge but also to exchange experience and ideas with their colleagues. They seem to take into account that after their return to their office they have to work away the backlog that has piled up during their absence.

⁹⁹ Justizakademie des Landes Nordrhein-Westfalen in Recklinghausen (www.jak.nrw.de).

5.2 Programs

Continuing education programs on the federal, the Länder and the regional level can basically be divided in four pillars.

Law

Traditionally, continuing education has had its emphasis on technical fields of substantive and of procedural law, taking into account both an exchange of experience as well as new developments. Therefore, a large number of seminars still deals with these either more general or rather special fields of the law. The variety of seminars is huge. Examples may be "new developments in the of law of contract", "insurance law", "trials in traffic accident cases", "introduction to tax law", "recent decisions of the European Court of Justice", "appeals in civil proceedings".

Skills

Another group of seminars deals with the improvement of professional skills and the way in which judges and prosecutors conduct their work. This may cover fields like "rhetoric skills", "examining witnesses", "relations to advocates", "organising criminal trials", "video examinations", "courts and court experts", "courts and the media" et cetera, but also more self-reflecting areas like "organising one's work flow" or "stress management".

Organisation, Information Technology

A substantial increase in work load, more complicated cases and, at the same time, in most cases a reduction in staff have created the necessity to completely review the tasks of courts and the way these tasks are being met. This process is under way in all judicial administrations. It coincides with the introduction of modern information technology, not only in the form of general office computer programs for the court staff but also in development and introduction of very special programs for, e.g., registration and management of trials, the land registry, the company register, uncontested proceedings et cetera. This process of re-structuring the organisation of the courts necessitates a substantial volume of further training for all personnel of the courts (and the prosecution). Seminars on information technology and re-organisation do not only deal with training in new computer programs but also with fields like the interaction of judges and other court staff, internal mediation, setting goals in the process of re-organisation, "corporate identity" within the courts, staff development plans, gender mainstreaming *et cetera*.

General topics

Seminars of the fourth pillar of continuing education concern fields of a more general interest like, e.g., the role of the judiciary between the years 1933 and 1945 and in the German Democratic Republic, developments in society, legal and ethical problems of cloning, of the internet *et cetera*.

Exact data as to available funds for continuing education and as to the proportion of activities of further education in these four pillars do not exist. It appears, however, that seminars are more or less evenly distributed over these four fields with a certain emphasis on organisation and information technology and, perhaps, the general topics being covered less often. In North-Rhine/Westphalia with about 25 percent of the judicial staff of Germany, about 2 million Euros per year are available¹⁰⁰, the sums however being subject to budget reductions.

5.3 Continuing Education, Evaluation and Promotion

Participation in programs of continuing education, so far, is voluntary, with the exception of training programs for newly appointed junior judges and prosecutors.¹⁰¹ Compulsory participation for judges appointed for life would be considered contrary to judicial independence. There is, however, a beginning debate on the question as to whether participation in further training should be introduced as a pre-requisite for promotion. In order to establish such a procedure, however, not only would a certain degree of evaluation of the success of further training have to be introduced but the results would also have to become part of the professional evaluation as a basis for decisions on appointment and promotion. This in turn would mean that the degree of success in programs of further education would be subject to judicial review.¹⁰² If further training is a pre-requisite for advancing in a career, it would also be necessary to grant opportunities for further training to all those who wish to take part. The risks would be that it might be difficult to meet an increasing demand, that selection procedures might have to be created¹⁰³ and that many more regular working days might be lost because people would attend seminars in order to establish and maintain chances of promotion.

6. JUDICIAL COUNCILS

Germany does not have higher judicial councils, neither on the federal level nor in the Länder. As has been pointed out above,¹⁰⁴ presidential councils with

¹⁰⁰ This includes continuing education for the staff of the penitentiary system.

¹⁰¹ cf. part 2, above.

¹⁰² cf. 3.6, above.

¹⁰³ where, in turn, the decisions might be subject to judicial review.

¹⁰⁴ Cf. 3.3, "process of promotion", note 53.

representatives of the judiciary do exist. They have an advisory function in the process of promotion and, sometimes, of initial appointment. The system of judicial electoral committees which is established on the federal level and in some of the Länder has also been described above.¹⁰⁵ Once a judge is appointed for life, he or she cannot be removed from office or transferred to another court without his or her consent.¹⁰⁶ Within the court, the case load is distributed by way of decision of the (independent) presiding committee of the court.¹⁰⁷

7. CRITICISMS

Specific criticisms and current reform initiatives concerning the judicial system in Germany cannot, at present, be identified. There is a certain continuing and underlying discussion about the checks and balances of the system, especially the system of evaluation, selection and promotion. This discussion includes the arguments in favour and against systems with parliamentary electoral committees on one hand and those with the single responsibility of the respective government minister on the other hand. In this discussion, it is undisputed that strictest guarantees for judicial independence have to be established or maintained. The discussion focuses on the problem how this could best be achieved. In favour of more parliamentary influence it is argued that interaction with a parliamentary committee would avoid the overriding political influence of the responsible minister. The argument against this system is that it would encourage political compromise and might lead to appointments to the judiciary in proportion with party representation in the electoral committee. To counter this, some propose a wider influence of professional bodies, an idea against which it could be argued that such professional bodies would only be representing the judiciary but would lack general democratic legitimacy. The opinion of the author is that the individual responsibility of the government minister, combined with the fact that his decisions have to be based on professional evaluations done by judges and with the awareness that every decision on appointment is subject to judicial review, seems to be sufficient to avoid one-sided political appointments or decisions governed by prejudice. Decisions for which an individual person carries responsibility tend to be more transparent than committee decisions where the person or persons that have influenced the outcome may not be identified.

Apart from the fact that the judicial system in Germany appears to be very diversified because of different structures in the Länder it is the field of continuing education which appears to be most in need of reform.¹⁰⁸ This coincides with a

¹⁰⁵ Cf. 1.1, "procedure of recruitment and selection".

¹⁰⁶ With the exception of the proceedings described in 4.3. above.

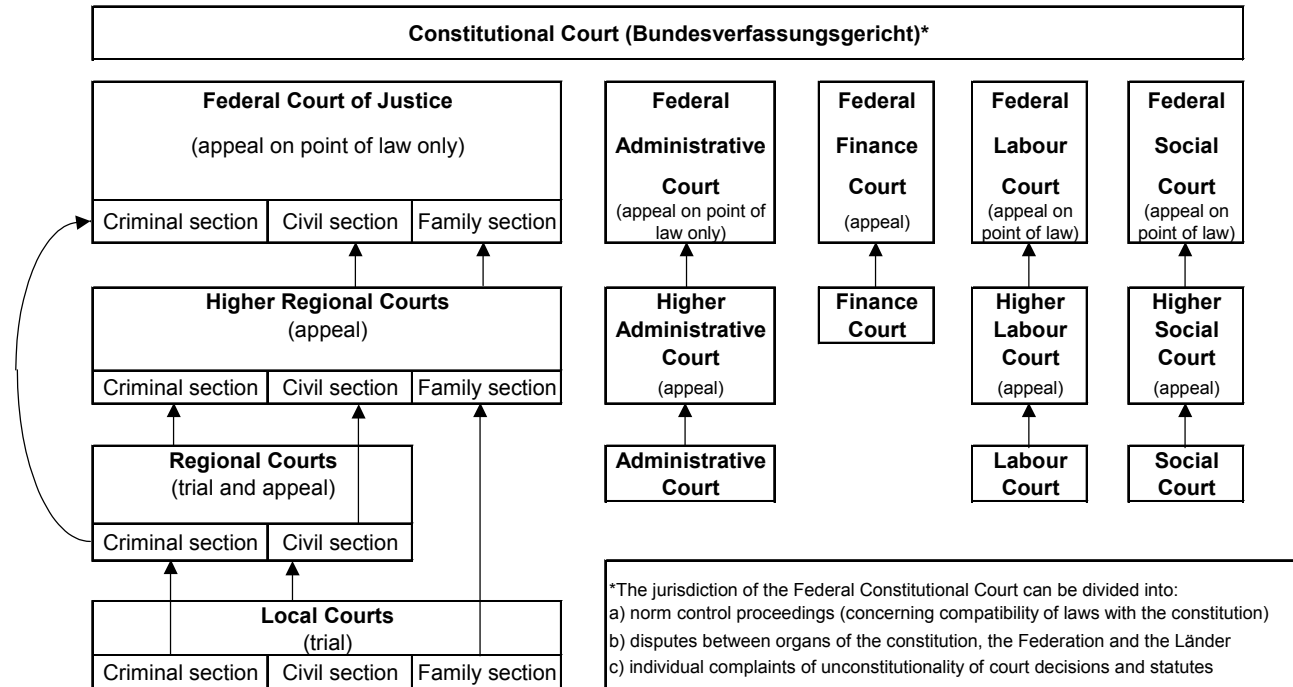
¹⁰⁷ Cf. 3.4, above.

¹⁰⁸ Cf. 5.1, above.

remarkable lack of interest of researchers towards the judicial system. University research on the efficiency of the system, on the sociological background of the judiciary, on recruitment, evaluation, promotion, their problems and their acceptance, even on the acceptance of the courts by the public and the way they are doing business is almost not existent, the major attempts in this field dating back to the 1970ies.

Table 1

Court System in Germany



The appeal system in criminal, civil and family cases is complicated:

Criminal cases: Appeals from local courts to regional courts, further appeal to higher regional courts
 Appeals from regional courts (trials, first instance) only to federal court of justice

Civil cases: Appeals from local courts to regional courts, no further appeal
 Appeals from regional courts (first instance) to higher regional courts, further appeal to federal court of justice

Family cases: Appeals from local courts to higher regional courts, further appeal to federal court of justice
 (Appeals to federal court of justice are subject to further conditions)

Table 2

**Judges in "ordinary" courts (civil, criminal, family courts) of the Länder
and prosecutors of the Länder in 2001**

Land	Judges	Female Judges	Female Judges %	Male Judges	Male Judges %	Prosecutors	Female Prosecutors	Female Prosecutors %	Male Prosecutors
Baden-Württemberg	1520	380	25,00	1140	75,00	474	117	24,68	357
Bayern	1984	417	21,02	1567	78,98	631	229	36,29	402
Berlin	1013	418	41,26	595	58,74	356	133	37,36	223
Brandenburg	505	223	44,16	282	55,84	242	81	33,47	161
Bremen	149	36	24,16	113	75,84	47	14	29,79	33
Hamburg	525	159	30,29	366	69,71	161	61	37,89	100
Hessen	1218	363	29,80	855	70,20	354	105	29,66	249
Mecklenburg-Vorpommern	351	133	37,89	218	62,11	160	53	33,13	107
Niedersachsen	1361	359	26,38	1002	73,62	469	145	30,92	324
Nordrhein-Westfalen	3506	995	28,38	2511	71,62	1010	289	28,61	721
Rheinland-Pfalz	712	198	27,81	514	72,19	227	69	30,40	158
Saarland	206	64	31,07	142	68,93	53	17	32,08	36
Sachsen	763	285	37,35	478	62,65	312	113	36,22	199
Sachsen-Anhalt	451	192	42,57	259	57,43	192	80	41,67	112
Schleswig-Holstein	487	134	27,52	353	72,48	164	44	26,83	120
Thüringen	438	174	39,73	264	60,27	175	65	37,14	110
Germany	15189	4530	29,82	10659	70,18	5027	1615	32,13	3412

Female judges in higher regional courts: 380 20,07 %

Female prosecutors in prosecutor generals' offices: 67 4,33 %

Table 3

Results of the first state exams in 2003

Land	Candidates	results of candidates examined															
		passed		passed with the mark*								failed		repeated exam			
			%	very good	%	good	%	fully satisfactory	%	satisfactory	%	sufficient	%		%	total	failed
Baden-Württemberg	1.789	1.154	64,5	3	0,2	35	2,0	158	8,8	380	21,2	578	32,3	635	35,5	211	123
Bayern	2.442	1.682	68,9	7	0,3	62	2,5	255	10,4	596	24,4	762	31,2	760	31,1	330	156
Berlin	1.124	796	70,8	2	0,2	31	2,8	130	11,6	355	31,6	278	24,7	328	29,2	119	55
Brandenburg	333	217	65,2	0	0,0	5	1,5	34	10,2	77	23,1	101	30,3	116	34,8	55	21
Bremen	141	105	74,5	0	0,0	2	1,4	11	7,8	48	34,0	44	31,2	36	25,5	30	14
Hamburg	478	387	81,0	2	0,4	19	4,0	85	17,8	153	32,0	128	26,8	91	19,0	44	7
Hessen	895	771	86,1	5	0,6	50	5,6	149	16,6	313	35,0	254	28,4	124	13,9	89	30
Mecklenburg-Vorpommern	306	204	66,7	0	0,0	7	2,3	23	7,5	86	28,1	88	28,8	102	33,3	49	20
Niedersachsen	880	689	78,3	2	0,2	40	4,5	138	15,7	249	28,3	260	29,5	191	21,7	123	49
Nordrhein-Westfalen	2.483	1.976	79,6	5	0,2	58	2,3	316	12,7	666	26,8	931	37,5	507	20,4	183	61
Rheinland-Pfalz	545	383	70,3	1	0,2	16	2,9	66	12,1	152	27,9	148	27,2	162	29,7	69	41
Saarland	153	118	77,1	0	0,0	3	2,0	24	15,7	49	32,0	42	27,5	35	22,9	15	8
Sachsen	637	375	58,9	1	0,2	9	1,4	59	9,3	138	21,7	168	26,4	262	41,1	111	71
Sachsen-Anhalt	327	193	59,0	0	0,0	8	2,4	32	9,8	82	25,1	71	21,7	134	41,0	64	36
Schleswig-Holstein	360	296	82,2	1	0,3	15	4,2	62	17,2	105	29,2	113	31,4	64	17,8	48	6
Thüringen	314	219	69,7	1	0,3	3	1,0	25	8,0	72	22,9	118	37,6	95	30,3	59	30
Germany	13.207	9.565	72,4	30	0,2	363	2,7	1.567	11,9	3.521	26,7	4.084	30,9	3.642	27,6	1.599	728

Female candidates: 6755
 Passed: 4777
 Failed: 1978

* Marks correspond with the following point system:

very good (sehr gut)	14.00 to 18.00 points
good (gut)	11.50 to 13.99 points
fully satisfactory (vollbefriedigend)	9.00 to 11.49 points
satisfactory (befriedigend)	6.50 to 8.99 points
sufficient (ausreichend)	4.00 to 6.49 points

Table 4

Results of the second state exams in 2003

passed		passed with the mark										failed		repeated exam	
		very good		good		fully satisfactory		satisfactory		sufficient					
	%		%		%		%		%		%		%	total	failed
892	87,3	0	0,0	13	1,3	114	11,2	336	32,9	429	42,0	130	12,7	96	34
1.569	87,4	1	0,1	38	2,1	223	12,4	597	33,3	710	39,6	226	12,6	178	63
684	82,6	0	0,0	10	1,2	126	15,2	310	37,4	238	28,7	144	17,4	155	41
247	83,4	0	0,0	1	0,3	32	10,8	125	42,2	89	30,1	49	16,6	50	13
75	86,2	1	1,1	2	2,3	22	25,3	33	37,9	17	19,5	12	13,8	11	3
330	89,9	3	0,8	28	7,6	93	25,3	127	34,6	79	21,5	37	10,1	28	6
792	86,0	0	0,0	14	1,5	140	15,2	382	41,5	256	27,8	129	14,0	98	29
134	77,5	0	0,0	1	0,6	8	4,6	63	36,4	62	35,8	39	22,5	16	5
647	87,2	0	0,0	11	1,5	132	17,8	316	42,6	188	25,3	95	12,8	106	16
2.524	86,9	1	0,0	67	2,3	432	14,9	1.042	35,9	982	33,8	382	13,1	360	101
526	89,5	0	0,0	7	1,2	107	18,2	255	43,4	157	26,7	62	10,5	32	6
125	85,0	0	0,0	3	2,0	27	18,4	56	38,1	39	26,5	22	15,0	16	2
421	84,2	0	0,0	5	1,0	36	7,2	165	33,0	215	43,0	79	15,8	61	24
135	75,0	0	0,0	0	0,0	11	6,1	47	26,1	77	42,8	45	25,0	67	11
365	84,9	0	0,0	15	3,5	80	18,6	155	36,0	115	26,7	65	15,1	40	16
256	88,0	0	0,0	1	0,3	23	7,9	113	38,8	119	40,9	35	12,0	35	10
9.722	86,2	6	0,1	216	1,9	1.606	14,2	4.122	36,6	3.772	33,5	1.551	13,8	1.349	380

5.132
4.498
634

following point system :

very good (sehr gut)	14.00 to 18.00 points
good (gut)	11.50 to 13.99 points
fully satisfactory (vollbefriedigend)	9.00 to 11.49 points
satisfactory (befriedigend)	6.50 to 8.99 points
sufficient (ausreichend)	4.00 to 6.49 points

Table 5

**Number of successful law candidates from 1989 to 2003 in Germany
(until 1993 without East Germany)**

First state exam		Second state exam	
1989	8020	1989	6129
1990	8127	1990	6853
1991	7508	1991	7522
1992	8411	1992	7555
1993	9781	1993	7796
1994	10127	1994	8359
1995	11380	1995	10653
1996	12573	1996	10689
1997	12393	1997	9761
1998	12153	1998	10397
1999	12099	1999	10710
2000	11893	2000	10366
2001	11139	2001	10697
2002	10838	2002	10330
2003	9565	2003	9722

**Table 6 Number of entries in "preparatory service" in 2003
(Referendardienst, practical training)**

Land	2003
Baden-Württemberg	852
Bayern	1.397
Berlin	760
Brandenburg	179
Bremen	75
Hamburg	250
Hessen	1.020
Mecklenburg-Vorpommern	95
Niedersachsen	711
Nordrhein-Westfalen	2.595
Rheinland-Pfalz	542
Saarland	106
Sachsen	382
Sachsen-Anhalt	95
Schleswig-Holstein	352
Thüringen	199
Germany	9.610

Table 7

Average age of appointees to positions of (junior) judge and / or prosecutor in the year 1999

Land	Appointments	Average Age
Baden-Württemberg	30	Ø 28,5
Bayern	74	Ø 27,8
Berlin	81	Ø 29,5
Brandenburg	11	Ø 29,8
Bremen	3	Ø 30,3
Hamburg	24	Ø 30,3
Hessen	53	Ø 30,7
Mecklenburg-Vorpommern	27	Ø 29,7
Niedersachsen	64	Ø 30,3
Nordrhein-Westfalen	167	Ø 29,3
Rheinland-Pfalz	33	Ø 28,8
Saarland	9	Ø 30,1
Sachsen	27	Ø 28,5
Sachsen-Anhalt	9	Ø 29,4
Schleswig-Holstein	9	Ø 30,9
Thüringen	12	Ø 27,3
Germany	633	Ø 29,4

Chapter 4

RECRUITMENT, PROFESSIONAL EVALUATION, CAREER AND DISCIPLINE OF JUDGES AND PROSECUTORS IN ITALY

Giuseppe Di Federico*

1. PREMISE

In Italy there are various courts that employ career prosecutors and/or judges: the administrative courts, the court of accounts and the so called “ordinary courts”. The judicial competence of ordinary courts is by far the most extensive: it encompasses all criminal cases and the greatest majority of civil cases. Furthermore the ordinary court system employs around 92% of all career magistrates (i.e. judges and prosecutors) operating in Italy. At present the law provides for 10,109 career magistrates for the ordinary justice system¹. In this paper we shall analyze only the recruitment and professional evaluations of the career judges and prosecutors of the ordinary justice system². Before doing so, however, a brief account must be given of the general characteristics of the corps of ordinary magistrates, and of the agencies in charge of their recruitment and professional evaluations in the course of their career.

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¹ The law has progressively and substantially increased the number of ordinary career magistrates in the last 40 years: from 5,703 in 1962 to 10,109 in 1999.

² There are also numerous honorary magistrates that exercise various judicial functions at the first levels of jurisdiction (altogether 11,476).

In reading this paper one must bear in mind that the term “magistrate” has a different meaning in different countries. In Italy as well as in France it is used to include both judges and public prosecutors. In both countries members of the two roles are jointly recruited and can move from one position to the other even recurrently in the course of their career. In Spain, instead, the term “magistrate” is used to indicate a specific level of the career of judges. In the United Kingdom and in the United States it is used to indicate judges having specific functions.

2. GENERAL CHARACTERISTICS OF THE SYSTEM OF RECRUITMENT AND CAREER OF ITALIAN ORDINARY MAGISTRATES

In Italy, as well as in other countries of Continental Europe, the recruitment and career of judges and prosecutors is modeled after that of the higher echelons of national public bureaucracies. In particular:

- a) Judges and prosecutors are jointly recruited by means of recurrent public competitions based on exams, written and oral, in which the theoretical knowledge of various branches of the law is verified. As a rule participants in those competitions are young graduates in law without any professional experience. In any case previous professional experience *per se* is not in any way taken into account in the process of selection. This characteristic of recruitment is much stricter in Italy than in some other countries of Continental Europe, where a limited proportion of judges and prosecutors is recruited from among lawyers, law professors or other persons having previous professional experience in the application of the law. The only, extremely limited, exception is the appointment for “exceptional merits” of university law professors and lawyers with fifteen years of professional experience as judges of the Supreme Court of Cassation. So far only six judges have been recruited this way.
- b) Judges and prosecutors recruited by means of national competition enter the judiciary rather young – as a rule between 25 and 30 years of age – and generally remain in service for their entire working life following a career which in various ways formally combines seniority of service and evaluations of professional merit. In Italy the period of permanence in service of judges and prosecutors is longer than in other countries of Continental Europe which adopt a bureaucratic system of recruitment. Compulsory retirement age is now set at 75. As a rule, therefore, Italian magistrates remain in service for over 45 years.
- c) The bureaucratic model of recruitment is based on the assumption that the processes of professional socialization, the ripening and development of the professional skills of the magistrates will take place and be governed entirely from within the judicial system. It implies, therefore, a sharp division of the processes of cultural socialization and of the development of professional skills

on the part of the various legal professions (i.e. lawyers, judges and prosecutors) soon after the period of higher education – a division that does not exist in common law countries where judges are recruited from among the lawyers and those processes are commonly shared by all the legal professions.

- d) The need to operate periodic and substantial professional evaluations of judges and prosecutors is closely tied to the bureaucratic model of recruitment. As they are recruited without previous professional experience, recurrent evaluations are provided for in order to satisfy a plurality of functional needs: in the first place to verify that the young magistrates have actually acquired the necessary professional competence; thereafter to choose among them those that are most qualified to fill the vacancies at the higher levels of jurisdiction; furthermore to ensure that magistrates maintain their professional qualifications throughout their several decades of service and until compulsory retirement. Another important and often overlooked function of an effective evaluation system is that of providing information which will permit the assignment of magistrates to specific functions which they are best suited to perform. This is another important difference of the bureaucratic system of recruitment *vis-à-vis* the system in which judges are recruited from among practicing lawyers (professional recruitment). While in the latter system judges are recruited to fill specific positions in a specific court without the formal perspective of a future career, in the bureaucratic system judges and prosecutors are recruited to satisfy indistinctly all of the functional needs existing in the court system of first instance. When promoted to the higher levels of their career they are formally supposed to be able to fill indifferently any of the vacancies opened at the higher levels of jurisdiction or be assigned to direct the various types of judicial offices at the lower jurisdictional level.

It seems important to point out that in some of the judicial systems of Continental Europe the range of functions to which judges and prosecutors can be assigned is wider and more diversified than in others (and the amplitude of the presumption of functional omni-competence varies accordingly). In most of the countries of Continental Europe judges and prosecutors are recruited separately and have different career systems; as mentioned above in France and Italy they are jointly recruited, follow the same career and can be assigned indifferently to the various judicial and prosecutorial functions. In Italy, furthermore, magistrates perform all the executive functions (high, intermediate and low) in the Ministry of Justice, including those dealing with technological innovation, the managing of the jail system and the actual command of the special jail police forces.

3. RECRUITMENT AND PROFESSIONAL EVALUATIONS: THE ROLE OF THE HIGHER COUNCIL OF THE MAGISTRACY (CSM)

In order to protect judicial independence, the Italian Constitution, enacted in 1948, provides that all decisions concerning judges and prosecutors from recruitment to retirement (promotions, transfers, discipline, disability etc.) be within the exclusive competence of the Superior Council of the Magistracy (*Consiglio Superiore della Magistratura*, hereafter CSM) composed prevalently of magistrates (*i.e.*, judges and prosecutors) elected by their colleagues. More specifically, it provides that two thirds of the members must be magistrates and that one third of the members be elected by Parliament among law professors and lawyers with 15 years of professional experience. It further provides that the CSM be presided over by the President of the Republic – *de facto* almost a symbolic presidency – and include among its members the President of the Supreme Court of Cassation and the General Prosecutor of Cassation. The elected members of the judiciary are renewed *in toto* every four years³. At present there are 27 members of the CSM. 29 judicial councils of court of appeals (*consigli giudiziari*) perform an advisory function for all the decisions of the CSM regarding promotions and professional evaluations of all the judges and prosecutors working in their respective areas of territorial competence. Each district council is composed of the President of the court of appeal, the Prosecutor General and five magistrates elected by their colleagues.

All the decisions of the CSM concerning the magistrates can be challenged in front of the administrative judge except those of a disciplinary nature. The latter can be appealed only in front of the united civil section of the Supreme Court of Cassation.

The first CSM came into existence only in 1959 (eleven years after the enactment of the Constitution). Since then, its role has progressively expanded far beyond that of managing judicial personnel. Its influence on the internal functioning of courts and prosecutor's offices is in many ways remarkable. The CSM has also acquired considerable influence on the decisions of the executive and legislative powers concerning all matters affecting the magistrates and the judicial system.

³ The structure and functions of the CSM are regulated in arts. 104-107 of the Constitution.

Table 4-1. Judicial Councils in France, Italy, Portugal and Spain

	Italy*	France**	Spain***	Portugal****
No. of members	27	12	21	17
Presidency	President of the Republic	President of the Republic	President of the <i>Tribunal Supremo</i>	President of the <i>Tribunal Supremo</i>
<i>Ex officio</i> members	President Supreme Court of Cassation General Prosecutor Court of Cassation	Ministry of Justice (as Vice President)		
No. Of members from outside the Judiciary	8 law professors or lawyers elected by Parliament with a qualified majority	3 appointed members: 1 by the President of the Republic 1 by the President of the Chamber of Deputies 1 by the President of the Senate	8 Jurists elected by Parliament	8 appointed members: 7 appointed by Parliament 1 appointed by the President of the Republic
No. of members of the judiciary elected or appointed	16 Elected by their colleagues (†)	7 elected members 1 judge of the Conseil d'Etat elected by his colleagues 5 judges and 1 prosecutor elected by their colleagues	12 judges elected by Parliament	7 judges elected by their colleagues 1 judge appointed by the President of the Republic

*Consiglio Superiore della Magistratura -

(†) As judges and prosecutors belong to the same corps and as the Council decides on matters concerning both judges and prosecutors, the active and passive electorate coincide.

**Conseil Superieur de la Magistrature : Judges and prosecutors belong to the same corps but there are two different sections of the Council, one for the judges and one for the prosecutors. The section here represented decides on matters related to the judges

***Consejo General del Poder Judicial.

****Conselho Superior da Magistradura. In addition, Portugal has also established a different Council for prosecutors, i.e. the Conselho Superior do Ministerio Publico.

For reasons that will become clear later on in considering the modifications in the career system, it is important to underline a specific aspect of the evolution of the CSM that concerns its composition. From 1959 to 1968 the higher ranks of the magistracy were greatly over-represented and were elected only by their rank peers⁴. From 1968 no higher ranking magistrate can be elected to the CSM without the electoral support of the lower ranking magistrates. It is worth noting that none of the more established Superior Councils of the Magistracy of Continental Europe (i.e. those of France, Spain and Portugal) has such a prevalence of members elected by the magistrates, nor an electoral law that makes those members so prone to the corporate expectations of the lower ranks of the judiciary (see Table 4-1).

4. RECRUITMENT OF JUDGES AND PROSECUTORS: PREREQUISITES FOR PARTICIPATION

The young law graduates who want to undertake a career as magistrates have to participate in a national competition (*concorso per uditore giudiziario*). Several prerequisites are required to participate in the competition, and to be successful the candidates must pass several written and oral exams. At this writing the rules governing recruitment are in a transitional phase. We shall first describe the characteristics of recruitment as they will be in the next few years (and very similar to what they were until three years ago). We will also indicate the temporary modifications presently applied. As we shall see some of those temporary modifications are due to the recent substantive increase of 1000 units in the number of magistrates and to the need to shorten the duration of the selection processes.

In order to participate in the national competition to become magistrates the law graduates must:

- be an Italian citizen
- have the full exercise of their political and civil rights
- be of “irreprehensible conduct”
- be at least 21 years of age and no more than 40
- be physically fit for the job
- have complied with the norms concerning military service⁵.

⁴ Prior to 1968 the number of elected magistrates were 14: four represented the lower ranking magistrates (*magistrati di tribunale*), four the appellate magistrates and six the higher ranking magistrates (*magistrati di Cassazione*). The four *magistrati di tribunale* were elected by the magistrates of the lower levels of the judicial career (68% of the electorate); the four appellate magistrates were elected by their peers (less than 25% of the electorate), the six higher ranking magistrates (*magistrati di cassazione*) were elected by their peers, who amounted in number to a little more than 6% of the entire corps of career magistrates.

⁵ A recent law abolished compulsory military service as of January 2005.

- have attained a degree from one of the “Schools of specialization for the legal professions” (a two year training program). This prerequisite, provided for by a law of 1997, has not been actually requested so far due to the delays in the creation of such schools of specialization.

The candidates that fail in three competitions are excluded from further participation. Those that have been dismissed from their jobs in any public agency are excluded as well.

The CSM is competent for all the decisions concerning the actual possession of the aforementioned prerequisites on the part of the applicants. Only two of them might entail a discretionary evaluation: i.e. the one concerning the “irreprehensible conduct” of the candidate and the one concerning his health. Our analysis of the decisions adopted by the CSM in the last 40 years show a lessening of the standards for both those prerequisites. As to the “irreprehensible conduct”, the only candidates that are consistently excluded are those that have been sentenced or incriminated for criminal violation of a voluntary nature. As to the health requisite, no specific check is actually made to relate the candidates’ health to the specific functions they will perform once recruited. Special assistance is provided for the handicapped that participate in the competition. In the course of the past competitions, for example, blind candidates have been admitted and allowed to use the Brail system for their written exams.

As one can see from tables 4-2 and 4-3, the applications to participate in the competition are very numerous and have progressively increased: in the 10 competitions issued from 1991 to 2000 they have increased from 9.796 to 26.706. As can be seen in those tables, from 1991 to 1997 the number of those that have actually participated in the written exams has increased from 4.285 to 7.458. In order to reduce the time needed to evaluate and grade the written exams, a law of 1997 introduced a system of pre-selection that the candidates have to pass to be admitted to the written exams: the candidates have to answer in two hours 90 multiple choice questions concerning civil law, criminal law and administrative law. Questions are sorted randomly from an archive of at least 15.000 questions. The entire archive of questions is revised and updated before every competition and made available to the candidates.

The use of the pre-selection tests has certainly had the desired effect of reducing drastically the number of candidates sitting for the first written exam. As one can easily see in table 4-3, their number has progressively decreased from well over 7000 to less than 2000. However, a new law enacted in 2001 has abolished the pre-selection tests for the future, but has maintained them both for the competition issued in 2002 and for the one issued in 2004. Tables 4-2 and 4-3 show that the recruitment process is time consuming, lasting from two to three years. They also show that women are more numerous than men both as applicants and as winners of the competitions.

Table 4-2. Competitions for the recruitment of magistrates 1991-1994

Competition issued (date)	12/01/1991			30/12/1991			01/10/1992			05/10/1993			25/02/1994		
No. of positions available	300			300			300			300			300		
Gender of candidates	M	F	TOT	M	F	TOT	M	F	TOT	M	F	TOT	M	F	TOT
No. of applicants	4494	5302	9796	4508	5497	10005	5498	6807	12305	6724	8635	15359	7366	9871	17237
Participants in 1st written exam	1903	2382	4285	2418	3258	5676	2877	3944	6821	3016	4368	7384	2613	3781	6394
Written exams completed	692	840	1532	1060	1184	2244	1041	1153	2194	965	1342	2307	998	1480	2478
Admitted to the oral exams	190	207	397	192	171	363	181	144	325	183	194	377	158	167	325
No. of Winners	146	161	307	144	131	275	147	115	262	144	158	302	115	124	239

Table 4-3. Competitions for the recruitment of magistrates 1995-2002

Competition issued (date)	COMPETITIONS WITHOUT PRESELECTION									COMPETITIONS WITH PRESELECTION								
	25/02/95			07/10/95			16/01/97			09/12/98			17/10/00			12/03/2002		
No. of positions available	300 POSTS			300 POSTS			300 POSTS			350 POSTS			360 POSTS			350 POSTS*		
Gender of candidates	M	F	TOT	M	F	TOT	M	F	TOT	M	F	TOT	M	F	TOT	M	F	TOT
No. of applicants	5.305	7.516	12.821	5.270	7.510	12.780	6.667	10.060	16.727	9.815	15.719	25.534	9.538	17.168	26.706	8.688	16.421	25.109
Exonerated from pre-selection	0	0	0	0	0	0	0	0	0	367	717	1.084	13	14	27	13	17	30
Participants in pre-selection	0	0	0	0	0	0	0	0	0	4.678	8.283	12.961	3.211	6.119	9.330	3.498	6.655	10.153
Participants in written exam	2.690	3.998	6.688	2.592	3.742	6.334	2.897	4.561	7.458	1.169	2.274	3.443	530	1.207	1.737	547	1.177	1.724
Written exams completed	933	1.370	2.303	1.185	1.604	2.789	1.044	1.370	2.414	912	1.684	2.596	409	887	1.296	463	978	1.441
Admitted to the oral exams	156	193	349	169	208	377	147	163	310	180	201	381	119	201	320	153	259	412
Winners	109	145	254	131	165	296	127	141	268	170	188	358	115	196	311	144	241	385
Date of appointment	23/12/97			28/07/98			12/07/99			18/01/02			19/11/02			19/10/2004		
Duration of competition (months and days)	33 ms 28 ds			33 ms 28 ds			29 ms 28 ds			37 ms 9 ds			24 ms 28 ds			31 ms 7 ds		

*Competition still pending as of September 2003

It is not a phenomenon characterizing only Italy. Actually the sharp and progressive increase in the number of women in the judicial corps, as well as the tendency to outnumber the male candidates in the selection processes, seems to be a phenomenon characterizing most of the countries which adopt a bureaucratic system of recruitment.

5. RECRUITMENT: WRITTEN AND ORAL EXAMS.

The candidates must take three written exams consisting of three compositions in which they have to consider specific questions concerning civil law, criminal law and administrative law. Candidates have at their disposal 8 hours for each exam. I have already mentioned that of recent there has been an increase of 1.000 units in the number of magistrates. In order to facilitate and expedite the selection processes in the light of this increase it has been decided to diminish temporarily the number of written exams from three to two. The subject to be excluded (pertaining to civil, criminal or administrative law) is drawn just before the date of the exams. It is also provided that the subject excluded from the written exams be more thoroughly tested in the course of the oral exams.

There are nine oral exams; some of them regard one discipline, others more than one:

- civil law and basic elements of Roman law
- civil procedure
- criminal law
- criminal procedure
- administrative law, constitutional law and fiscal law
- labor law and social security law
- European community law
- international law and elements of juridical information technology
- a foreign language chosen by the candidate from among the official languages of the countries of the European Union (this exam was added only in 2002).

The examining commission is composed of 24 magistrates and eight university law professors. All its members are chosen and appointed by the CSM, which designates among them also the higher ranking magistrates that will serve as president and vice president of the examining commission. The CSM designates also the members of the commission that will test the knowledge of the candidates in the foreign language of their choice.

At the end of the selection process the president of the examining commission transmits to the CSM the list of the successful candidates and a report containing a description of the selection process, of the difficulties encountered and sometimes

also suggestions to improve the selection process. Thereafter the CSM verifies the regularity of the selection process, approves the list of winners and appoints them as “*uditori giudiziari*”.

6. INITIAL TRAINING AND PROFESSIONAL EVALUATIONS

As already pointed out, in countries that have adopted a system of bureaucratic recruitment newly recruited magistrates do not as a rule have any previous professional experience. As a consequence, in those countries judges-to-be and prosecutors-to-be must undergo a prolonged period of initial training before being assigned to perform specific judicial functions autonomously. The length of this period, the content of the initial training and the evaluation of the trainees vary from country to country. In Italy the newly recruited magistrates (the *uditori giudiziari*) have to undergo a period of initial training for “no less than 18 months”. The actual length and the content of the initial training are regulated by the CSM which “directs, coordinates and controls the initial training” with the assistance of the district judicial councils and the collaboration of a series of other subjects of its own creation that operate both at local and national levels.

The CSM has divided the period of initial training in two functionally different parts: the “ordinary training” (*tirocinio ordinario*) and the “specific training” (*tirocinio mirato*). The ordinary training lasts for “no less than 13 months” and is intended both to widen the technical knowledge of the *uditore giudiziario* and above all to familiarize her/him with the actual judicial work through various experiences of on the job training: six months in the civil sector and seven months in the criminal sector (four months in criminal jurisdiction and three months in a prosecutor’s office). At the end of the “ordinary training” the CSM assigns each *uditore giudiziario* to a specific function in a specific judicial office (either as a judge or as a prosecutor). For the following five months the *uditori giudiziari* are then assigned to a program of on-the-job training in the specific functions of their first destination as judges or prosecutors. The on the job training is complemented and integrated by seminars on various topics held both at the local and national levels.

The adequacy of the *uditori* to actually perform judicial functions as judges and prosecutors is evaluated at the end of both periods of initial training. Such evaluations are made by the CSM on the basis of the reports and advisory opinions of the magistrates that at the local level have been in charge of the on the job training, of the heads of the offices attended, of the local district council. In case of negative evaluations the *uditore* has to undergo an additional period of training at the end of which a new evaluation is made. In case of a new negative evaluation the CSM dismisses him.

The analysis of the records of the CSM meetings of the last ten years does not show any case of dismissals or prolongation of the training periods specifically due to a negative evaluation of the professional competence of the trainees.

After the 18 months of training the *uditori giudiziari* are finally destined to actually perform autonomously the specific judicial function in the office to which they had been assigned since the end of the first period of the initial training.

7. PROFESSIONAL EVALUATIONS FOR THE JUDICIAL CAREER

Promotion to magistrato di tribunale. Two years after recruitment the *uditori giudiziari* are evaluated for promotion to *magistrato di tribunale*. The promotion is decided by the CSM on the basis of information supplied by a document of self evaluation of the candidate, by an assessment of the candidate on the part of the heads of the judicial offices in which the candidate has worked and by an advisory opinion of the competent district council. The CSM may take all the initiatives it deems necessary to integrate the aforementioned information. The law provides that the professional evaluation for this promotion should consider “the equilibrium, the preparation, the capacity, the productivity, the diligence shown by the *uditore giudiziario* in the exercise of her/his judicial activities” as judge or prosecutor. It furthermore provides that the evaluation must take into account “the judicial acts written by the *uditore*, his performance in the exercise of judicial activities and any other element which is relevant for a fully informed evaluation”. In case of a negative evaluation the *uditore giudiziario* must be evaluated once again after two years and in case of a second failure the law provides that he/she be dismissed.

As a rule, a rule with extremely limited exceptions, all the advisory opinions are worded in highly laudatory terms. In the 11 year period 1993-2003 the CSM considered 3.307 cases of promotion to *magistrato di tribunale* and expressed a negative evaluation in only 3 cases. All three cases concern grave and visible violations of professional conduct. In one of them, concerning a magistrate who later left the judiciary, the negative evaluation was made because, among other things, the magistrate used to remain absent from the office for prolonged periods of time without even communicating an address where he could be reached. Two of them were promoted with a delay of two years: one had a disciplinary sanction and the other had shown a “very grave lack of equilibrium in making judicial decisions, lack of professional preparation, and recurrent conflicts with the lawyers”.

Promotion to magistrato di appello. After 11 years from the promotion to *magistrato di tribunale*, judges and prosecutors are evaluated for the promotion to *magistrato di appello*. The CSM decides the promotions on the basis of the same

kind of information and the same criteria indicated above for the previous promotion. The candidates who fail are subject to a new evaluation in two years time. Meanwhile they continue to exercise their judicial functions.

The professional evaluations for this step of the career and those for the following two steps differ from the previous ones in two respects: a) the law does not require that the written judicial acts of the candidates be taken into account in the process of professional evaluation; b) the candidates are not dismissed from service even in case of recurrent failures (in other words, negative evaluations of professional performance can lead to dismissal only in the very first years of service).

In the eleven year period 1993-2003 the CSM made 2.496 professional evaluations for this step of the career. The magistrates evaluated negatively, once or more, were 30. Among those: 23 had had disciplinary sanctions (two of them had also undergone criminal proceedings); 7 were failed for a grave incapacity to fulfill their very basic duties (4 for “lack of equilibrium” and 2 for other health impediments). 17 out of the 24 magistrates who are still in service (5 retired or died, one was dismissed) have already been promoted with a delay of 2 or more years. The remaining 7 magistrates were failed only in recent years and are still waiting to receive a new evaluation.

Promotions to magistrato di cassazione. After seven years from the promotion to *magistrato di appello* judges and prosecutors are evaluated for the promotion to *magistrato di cassazione*. In addition to the seven years of seniority in the previous career rank the appellate magistrate must have actually exercised the judicial functions for at least 10 years. It is worth noting that this is the only type of promotion for which a prerequisite of actual judicial experience is required. In other words the Italian magistrates may reach the top of the career and remain in service for 45 years with only 10 years of actual judicial work (and the law even allows exceptions to that⁶).

The CSM decides the promotions to *magistrato di cassazione* on the basis of the same kind of information, criteria and procedure provided for the promotion to *magistrato di appello*, with only two differences: a) while for all the previous and successive steps of the career evaluations are made by the CSM of its own initiative at the completion of the seniority requirements, this promotion is decided only following an application on the part of the candidate; b) the candidates who fail can be evaluated again only after three years.

⁶ The law provides that the years of service in administrative functions at the Ministry of Justice as well as those spent as assistants to constitutional judges be calculated as years of service in the judicial functions. In the first five years of application of the laws on promotions of 1966 and 1973 no requisite of judicial service was required. In those years, for example, two magistrates who had been members of Parliament since the years immediately following the second world war (respectively since 1946 and 1948), were retroactively promoted to the highest level of the career.

In the years 1993-2003 the CSM made 1.889 evaluations. The magistrates who received one or more negative evaluation were 27. Among those: 19 had previously received one or more disciplinary sanctions (3 of them had also undergone criminal proceedings); 8 were failed for either physical or technical incapacity to fulfil their most basic duties. 8 out of 27 are not in service any more: 5 resigned, 2 were dismissed for disability and one dismissed following a disciplinary proceeding. 13 out of the 19 that are still in service have been promoted to “*magistrato di cassazione*” with 3 or more years of delay. Most of the remaining 6 magistrates were failed only in recent years and are still waiting to receive a new evaluation.

Promotion to magistrato di cassazione con funzioni direttive superiori. All magistrates with 8 years of seniority in the rank of *magistrato di cassazione* are evaluated for this promotion. The CSM decides once again on the basis of the same kind information, the same criteria and procedures indicated for the previous step of the career. Also in this case the magistrate that fails will be evaluated again in three years time. The only difference is that the CSM proceeds to the evaluations of the magistrates of its own initiative once the seniority requirement is met.

In the years 1993-2003 the CSM made 1.954 evaluations. The magistrates who received one or more negative evaluations number 57. Among those: 50 had disciplinary sanctions (12 of them had also undergone criminal proceedings); 6 were failed for either physical or professional incapacity to fulfill their most basic duties; one had been transferred by the CSM from one court to another in a different location, without his consent, because his behavior in the former court had been such that he could not properly and with due prestige exercise there the judicial functions. 20 are not in service any more: 14 retired voluntarily or due to age limits; 2 were dismissed due to health problems; 3 died; one was dismissed following a disciplinary proceeding. 20 out of the 37 magistrates still in service have been promoted with 3 or more years of delay. Most of the remaining 17 were failed only in recent years and are still waiting to receive a new evaluation.

It must be added that there are six top ranking positions to which the CSM usually appoints the *magistrati di cassazione con funzioni direttive superiori* having the highest seniority: the President of the Supreme Court of Cassation, two Presidents Adjunct of the Court of Cassation, the Prosecutor and Vice Prosecutor General of the Court of Cassation, the President of the Superior Tribunal of Public Waters.

This very brief description of the professional evaluations connected to the career suggests the following summary considerations:

- a) after the professional evaluation for the first step of the career, i.e. the promotion to *magistrato di tribunale*, the professional evaluations for all the following steps, even if reiterated several times, do not lead *per se* to a dismissal of the magistrates. After the negative evaluation(s) the magistrates that have been failed continue in any case to perform judicial functions. In other

words negative evaluations of professional performance can lead to dismissal only in the very first years of service (if failed twice in the evaluation for the promotion to “magistrato di tribunale” that takes place two years after recruitment).

- b) the analysis of the evaluations of the professional performance of the magistrates expressed by the CSM in deciding promotions for all the steps of the career shows clearly that all the magistrates are routinely promoted with motivations worded in highly laudatory terms. Almost all the negative evaluations occur when the candidate has received disciplinary sanctions, criminal sanctions, or is subject to disciplinary or criminal proceedings. In the few remaining cases the negative evaluations make reference to events concerning a very substantial incapacity to perform their duties (due to health problems or professional incompetence that is of great visibility and of the gravest nature).
- c) almost all the magistrates reach the top of the career in the 28th year of service (except for the six highest ranking positions indicated above). For the remaining 15-20 years of service following their promotion to the highest rank of the career the law does not provide that the magistrates undergo any other sort of evaluation of their professional capacity and performance.
- d) while most of the magistrates who are temporarily failed for the promotion to a higher rank of the career do have in their record a previous disciplinary sanction, it would be mistaken to assume that all disciplinary sanctions do lead to a temporary negative evaluation for the career. Actually in the last 30 years there are numerous cases of disciplinary sanctions of serious professional misbehavior that did not have that effect⁷.

The abandonment of the traditional means of professional evaluation based also on the analysis of the substantive aspects of the judicial production of judges and prosecutors (opinions, decrees, pleadings, appeals etc.) has greatly diminished the same relevance of judicial experience for the promotion to the higher levels of the career. In the last 35 years the CSM has constantly and unfailingly promoted to the higher levels of the career for “judicial merit” magistrates that for years and decades had been engaged full time in non judicial activities (the numerous magistrates elected to the National or European Parliament, elected to be president of region, mayors of large and small cities, magistrates appointed as Ministers or

⁷ It would be too long to describe the numerous cases of this kind which have occurred in the last 35 years. Let me just make a recent example. In February 2004 the CSM considered the case of a magistrate who had forgotten to free a foreign immigrant from an underdeveloped country whose terms of preventive detention had expired. As a consequence that citizen remained in prison for an additional 15 months. The magistrate in question received a rather light disciplinary sentence (admonition). Soon after that magistrate had to be evaluated for promotion to a higher rank of the career. The CSM decided to promote the magistrate anyway, regardless of the disciplinary sanction and of the deeds for which the magistrate had been sentenced.

Undersecretaries of State, magistrates serving as functionaries in various Ministries, etc.)⁸.

It is of interest to note that all the laws regulating the professional evaluations of magistrates for the various steps of their career specifically provide that the Minister of Justice may make his own evaluations known to the CSM, and that the CSM should take them into account in making its decisions. The analysis of the decisional processes of the CSM shows that in the last 40 years the Minister of Justice has not exercised this power of his except in extremely rare occasions.

The law also provides that a special commission of the CSM (*Commissione per il concerto*) should consult with the Minister of Justice regarding all the decisions concerning the appointment of the heads of the judicial offices. The Minister does not have, however, a veto power on the matter. If a common decision cannot be reached the CSM can choose its own candidate.

8. THE RELATION BETWEEN THE CAREER RANK OF THE MAGISTRATES AND JUDICIAL OR PROSECUTORIAL FUNCTIONS TO WHICH THEY CAN BE ASSIGNED

In very general terms one can say that in all the judicial systems there are always numerous courts of first instance, a lesser number of courts of appeal and one supreme court that decides cases in a definitive manner. As the workload of the courts of appeals is lower than that of the courts of first instance, and the workload of the supreme court is far lower than that of the courts of appeal, also the number of magistrates assigned at the higher levels of jurisdiction diminishes accordingly

⁸ The determination of the CSM to promote magistrates for judicial merit regardless of any substantive judicial experience showed itself in its most visible form at the beginning of the 1970'. Until then very few magistrates had been elected to the National Parliament. Two of them, Oscar Luigi Scalfaro -later to become president of the Republic- and Brunetto Bucciarelli Ducci, had been elected respectively in 1946 and 1948 when they were young magistrates at the bottom of the judicial career. Since then they had always been re-elected as MPs. Until the early 70's they had not progressed at all in their judicial career. In 1973 they were promoted by the CSM retroactively "for judicial merit" step by step up to the top of the judicial career without having performed judicial functions for a single day in more than 25 years. The possibility to reach the top of the judicial career and the advantages that go with it while performing other rewarding activities has induced many magistrates to actively pursue their acquisition. Naturally the diffusion of extrajudicial activities, be they full time or part time, poses serious problems both for judicial independence and for judicial productivity. See G. Di Federico "Independence and accountability of the judiciary in Italy: the experience of a former transitional country in a comparative perspective", in Andras Sajó (ed.), *Judicial Integrity*, Martinus Nijhoff Publishers, Leiden/Boston 2004, pp. 181-205; G. Di Federico, "Gli incarichi extragiudiziari dei magistrati: una grave minaccia per l'indipendenza e imparzialità del giudice, una grave violazione del principio della divisione dei poteri", in F. Zannotti, *Le attività extragiudiziarie dei magistrati ordinari*, Cedam, Padova 1981, pp. XIII-LXXVI.

(though in a measure that varies considerably from country to country). The selection of the magistrates for the different levels of jurisdiction tends to be progressively more demanding as one moves from the first instance, where magistrates are more numerous, to the appellate level and the level of the supreme court. The objective is to guarantee an ever higher level of professional capacity for those that have to take appellate decisions and for those that have to take definitive decisions at the supreme court level. In the magistracies having a bureaucratic system of recruitment the selection of judges and prosecutors for the appellate jurisdictions and for the jurisdiction of last resort is effectuated exclusively or prevalently among those that already exercise judicial functions at the lower jurisdictional levels. In the judicial systems with a bureaucratic judicial corps, therefore, there is a necessary relation between the career level of each magistrate and the judicial functions to which she/he can be assigned. As we shall see, this relation in the Italian judicial system was of an absolute rigidity until the mid '60s, but has since lost most of its cogency.

Table 4-4 summarily portrays the levels of the judicial career, the main judicial functions (operative and supervisory) to which judges and prosecutors may be assigned at the various levels of the jurisdictional ladder and the number of judicial positions in the offices reserved for the judges and prosecutors of the various levels of the judicial career as provided for by the law.

The *uditori giudiziari* with judicial functions and the *magistrati di tribunale* may be assigned by the CSM to one of the many operative judicial functions of judges or substitute prosecutor at the first level of the ordinary jurisdiction reserved for career magistrates. More specifically they may be assigned to serve: as judges in one of the 166 *tribunali* or in one of the 29 juvenile tribunals (*tribunali per i minorenni*); as substitute prosecutors in one of the 166 prosecutor's offices (*procure della Repubblica*) or in one of the 29 juvenile prosecutor's offices (*procure della Repubblica per minorenni*).

The *magistrati di appello* may be assigned by the CSM to serve: as judges in one of the many operative functions in one of the 29 courts of appeal; as substitute prosecutor general in one of the 29 general prosecutor's offices⁹. They may also be destined to serve in supervisory positions in the lower level of the jurisdictional ladder: as presidents of the 154 *Tribunali* of small and medium size, as *presidenti di sezione* (an intermediate supervisory position) in all the 166 *Tribunali*: as presidents of one of the 29 juvenile tribunals; as heads of one of the 154 small and medium size prosecutor's offices of first instance; as adjunct prosecutor (an intermediate supervisory position) in one of the 166 prosecutor's offices of first instance; as head of one of the 29 juvenile prosecutor's offices.

⁹ Actually the courts of appeal as well as the general prosecutor's offices connected thereto are only 26. There are, however, three "detached seats of court of appeal" and related general prosecutors' offices with a territorial competence of their own.

The *magistrati di cassazione* may be assigned by the CSM to serve as judges of the Court of Cassation or substitute prosecutor in the General prosecutor's office of Cassation. They may also be assigned to serve in a series of supervisory positions at the lower levels of the jurisdictional ladder, in particular as: presidents of one of the 12 *tribunali* of greater size or heads prosecutors in one of the 12 prosecutor's offices of greater size; in an intermediate supervisory position (*presidente di sezione*) in one of the 29 courts of appeal; in an intermediate supervisory position (*avvocati generali*) in one of the 29 general prosecutor offices.

The *magistrati di cassazione con funzioni direttive superiori* may be assigned by the CSM to serve in a series of supervisory positions: as *presidenti di sezione* (an intermediate supervisory position) of the Court of Cassation; as *avvocati generali* (an intermediate supervisory position) in the General Prosecutor's office of the Court of Cassation; as presidents of one of the Appellate courts or General prosecutors of Court of appeals. Among the magistrates of this level of the career the CSM chooses those destined to fill the four top ranking positions, i.e.: the First President and the President adjunct of the Court of Cassation; the Prosecutor General of the Court of Cassation; the President of the Superior Tribunal of Public Waters.

Table 4-4. Levels of the judicial career, main judicial functions connected thereto and number of judicial positions at each level provided for by the law as of 2003*

Levels of the career	Judicial functions connected to each level of the career at the various level of jurisdiction	No of. positions	percentages
I	<i>Magistrato di cassazione con funzioni direttive superiori:</i> First President of the Court of Cassation	1	0.01%
II	<i>Magistrati di cassazione con funzioni direttive superiori:</i> President Adjunct of the Court of Cassation; Prosecutor General at the Court of Cassation; President of the Superior Tribunal of Public Waters	5	0.05%
III	<i>Magistrati di cassazione con funzioni direttive superiori:</i> Intermediate supervisory positions in the Court of Cassation and in the General Prosecutor's Office at the Court of Cassation; Presidents of Courts of Appeal; Prosecutors General at the Courts of Appeal	110	1.11%
IV	<i>Magistrati di cassazione:</i> Judges and substitute prosecutors general at the Court of Cassation; intermediate supervisory positions in one of the Courts of Appeal or in one of the General Prosecutor's offices of Courts of Appeal; presidents of one of the 12 largest tribunals or of one of the 12 largest prosecutor's offices	642	6.48%
V	<i>Magistrati di appello:</i> judges and substitute prosecutors general at the Courts of Appeal; presidents of small and medium size tribunals; head of one of the small or medium size prosecutor's offices; intermediate supervisory positions in a tribunal or prosecutor's office	2253	22.74%
VI e VII	<i>Magistrati di tribunale e uditori con funzioni giudiziarie:</i> Judge in a tribunal or substitute prosecutor in a prosecutor's office of first instance	6568	66.28%
VIII	<i>Uditori senza funzioni giudiziarie:</i> Magistrates in training	330	3.33%
	Total	9909	100%

* the number of magistrates indicated in this table refers to judges and prosecutors to be assigned to judicial functions. The 200 magistrates that may be destined to other functions are not included.

As mentioned above, until 1966 for the *magistrati di appello* and until 1973 for the magistrates of two higher steps of the career, the relation between the level of the career and the corresponding judicial functions indicated above was absolutely rigid. No magistrate could exercise judicial functions lower than those reserved to

his career level. Competitions for the promotions to *magistrato di appello* and promotions to *magistrato di cassazione* were issued yearly and their number could not exceed the vacancies open at the higher levels of the career. As a consequence the number of participants in those competitions far exceeded the number of those that could be promoted. The selection process in the competitions was mainly based on the analysis of the written judicial acts of the candidates in “good standing”¹⁰. The magistrates that were promoted had to abandon their previous judicial function and were assigned to one of those corresponding to the newly acquired level of their judicial career (or otherwise refuse the promotion). Our research data show that prior to 1966 over 50% of the magistrates would reach compulsory retirement age as *magistrati di appello*, i.e not beyond the second level of the judicial career.

During the late 50’s and early 60’s, this career system was widely criticized by a large majority of the magistrates (above all by those who had still to go through the very selective competitive steps of the career) on the grounds that professional evaluations based on the written opinions of the candidates and placed in the hands of a limited number of higher ranking magistrates was hindering (internal) judicial independence and inducing among the lower ranking magistrates a diffused conformism with the judicial interpretations of a “conservative” judicial élite that had entered the magistracy during the fascist regime¹¹.

The laws regulating promotions were radically changed by Parliament between 1963 and 1973 under pressure from the CSM, from the powerful Association of Magistrates and with the support of the leftist parties (most notably of the numerous parliamentarians of the Communist Party). The new laws did indeed require that evaluation of professional performance be maintained for all the steps of the existing career, but they left wide discretion to the CSM in defining how to decide on the matter. More specifically those laws did not explicitly require that the professional evaluations should take into account the written judicial work of the candidates. Furthermore, they explicitly established that the magistrates having the necessary seniority requirement could be promoted at every level of the judicial career regardless of the number of existing vacancies. By then the system for the election of the magistrates to the CSM had already been changed, as described above in paragraph 3, making two thirds of the Council extremely responsive to the career expectations of their colleagues. The result has been that those new laws regulating the career of the magistrates have been interpreted by the CSM with

¹⁰ Magistrates that had received censures or that were widely criticized for their behavior in and out of the office were not, as a rule, taken into consideration for promotion. For an empirical analysis of the criteria actually used for the professional evaluation and the career of Italian magistrates before the reforms introduced in 1966 and 1973, see G. Di Federico, “The Italian Judicial Profession and its Bureaucratic Setting”, in *The Juridical Review. The Law Journal of Scottish Universities*, 1976, pp. 40-57.

¹¹ G. Freddi, *Tensioni e conflitto nella magistratura*, Laterza, Bari 1978, pp.115-147.

such extreme self complacency as to amount to a *de facto* refusal to enforce any substantial form of professional evaluation or selection. So much so that promotions “for judicial merit” to the highest ranks have so far been granted even to those magistrates that take prolonged leaves of absence to perform other activities in the executive or legislative branches of government¹². At present, and for the past 38 years, the evaluation of candidates having the minimum seniority requirements to compete for promotion at the different levels of the judicial hierarchy of ranks is no longer based either on written or oral exams, nor on the evaluation of their written judicial work, but on a “global” assessment of their judicial performance decided by the CSM¹³. As we have already shown, all candidates having the required seniority are promoted, short of serious disciplinary or criminal violations or patent professional incapacity. Those promoted in excess of the existing vacancies nevertheless acquire all the economic and symbolic advantages of the new rank, but remain *pro tempore* to exercise the lower judicial functions of their previous rank. In other words, the young law graduate by simply passing an entrance examination, where his/her general knowledge of various branches of the law is tested, can rest pretty much assured that the mere passing of time will lead him/her in 28 years and with no further checks of professional qualifications to reach the peak of the judicial career, which until the mid-60’s was reserved for only a little over 1% of the magistrates. While only some 100 magistrates reached the upper level of the judicial career until the mid 60’s (and they all occupied the high judicial positions formally connected to their high career rank), in the last 10 years their number has ranged constantly between 1000 and 2000. Of course, most of them still exercise judicial functions at the lower levels of the jurisdictional ladder. As of September 2002, for example, the percentage of middle and high ranking magistrates who exercised the judicial function formally corresponding to their career rank was rather low: only 5.5% (89 out of 1.560) of the appellate magistrates; only 1.6% (24 out of 1.533) of the *magistrati di cassazione*; only 7.9% (90 out of 1.137) of the *magistrati di cassazione con funzioni direttive superiori*. In fact most of those that are promoted to the higher levels of the career will never acquire the higher judicial position formally connected with their new career ranks.

As a rule, when substantive changes are introduced in one of the basic functional components of an organization, such as those described so far, other changes, often unintended, automatically follow in their wake. Judicial organizations are no exception. The changes introduced in a career system organically connected to a bureaucratic system of recruitment brought about quite a few relevant modifications in the personnel management system of the magistrates.

¹² G. Di Federico, “Le qualificazioni professionali del corpo giudiziario: carenze attuali, possibili riforme e difficoltà di attuarle”, in G. Di Federico (ed.), *Preparazione professionale degli avvocati e dei magistrati: discussione su un ipotesi di riforma*, Cedam, Padova 1987, pp. 3-55.

¹³ *ibidem*.

We will recall here only some of the implications of those modifications, i.e. those that seem to be more relevant for the purposes of this paper. We will first deal with the consequences for the assignment of the magistrates to specific judicial functions. Thereafter we shall consider the influence that those modifications have had on matters such as discipline, salaries and pensions¹⁴.

9. PROFESSIONAL EVALUATION AND ROLE ASSIGNMENT

As we have already indicated, a basic characteristic of the bureaucratic system of recruitment is that the magistrates are not recruited to fill specific vacancies in specific judicial offices, but rather to fill the vacancies, present and future, in all the judicial offices at all levels of the jurisdiction. In such a system professional evaluations of various kinds collected on various occasions and for various purposes throughout the long working life of judges and prosecutors serve not only the objective of guaranteeing high levels of professional standards in general but also to provide the necessary information to assign to specific judicial roles those magistrates that are best suited in terms of personal and professional characteristics. Of course the functional need for this type of information becomes all the more crucial where the nature and substantive content of judicial roles are as diversified as they are in the Italian judicial system.

Certainly the traditional professional evaluations for career advancement provided not only a powerful motivation for the refinement and improvement of professional qualifications, but they also provided – based as they were on the analysis of the written judicial work of the candidates – recurrent occasions for the collection of specific information on the professional characteristics of all the magistrates to be included in their personal dossiers¹⁵. We have already indicated that, with rare exceptions, for over 35 years all the evaluations prepared by the local judicial councils and by the CSM have been couched in highly laudatory terms and are very similar to one another (except for the fact that they indicate the types of work – judicial or of other nature – in which the magistrates have been formally engaged). As a consequence this kind of information is usually not very reliable or useful for decisions concerning role assignment.

¹⁴ For the other consequences regarding, among others, judicial independence, efficiency, work performance, and the diffusion of extra judicial activities, see G. Di Federico “Independence and accountability of the judiciary in Italy: the experience of a former transitional country in a comparative perspective”, quoted in note no. 8.

¹⁵ For an empirical analysis of the criteria actually used for the professional evaluation and the career of Italian magistrates before the reforms introduced in 1966 and 1973, see G. Di Federico, “The Italian Judicial Profession and its Bureaucratic Setting”, quoted above in note 10.

It would be a mistake, however, to concentrate our attention only on the professional evaluations connected to the career as performed by elected councils in order to assess the adequacy of the system to properly decide on judicial role assignment. There are other means of professional evaluations that are in various ways present in organizations with a bureaucratic type of recruitment, means that were once relevant for those decisions and that have progressively vanished from our judicial system. I shall hereafter indicate them summarily.

9.1 Role assignment and the widening of the scope of the constitutional principle of “non transferability” (*inamovibilità*)

In Italy, as well as in other judicial systems of Continental Europe, one of the means to protect judicial independence is that of forbidding that magistrates be moved from one office to another without their consent¹⁶. In several countries having a bureaucratic system of recruitment, however, some exceptions to the applications of that principle are provided. The more common exceptions to the full observance of the principle of “non transferability” usually concern: a) the first years after recruitment and b) the transfer to different functions following career promotions.

- a) In several European countries the newly recruited magistrates perform their judicial function for some years before being confirmed. In this period of apprenticeship they are kept under observation to evaluate both their fitness for the exercise of judicial functions in general and to test their specific aptitudes for the various sectors of judicial activity. Only after their confirmation do they acquire their full judicial status and thereafter cannot be transferred to another judicial office. Traditionally, the Italian magistrates would acquire their full judicial status only five years after recruitment. In the meantime they were required to serve in various judicial functions and, after two years of service, also to take a written and oral exam specifically intended to test the acquisition of professional skills. In 1970 this exam was abolished and, furthermore, the CSM ruled that the principle of non-transferability was inextricably tied to the exercise of judicial functions and that therefore it must obtain from the very moment in which the newly recruited magistrates are assigned to perform judicial functions (that is, at the end of the 18 months initial training period).
- b) An even greater widening of the application of the principle of non transferability has been generated by the changes in the career system. As I have already indicated, promotion to the higher levels of jurisdiction no longer entails –and *de facto* excludes– that magistrates be contextually destined to judicial functions different from those they exercise prior to their promotion. Actually they all remain in the exercise of their previous functions. When there

¹⁶ Art. 107 of the Constitution.

are vacancies in judicial positions corresponding to their rank they may, only if they so wish, apply for them. In other words the principle of non-transferability covers the entire working life of the magistrate from the very first assignment to judicial functions at the end of their initial training. The choice of the magistrates to fill the vacancies in the judicial positions reserved to the higher ranks of the career is always restricted to those that voluntarily apply for them. In other words *ex officio* assignment of judges and prosecutors to fill the existing vacancies is *de facto* possible only for the first assignment of judicial roles to the newly recruited magistrates. Any one of them who is fully satisfied with the location and functions of first destination after initial training can remain in that position for the next 45 years and at the same time be promoted step by step up to the highest level of the career.

9.2 Role assignment and collegiate professional evaluations

We have shown that at present Italian magistrates in the course of their service do not have to undertake any form of exam or competitive professional evaluation to obtain promotion to the higher levels of the career. All professional evaluations are actually made by collegiate bodies composed exclusively or prevalently by magistrates elected by their colleagues: such are the advisory opinions of the district council and the decisions adopted by the CSM. The role played by the presidents of courts or the heads of prosecutor's offices in the processes of professional evaluations has lost its traditional weight, even in matters concerning internal role and work assignments of the magistrates in the offices that they formally direct. Actually the CSM issues detailed regulations concerning role and work assignment and the head of all judicial offices are obliged to apply them. On those matters the conformity of their decisions to the regulations issued by the CSM can be, and often is, contested by the magistrate concerned. The proposal on matters of internal role assignment and case distribution prepared by the heads of each judicial office (be it a court or a prosecutor's office) as well as the objections of the magistrates is then reviewed by the local district council that sends the proposals of the heads of the offices of the district together with the objections of the magistrates and its own advisory opinion to the CSM. The CSM often asks the heads of judicial offices to change their proposals. When the conflicts between one or more magistrates and the heads of their judicial offices seem particularly acute, the CSM hears both sides before deciding (often the decision to hear the magistrates that are protesting against the decisions of their "superiors" is the result of pressures brought on the magistrates that are members of the CSM by local magistrates that have been active in supporting their election).

10. JUDICIAL DISCIPLINE

The Italian constitution provides that judicial discipline be administered by the CSM. Actually such a task is performed by a disciplinary commission composed by 6 members that the CSM chooses, by way of a secret ballot, from among its own ranks (two are chosen among the members designated by Parliament and four among those elected by the magistrates¹⁷). As a rule it is presided over by the Vice president. In any case the President of the CSM can preside over the disciplinary commission whenever he so wishes (in this case the Vice President is excluded from the judging panel).

Disciplinary initiative is formally in the hands of the Minister of justice and of the General prosecutor of the Court of Cassation. The investigative activities of the Minister are performed by the magistrates serving in the General inspectorate of the Ministry of Justice. *De facto* most of the initiatives are taken by the General Prosecutor and the magistrates of his office conduct the investigations and act as prosecutors in front of the Disciplinary commission. After a long debate on whether the Disciplinary commission was an administrative agency or a court of justice the second interpretation has prevailed¹⁸. In fact the decisions of the Disciplinary commission of the CSM can be appealed for questions of law in front of the united civil sections of the Court of Cassation. The opinions of the Disciplinary commission are subject to the same publicity as any other judicial opinion. The disciplinary initiative is terminated regardless of the gravity of the charges when the phase of investigation exceeds one year or when the interval between the notification of the charges to the magistrate and the relative judgment exceeds two years.

The disciplinary sanctions provided for by the law are: admonition, censure, loss of seniority up to a maximum of two years, expulsion or dismissal.

Disciplinary responsibility must be specified by law. However the law does not provide for a detailed code of judicial ethics¹⁹. The main norm regulating the matter is in fact rather vague and leaves ample room for discretion. It provides that magistrates are subject to disciplinary proceeding and sanctions when they “fail to accomplish their duties and conduct themselves either in their office or outside in a way that makes them unworthy of the trust and consideration that a judge must enjoy, or when they jeopardize the prestige of the magistracy”.

Tables 4-5 portray the basic quantitative information on the activities of the disciplinary commission of the SCM from 1991 to present: number of proceedings dealt with, number and types of sanctions, number of dismissals or termination of

¹⁷ Six additional substitute members are elected as well.

¹⁸ Decision of the Constitutional Court 1971, n.2.

¹⁹ Actually in 1994 the National Association of Italian Magistrates was asked to draw up a code of judicial conduct and did indeed prepare a proposal on that subject. A proposal that, as such, has no legal validity.

cases for various reasons. A word of caution must be spent with regard to the possibility to use statistics concerning disciplinary action and sanctions in comparing the working of different judicial systems. In fact the number and nature of disciplinary initiatives and sanctions may vary as a consequence of the different characteristics of the various judicial systems, such as: the features of recruitment²⁰ and related processes of socialization in the judicial profession, the rigor with which the conduct on and off the bench is taken into account in evaluating the members of the judiciary for promotion to the higher levels of jurisdiction, the nature and extent of the supervising powers of the heads of courts and prosecutors offices²¹.

²⁰ In some European continental countries judges and prosecutors acquire full judicial status and tenure in the very moment in which they start exercising the judicial functions (like in Italy) while in some other countries full judicial status and tenure is granted after having tested the professional competence and character of the candidates in the actual exercise of judicial work (in Germany, for example, this period varies from 3 to 5 years). It is obvious that the final recruitment in the latter countries is based on more relevant information on the actual professional capacity and personal characteristics, i.e. those very elements that later on may give rise to disciplinary proceeding and sanctions (temper, equilibrium, resistance to stress, ability to collaborate with others, etc.). The relevance of the system of recruitment to these matters becomes even more evident when we compare countries with bureaucratic system of recruitment with those that recruit judges from the higher echelons of the legal profession. This point is well represented in a paper written by Sir Thomas Bingham, Lord Chief Justice of England, for a seminar on “Judicial Ethics in Europe” held in London in June 1996. In this paper he recalls that in the last three hundred years no English High Court Judge had been dismissed for ethical reasons and, with cause, he maintains that this is due to “*the practice of appointing judges from a small pool of candidates, sharing a common professional background and known personally or by professional repute to those making and advising on appointments*”.

²¹ Let me illustrate this point with an example. The data published by the *Rapport d'activité* of the French *Conseil Supérieur de la Magistrature* for the years 1999 (pp. 23-24 / p. 79) and 2000 (p. 95) show that while on the one hand the norms which govern judicial discipline are not very dissimilar in nature from those existing in Italy, the number of disciplinary proceedings and sanctions is far higher in Italy than in France. One could be led to conclude that the observance of the rules of judicial conduct, worded in equally vague fashion in both countries, are interpreted and enforced with far greater severity in Italy than in France, short of thinking that the Italian magistrates are irremediably, almost genetically, more prone to be transgressive. But if one takes into account other aspects of the working of the two judicial systems other explanations may become more plausible. Let me mention only two of the differences that seem to be relevant: a) the traditional means of supervision by which the head of the judicial offices pervasively influenced the processes of professional socialization of the younger members of the judiciary have been to a great extent dismantled in Italy but not in France; b) where the career is competitive and based on substantive evaluations of professional performance, the members of the judiciary are from the outset and throughout their career recurrently and effectively reminded of the expectations existing in the system as to their conduct on and off the bench. Such conditions still seem to exist in France but certainly not in Italy.

Table 4-5. Proceedings dealt with by the Disciplinary Commission of the SCM 1991-2002

Decisions	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Admonition	19	12	16	10	20	13	20	12	9	15	18	17	181
Censure	18	6	10	10	11	22	13	7	2	6	3	5	113
Loss of seniority	6	8	2	1	3	4	2	3	0	3	0	1	33
Expulsion or dismissal	0	1	2	2	1	0	0	1	0	1	0	2	10
Total 1	43	27	30	23	35	39	35	23	11	25	21	25	337
No reason to proceed	35	35	29	35	46	73	79	51	54	87	66	39	629
Acquittals	20	19	20	15	24	18	47	15	38	46	54	47	363
Revision of previous sanctions	0	0	0	0	0	1	0	2	2	2	0	2	9
Total 2	55	54	49	50	70	92	126	68	94	135	120	88	1001
Total n. of proceedings	98	81	79	73	105	131	161	91	105	160	141	113	1338

11. PROFESSIONAL EVALUATIONS, CAREER AND SALARIES

Through a complex combination of judicial initiatives, judicial decisions and powerful pressures on Parliament, prosecutors and judges obtained (in 1984) salaries, pensions and retirement bonuses that are by far the highest in public service²². Another distinctive characteristic of the Italian judicial system is that there is no relevant relation between the professional performance of the magistrates and the level of their salaries. In fact, as we have already shown, though professional evaluations for career advancements are still formally provided for by the law, *de facto* all the magistrates, with very few exceptions, are promoted

²² G. Di Federico, "Costi e implicazioni istituzionali dei recenti provvedimenti giurisdizionali e legislativi in materia di retribuzioni e pensioni dei magistrati", in *Rivista trimestrale di diritto pubblico*, 1985, n. 2, pp. 331-73. F. Zannotti, *La magistratura, un gruppo di pressione istituzionale. L'autodeterminazione delle retribuzioni*, Cedam, Padova 1989.

by the CSM on the basis of their seniority. Therefore all the magistrates that remain in service until retirement age unfailingly reach the salaries of the highest rank (except for those of the 6 top positions).

Table 4-6 provides the basic data on the gross and net salaries of the magistrates divided by career rank and seniority.

Table 4-6. Gross and net salary by seniority of service and career rank

Gross and net salary by seniority of service and career rank				
Rank	Seniority	Gross monthly salary (for 13 months*)	Net monthly salary (for 13 months*)	Net yearly salary (for 13 months*)
Uditore	initial	2.695,18	1.791,61	23.290,93
	6 months	2.949,30	1.936,94	25.180,22
	18 months	3.404,27	2.208,37	28.708,81
Magistrato di Tribunale	2 years	4.153,23	2.600,24	33.803,12
	4 years	4.300,69	2.674,26	34.765,38
	5 years	5.299,43	3.206,51	41.684,63
	9 years	5.983,24	3.572,07	46.436,91
Magistrato di Appello	13 years	6.951,10	4.070,07	52.910,91
	20 years	7.679,99	4.421,69	57.481,97
Magistrato di Cassazione	21 years	8.754,85	4.963,16	64.521,08
	28 years	9.562,15	5.328,52	69.270,76
Magistrato di Cassazione con funzioni direttive superiori	29 years	10.663,94	5.860,60	76.187,80
	final	13.022,94	6.996,90	90.959,70
Presidente Aggiunto di Cassazione		15.192,83	8.037,03	104.481,39
Primo Presidente di Cassazione		15.318,96	8.104,10	105.353,30

* Every year, in the month of December, all public servants in Italy receive a double salary

The level of pensions and retirement bonuses²³ is related not only to the years of service in the judiciary but also to a series of other factors that allow for some variations from case to case, variations that are relevant principally with respect to the amount of the retirement bonuses. The analysis of the actual pensions of those that left the judiciary at the age of 70 or more in 2002 shows that the monthly

²³ The expression "retirement bonus" is here used to indicate the amount of money that the magistrates receive when they retire.

pensions for 13 months²⁴ is over 6.000 euros. The same analysis with regard to retirement bonuses received by the magistrates in the same period shows that the average amount of net retirement bonuses was 330.226 euros²⁵. In only 3 cases the net retirement bonus was a little lower than 300.000 euros. For the others it was well over that amount and up to a maximum of 372.140 euros. The net retirement bonus for the 6 top positions is well over 400.000 euros.

12. CONCLUDING REMARKS AND REFORM PERSPECTIVES

The analysis conducted so far clearly shows that the only substantive competitive evaluations of the Italian magistrates takes place at the time of their entrance examination, an examination for which no previous professional experience is required and that is intended to test their general knowledge of various branches of the law. The professional evaluations that they undergo in the 40/45 years of service are more ritual than substantial. Negative evaluations occur only when the magistrate has received disciplinary sanctions, is being tried for disciplinary or criminal violations or clearly shows a patent, prolonged professional incapacity to perform his basic duties. More often than not negative evaluations are reversed some years later. All the magistrates that remain in service till retirement age do reach the higher levels of the judicial career. The traditional forms of exams and competitive professional evaluations typical of the judicial systems adopting a bureaucratic type of recruitment have long been abolished. They have all been replaced by collegiate evaluations made by agencies (district judicial councils and the CSM) composed for the most part of magistrates elected by their colleagues. Even the actual performance of judicial functions weighs little in the evaluations of judicial merit: as we have indicated, at present only 10 years of actual judicial work are required to obtain positive professional evaluations for all the steps of the career in the 45 years or so of service. Furthermore there are even several exceptions that allow the magistrate to bypass that very limited requirement of actual judicial experience and anyway be promoted to the higher ranks of the career for judicial merit.

The role of the president of courts and heads of prosecutor's offices at all levels of jurisdiction, once certainly relevant in the processes of professional evaluation, has been drastically reduced. Collegiate evaluations of professional performance

²⁴ Every year, in the month of December, all public servants in Italy receive a double salary, be they in service or retired.

²⁵ It was impossible to acquire all the data concerning the exit bonuses of all the magistrates that retired in 2002 (the Ministry of Justice does not have such information). However the sample that we have is very large, it encompasses around half of the magistrates that retired in that period and can certainly be considered representative of the entire universe.

being all worded in highly laudatory terms do not provide the CSM with reliable information in deciding on the requests of the magistrates to be transferred from one office to another or from one judicial function to another, to be destined to a post as head of a court or of a prosecutor's office. The *de facto* abolition of substantive differentiated evaluations of the professional competence and personal characteristics of the magistrates, once included in their personal *dossiers*, has substantially increased the discretion of the CSM in reaching its decisions on matters that are of great importance for the magistrates who, from time to time, compete to be destined to a more desirable location or to an important office (such as the presidency of a large court or the direction of a large prosecutor's office). Our research data clearly show that in the course of the past 35 years Italian magistrates have progressively realized that their aspirations in those matters must of necessity be cultivated through personal ties with the decision makers and more particularly with their colleagues elected to the CSM as representatives of one of the four factions of the National Association of Italian Magistrates (ANMI). For this very reason almost all magistrates become members both of the ANMI and of one of its factions. To be a member in good standing of one of the factions of the ANMI is often a decisive factor in obtaining the desired decisions.

Obviously the lack of substantive professional evaluations in the course of the career does not mean that one cannot find a substantial number of Italian magistrates that are highly qualified, but it certainly means that the Italian judicial system does not provide the proper organizational *stimuli* that are necessary for the promotion of adequate diffused standards of professional qualification in a corps recruited among professionally inexperienced graduates in law that as a rule remain in service for 40/45 years.

In the last 10 years widespread criticisms have been voiced both for the lack of substantial guaranties of professional qualifications of our judges and prosecutors and for the leniency with which the CSM decides on disciplinary violations. At present there are two reform initiatives regarding those two issues. One internal to the SCM and the other in Parliament.

Let us consider first the innovations that the SCM wants to introduce in the procedure for the professional evaluation of judges and prosecutors. On the 13th of November 2002, shortly after being elected by Parliament as a member of the SCM, I distributed to all the other members of the Council a written report concerning the fact that for 35 years the Italian magistrates had been promoted step by step to the highest ranks of the judicial career without any substantive evaluation of their professional performance, and signalling at the same time the many negative consequences of such a phenomenon. The substance of that report was essentially identical to what I have written above in paragraphs 6 and 7. No one in the SCM raised relevant objections to the content of my report and it was unanimously decided to establish a study commission with the task of proposing a new, effective system of professional evaluations. That commission has worked for

over two years and its results have been discussed and approved by the SCM very recently, i.e. on the 26th of January 2005. The main innovation included in this new procedure for the evaluation of professional performance connected to various steps of the judicial career, consists in the provisions that part of the evaluation should take into account the written documents prepared by the magistrates in performing their duties (opinions, pleadings, ordinances, etc.). In writing the new procedure special care has been dedicated to the necessity to avoid that the evaluations of such written documents might concern the merit of the decisions taken by the magistrates, and by the same token be prejudicial for their independence. It is too early to say whether the innovation will produce the desired changes in the professional evaluations of Italian magistrates. As we have shown above in paragraph 7, the provision that the “written acts” of the magistrates be taken into account in the evaluation of professional performance does not necessarily imply that the evaluations be less lax²⁶.

At present Parliament itself is discussing a reform bill that delegates to the Executive the task of preparing a complex reform of various aspects of the magistrates’ status. It provides for very detailed guidelines that the Executive must follow for the modification of relevant aspects of the professional evaluations, career and discipline of judges and prosecutors. Promotions to the higher levels of jurisdiction would no longer exceed in number the existing vacancies and will be based on competitive evaluations (written and/or oral and/or relative to the actual activities of the candidates). Those that choose to compete for positions to the higher levels of jurisdiction will be allowed to enter the competition with a lower seniority than that required at present. If successful they will therefore reach the higher levels of salary sooner than at present and also sooner than their colleagues that have chosen not to compete. The magistrates that choose not to participate in the competitions for promotions to the higher career ranks will remain at the lower levels of jurisdiction but nevertheless acquire the same salary increases that exist at present, increases that will be based on the same summary and ineffectual professional evaluations that we have illustrated in the previous paragraphs. In other words all magistrates will continue to reach the top of the salary and pension ladder and also maintaining the same exit bonuses we have described above in paragraph 11. As regards the disciplinary system, the major innovation proposed in the bill consists in the introduction of a rather detailed list of disciplinary violations and of the sanctions connected thereto.

It must be added that the reform bill was introduced in Parliament by the Minister of Justice in March 2002 and that many changes have been introduced since, due to various and very effective sources of resistance to the innovations

²⁶ The law which regulates the promotion to “*magistrato di tribunale*” already provides that the district councils and the SCM should evaluate “the judicial acts” written by the candidates. As we have shown above in paragraph 7, that provision certainly did not prevent ineffectual, generalized positive evaluations.

originally proposed. The powerful trade union of Italian magistrates has conducted a firm, very active and vocal campaign of opposition to that bill and in this regard it is worth noting that, without exceptions, in the past 40 years all reforms passed by Parliament on the *status* of magistrates have always been introduced in response to specific requests of the magistrates' trade union or with its consent. Harsh criticisms against the reforms proposed in the bill have also been expressed in the official opinions that the majority of SCM has prepared for the Minister of Justice (this should come as no surprise considering that the majority of the members of the SCM are elected from among the most active members of the trade union of magistrates).

As we have already pointed out, at the time of this writing the bill is still pending in Parliament. Even if approved in the next month or so, the text of the reform has to be elaborated by a ministerial commission and Parliament will then have to verify that its guidelines have been thoroughly followed by the Executive. In any case the reform will not be enacted before the fall of 2005 or the early part of 2006. The opposition parties in Parliament, on their part, have firmly opposed the reform and have in various ways pledged that they will abolish it in case of their victory in the next general election that will take place in March 2006 (a victory which is not unlikely to occur).

Chapter 5

RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN THE NETHERLANDS

Philip M. Langbroek¹

1. INTRODUCTION

Recruitment, selection and training, but especially evaluation and career decisions of judges and public prosecutors are sensitive subjects almost everywhere, and the Netherlands are no exception to that. In this contribution I will describe the ways in which judges and public prosecutors are recruited, selected, how they are appointed and evaluated, how career decisions are made and how they may be dismissed from office. But first I will go into the organizational background of the judiciary and the Public prosecutions office, and describe the background and changes in the current processes of recruitment, selection, evaluation and promotion.

2. THE DUTCH JUDICIAL ORGANIZATION

In the Netherlands, the public prosecutions office and the judicial power have been separated. Today they have different functions and different organizations; the College of Procurators General, for which the minister of justice is politically accountable, manages the Public Prosecutions Department and the Public

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Prosecutions offices. The Council of the Judiciary manages the judicial organization, comprising court-organizations and judges. They are different and separate organizations and they pursue separate personnel policies.

This has not always been so. Before January 1, 2002, the courts were administrated by the ministry of justice; the court-organisations consisted of territorially deconcentrated service organizations of the ministry of justice. The public prosecutor's office-organisations consisted also of territorially deconcentrated service organisations of the ministry of justice. At the level of districts, the service organisations of the courts' and of the public prosecutors' offices had a common organization management, so the service organizations of the courts and the public prosecutor's offices were intertwined. In 1997, the College of Procurators General was instituted as a special service of the ministry of justice. They were and are responsible for the organizational service of the Public Prosecutors' Offices and it also coordinates on a national level the work of the 19 Public Prosecutors' offices and of the 5 Public Prosecutors' offices at the Appeal Courts.

The instalment of the Council of the Judiciary in 2002, as an organisation separate from the ministry of justice and from the Public Prosecutions Department, made it inevitable to also separate the local service organisations of the Public Prosecutors' Offices and of the Courts. So since 2002 responsibilities for courts and the public prosecutor's offices were not only separated *at the judicial level*, they were also separated at the local level. And as a consequence of that the service organisations split up into two different entities.

2.1 The public prosecutions department

Formally, public prosecutors are judicial public servants, and therefore, they belong to the same category as judges: they are 'judicial public servants'². However, their status concerning independence differs from that of judges. The Judicial Organisation Act clearly states the competence of the Minister of Justice to instruct the Public Prosecutions Department concerning all its tasks and competencies³. The Public Prosecutions Office (PPO) is fully accountable to the Minister of Justice. From a constitutional point of view, there is no difference on principle between the relation of the Public Prosecutions Department with the Minister of Justice and the relation between the Taxation Service and the Minister of Finance. However, it is generally believed that public prosecutors should be trusted to exercise their legal competencies in an autonomous and professional way. Too much interference of politics would harm the authority of public

² art. 1 Judicial Organisation Act - Wet RO

³ Wet RO, art. 127

prosecutors either in the eyes of the public or in the eyes of the judges.⁴ Nevertheless, members of the Public Prosecutions Department (PPD) are not independent as judges are; on rare occasions the minister of justice does give instructions concerning a particular case, e.g. occasionally in the prosecution of a medical practitioner committing euthanasia on request without consulting a colleague.

The Judicial Organisation Act institutes a Board of Procurators General.⁵ This board's tasks are to direct the proper prosecution and investigation of crimes throughout the country. Therefore, it is made competent to instruct chief public prosecutors at the level of the districts (*arrondissement* – the territory of the district court) and the chief advocate-general at the level of the resorts concerning prosecution and criminal investigation.⁶ The Public Prosecutions Department⁷ consists of 19 district offices covering the same territories as the districts courts (*rechtbanken*). Apart from that, there are the 5 Public prosecutors' offices at the level of the resorts (coinciding with the territorial areas of the ordinary appeal courts). There also is a national public prosecutors' office whose main tasks concern the investigation and prosecution of international organised crime. Public prosecutors are competent to investigate crimes over the borders of the districts they are assigned to.⁸ The Procurator General and the Advocates-General of the PPO at the Supreme Court have a special position, because their independence is guaranteed by the judicial organisation act. They have an advisory function on the interpretation of the law in cases brought before the Supreme Court.

2.2 The organization of courts and judges

Starting January 1, 2002, the Council of the Judiciary was instituted. The Council of the Judiciary has administrative tasks in the judicial field. The services of the ministry of justice relating to judicial administration were transferred to the Council of the Judiciary, except the tasks the ministry of justice kept responsibility for. The main tasks of the Council of the Judiciary are to distribute the budget allocated to it by law among the courts, to control the management of the courts and to help the courts manage and develop their organizations adequately. Part of this is the development and implementation of a model for quality management in

⁴ G.J.M. Corstens, De nieuwe organisatie van het openbaar ministerie en de gevolgen daarvan voor de onafhankelijkheid van de rechter, Raio-congresbundel 1999, Wolf Legal Publishers, Nijmegen 1999, p. 56-67.

⁵ Wet RO art. 125.

⁶ Code of Penal Procedure, artt. 8 and 140.

⁷ The term "public prosecutions department" refers to the national organisation of all public prosecutions offices, including the College of procurators general; a public prosecutions office is always a specific prosecutors office, with either a national specialised or a territorial general task.

⁸ Code of criminal procedure, art. 10; Code of Penal Procedure, artt. 8 and 140

the courts. The ministry of Justice is responsible for legislative initiative and orders in council on the judicial terrain.

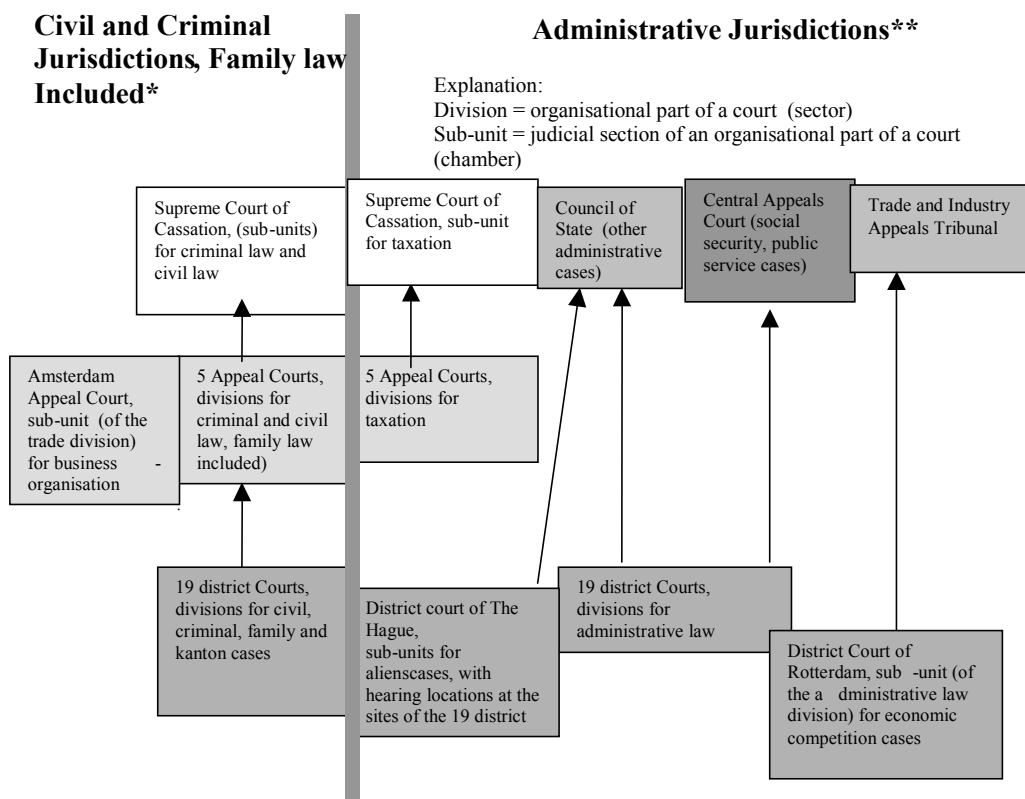
Nonetheless, the courts do have a great deal of organizational autonomy. The Council of the Judiciary has some accountability for its financial and managerial responsibilities towards the Minister of Justice. This accountability is restricted to the controlling competences of the Minister of Justice, and these competences (giving assignments to the Council and making proposals to the government to remove members of the Council from office) are intended to be used only in case of apparent mismanagement. Next to that, the Council has advisory competences regarding government policies and bills before parliament as far as they may affect the work of the courts.

The Netherlands has 19 district courts (*rechtbanken*), 5 courts of appeal (*gerechtshoven*) and one Supreme Court (*Hoge Raad*) as court of cassation across 12 provinces. Alongside this, there is a different organisation for administrative jurisdiction. For administrative cases there are 19 divisions (sectors) at the district courts, and 2 appeal courts, the Central Appeals Tribunal (for public service and social security matters) and the Judicial Division of the Council of State (other administrative cases). In certain matters these courts function as specialized courts at the first and only instance (nationwide). For example, the judicial division of the Council of State decides on decisions of public bodies under the Environment Management Act and the Land Planning Act. In addition, there is the district court of Rotterdam for economic competition cases, with the Trade and Industry Appeals Tribunal as the court of appeal. But the latter also functions as a first and only instance court for decisions by public bodies from the public industrial organisation (especially important for agriculture). Furthermore, currently there are 5 first instance courts (the 5 Appeal Courts) for taxation, with the Supreme Court as the court of cassation. For taxation, a bill is currently before Parliament. It proposes to vest first instance competence for taxation cases in the 5 district courts where the 5 Appeal courts are located. Hence, the two-tier system for taxation would change into a three-tier system.

Military criminal cases are dealt with by the unit for military cases at the district court of Arnhem and by the military unit of the appeal court of Arnhem.⁹ The Supreme Court hears appeals only in cassation (i.e. points of law and not fact). All the other courts beneath the Supreme Court can hear cases on both points of law and fact.

The Council of the Judiciary has no competences regarding the Council of State and the Supreme Court, even although they fulfil important judicial functions.

⁹ Not included in the chart.



*Kanton divisions are the former sub-district courts, with competences in small claims cases and minor criminal cases; kanton-judges also deal with rent and labour-cases

**The chart does not show the first and only instance competences of the three highest administrative courts.

Figure 5-1. The Court System in the Netherlands, April 2005

3. PERSONNEL POLICIES FOR COURT ORGANIZATIONS AND JUDGES

Because the Council of the Judiciary is responsible for the quality of the courts and for the judiciary, personnel policies also belong to its domain as a matter of

fact. But because *the Crown* (in fact: the government on advice of the Minister of Justice) had the competence to appoint judges, these policies concerning recruitment, selection and judicial career are in effect considered as a joint responsibility of the Council, the courts and the Minister of Justice. So, formally, the Minister of Justice is responsible for the recruitment, selection and training of candidate judges. The Minister of Justice installed the Committee for recruitment of members of the judiciary (commissie aantrekken leden rechterlijke macht) and the raio selection committee,¹⁰ and appoints its members. The same persons are members of both committees. The committees operate autonomously. Members are judges (the chairman is a member of the Supreme Court), public prosecutors, professional lawyers and a few non-lawyers with managerial positions within the industry or the public sector. To date, the bureau of the committee is in the same building as the Council of the Judiciary.¹¹

By December 31, 2002 the Dutch Judicial organization employed 1809 fte¹² judges and 5016 fte Court staff.¹³ Personnel policies are related to the overall policies of the council. These policies concern:

- reinforcement of the external orientation of the judiciary¹⁴
- development of personnel management
- description of working processes (in order to improve them)
- increase productivity
- implementation of the quality system
- enhance the use of ICT's

In a professional organisation, personnel are considered a main factor to achieve desired outcomes. The desired outcomes are to fill up the available places of judges reaching retirement age (at 65) and correspondingly increase the number of positions for judges. In five years 800 new judges (on a total of 1800 fte in 2002!), are necessary. Next to that there is a need for 2500 fte new clerical staff.¹⁵ Because of the need to find about 800 new judges in the next five years, the Ministry of Justice and the Council of the Judiciary have gone through considerable efforts to inform their resource groups of candidate judges of the possibilities and attractiveness of becoming a judge. This has been successful so

¹⁰ 'Raio' is an abbreviation for: 'rechterlijke ambtenaar in opleiding' = judicial public servant in training.

¹¹ TK 2000-2001, 26352, nr. 49.

¹² Fte=full time equivalent.

¹³ Source: Jaarverslag voor de Rechtspraak 2002, p. 38, via: http://www.rechtspraak.nl/Raad_voor_de_rechtspraak/default.htm

¹⁴ The aim is that courts and judges have a societal outlook and are able to react to new societal developments.

¹⁵ Jaarplan voor de rechtspraak 2003, p. 14. The original plan was to find 1000 new judges, 200 more than the number of retiring judges to be replaced. Cut backs in government spending has resulted in a less ambitious goal.

far. From my findings until now, however, it may be derived that it is easier to find adequate candidates amongst experienced lawyers than amongst law school graduates. Because of cut backs in government expenditure starting 2004, the growth of the number of positions of judges has been reduced considerably, postponing original plans.

Next, the Council aims at a further professionalisation of judges regarding managerial skills, but also regarding societal and legal knowledge. Following the policy that candidate judges need courses *and* training on the job, the large numbers demand that more training capacity is made available at the national judicial training institute, and also within the courts.

Furthermore, the training schedules for trainees should be adapted to the new professional demands. The central issue in personnel management is management of skills and knowledge.

Last but not least, by consulting the courts, a personnel development and career program has been constructed. The idea behind that is not only to rationalize personnel policies, but also to make the judicial organization an attractive employer.

4. PERSONNEL POLICIES BY THE PUBLIC PROSECUTIONS DEPARTMENT.

By December 31, 2003 the public prosecutions department counted 586 fte public prosecutors (610 persons) and 3064 fte clerical staff (3380 persons).¹⁶

Several years ago, a parliamentary inquiry (1995-1996) into methods of criminal investigations supervised by the public prosecutions department led to a reorganisation. A college of Procurators General was instituted. Since that time serious efforts have been made to develop the organisation of the PPD and the public prosecutions offices, implementing a Dutch version of the quality management model of the European Foundation for Quality Management.¹⁷ According to the plan for the year 2003, the PPD focuses on improving juridical quality, styles of leadership and developing a career policy by implementing 'career talks'. Developing ICT is a further point of attention. Furthermore, quite some attention is given to management development.

The PPD has developed a personnel policy for public prosecutors. It aims at improving and maintaining quality of personnel, especially for the ranks of public prosecutors.¹⁸

¹⁶ Source: annual report Public Prosecutions department 2003, p. 17, see: <http://www.openbaarministerie.nl/pg/documents/extra/jaarverslag2003/jaarverslag2003.pdf>

¹⁷ www.efqm.org

¹⁸ See the list of ranks at p. 18

The public prosecutions department does not have particular problems with recruitment and selection.

5. RECRUITMENT AND SELECTION OF JUDGES AND PUBLIC PROSECUTORS.

Recruitment and selection of public prosecutors and judges are a formal responsibility of the ministry of justice. Both follow partly the same path, especially concerning the recruitment, selection and training of law school graduates.

5.1 Law school graduates

After law school, a graduate may apply for becoming a 'judicial public servant in training' (raio). The recruitment and selection process follows 4 major steps, in which the number of candidates is gradually reduced.

Step 1: application for admission

Via www.rechtspraak.nl, they may fill out a form, and send it to the raio-selection committee. The formal demands are:

- having graduated at a law faculty with the effectus civillis exams in civil law, criminal law and administrative law;
- to be of Dutch Nationality
- to have the following personal characteristics:
 1. Analytical capabilities
 2. Juridical expertise
 3. Decisiveness
 4. Being able to produce adequately under pressure
 5. Good communicative skills
 6. Having a clear judgment

Step 2: tests and interview

The procedure of selection for entry consists of a test on intelligence followed by an interview with the selection committee of those candidates that fulfilled requirements.

Step 3: Assessment and selection interview

The candidates admitted by the selection committee, have to go through a psychological assessment (about 100 each year), and another interview with the raio-selection committee. The psychological assessment consists of tests and 'real

working life' - situations under observation. Access is granted according to the test results and according to the number of vacancies. The tests are designed to select the most talented and able candidates. There is a lot of competition, because each year only 50 candidates are eventually selected.

Step 4: Six years of courses and training on the job

After admission to the training, candidates will be assigned to a court for training. The training consists of courses and training on the job, under supervision of a 'mentor', who is usually an experienced judge or public prosecutor.

The training period for selected law school graduates is 6 years. Their scheme of basic training consists of the following courses during 4 different internships:

Criminal law	Time
	6 months
Introduction	14 x 4 contact hours
Defence	5 x 5 „
Evidence	2 x 4 „
Juridical essays	4 x 4 „

Civil Law	Time
	10 months
Civil judgements	14 x 4 contact hours
Evidence	2 x 2 „
Communication	10 x 4 „
Juridical Inquiry	5 x 4 „
European Law	5 x 4 „

Administrative Law	Time
	10 months
Introduction	5 x 4 contact hours
Administrative judicial control	2 x 4 „
Writing judgments	3 x 4 „
Land use planning law	5 x 4 „
Social insurance law	5 x 4 „
Time management	5 x 4 „
Styles of communication	5 x 4 „

Public Prosecution	Time
	12 months
Introduction	16 x 4 contact hours
Searching and Seizure	5 x 4 „
Police and special services	2 x 4 „
Presentation during court sessions	5 x 4 „

The internship means that the candidates actually function at a court sector and at the public prosecutions office. After 38 months of basic training, candidates have to choose either for a career as a judge or for a career as a public prosecutor. After that, they follow an in-depth training of 10 months. According to the choice of the candidate, the in-depth training focuses on Criminal, Civil or Administrative law, or on the Public Prosecutions Office. Following the period of in-depth training, a two year period of an internship outside the judicial organisation follows, for example at a law firm, a juridical function in a public service (ministry, or a special agency) or in a juridical function in a business company.

Step 5: for candidate judges: application for appointment at a specific court

Having finished the subsequent six years of courses and internships (in different court sectors, in the public prosecutions department and in an organization outside the judicial organization – a law firm, the law office of a company, or e.g. the legal department of a ministry), one has to apply for a judicial job. The final part is an interview with judges from the court that has a vacancy – this may be the court where one had training, but not necessarily so. They want to be sure that a candidate fits into their organisation. So within the limits of the recruitment and selection on a national scale, an element of co-optation still does exist for judges.

Step 5: for candidate public prosecutors

The fifth step is different for public prosecutors: they will have to discuss their preferences for assignment to a district prosecutions-office with the PPD's placement committee. They may seek a positive advice to the committee from a Chief Public Prosecutor.¹⁹

5.2 Experienced lawyers as candidate-judges

Experienced lawyers may also apply for recruitment as a judge or as a public prosecutor. Of course they must fulfil the formal obligations of having a law school degree/diploma, and have reached at least the age of 31. Next to that, they should have 6 years of working experience as a professional lawyer (advocate, public servant, business employee). For candidate judges and for candidate public prosecutors' different procedures apply. We describe them in different steps.

Step 1: application

The procedure consists of filling out an information form, via www.rechtspraak.nl.

¹⁹ This is a committee of the Public Prosecutions Department. It functions under responsibility of the College of Procurators-General, and consists of Chief Public Prosecutor's and occasionally a member of the College.

Step 2: pre-selection

Then, a pre-selection follows, to decide if an applicant is (formally) admissible.

Step 3: selection

If a candidate is accepted for the selection procedure, he or she is then submitted to a psychological examination and three interviews with three different couples of members of the recruitment and selection committee.

Step 4: finding entry into a court

Having passed the selection procedure, the candidate judge should find entry into a court. In order to do so it helps to have the support of the president, although unsupported lawyers do occasionally apply. Having found the support of the president of a court, one is appointed as a deputy-judge for one day a week.

Step 5: part-time training on the job until the candidate qualifies

After that, one has to follow a period of training on the job, under the guidance and judgment of a personal coach – an experienced judge. The training is usually directed at learning how to conduct a hearing at court and at writing judgments. Next to that, depending on the experience and knowledge of the candidate, a number of law courses of the judicial training centre should be followed. The training programs still differ from court to court. Only if the personal coach is satisfied with the results of the training on the job, one may apply for a judicial job. Much depends on the judgment of the personal coach – sometimes candidates take two or three years before they pass qualification. Once their mentor is satisfied, they can live up to the demands of handling cases in courts and of writing judgments, and they may get a positive advice from their court and be appointed as a full time judge.

Comments

This way of becoming a judge is quite demanding for experienced lawyers, because one needs to maintain one's job during this period of training. So one has to spend quite some private time in order to qualify. Co-optation is a dominant trait here as well, as is the socialization-on-the-job. Currently, on the initiative of the Council of the Judiciary, a national project is implemented to make these training projects uniform. The outcomes will be ready for consent by the national assembly of presidents of the courts by the end of 2003.

Formally, the best court clerks with an academic degree in law may apply for a function as a judge, but for reasons of the judicial professional culture, this is not an easy track. Efforts are being made to give such court clerks a more realistic opportunity to enter a judicial career.

Currently a “third road” is under development, in order to enable lawyers with less than six years’ experience to apply for a job /traineeship as a judge.

This means that for accepted candidates the current knowledge and skills are assessed, and that an individual training program is designed accordingly. This possibility is being developed especially for excellent registrars at the courts. It is considered a responsibility of the courts as employers to invest in professional personnel policies.

5.3 Experienced lawyers as candidate public prosecutors

Step 1: application

Experienced lawyers will have to write a letter and send their CV to the Public Prosecutions’ Departments’ recruitment and selection committee (Selectiecommissie OM). This selection committee consists of public prosecutors of different ranks.

Step 2: primary selection

After that, a primary selection takes place. The primary selection is oriented towards the formal requirements to become a public prosecutor.

Step 3: selection

The persons that pass the primary will be assessed psychologically and after that they will have three interviews with different pairs of members of the selection committee. Occasionally even members of the College of Procurators General do participate. The selection procedure is oriented on 5 competences:

- Problem-analyses
- Juridical judgment and opinion
- Convincingness
- Social consciousness
- Decisiveness

The different interviews are about the CV and background of the candidates, juridical insight and opinion, and on their functioning in an organization. About 30 % of the candidates make it. This means that selection requirements are quite high. To date there are about 10 vacancies/year.

Step 4: training on the job and evaluation

Once selected, candidate public prosecutors will be appointed to a PPO as a full time deputy public prosecutor for one year. This implies a paid job on a temporary basis. In that year they will have to follow special courses at the judicial training centre and a mentor (an experienced public prosecutor) will coach them in doing everyday public prosecutors’ work.

For experienced lawyers working in a temporary position as a deputy public prosecutor, evaluation after one or two years is decisive. If the evaluation is positive, they will be appointed as a public prosecutor on the advice of the Chief public prosecutor. It only rarely happens that a deputy public prosecutor is dismissed because of bad training results, but it does occur occasionally.

Comments

In order to become a public prosecutor after final selection a candidate is offered a fulltime job. This job is offered to the candidate under the reasonable expectation that the candidate will qualify. The selection process makes it possible for the Public Prosecution Department to commit itself to the candidate. This seems to make it somewhat easier for candidate public prosecutors compared to candidate judges – who have to invest their own time into their qualification process, whereas there is no guarantee for a positive outcome after one or two years.

5.4 Career possibility for clerical staff at the Public Prosecutor's Offices.

A third possibility to become a public prosecutor exists for clerical staff members at the Public Prosecutor's Offices. They can apply for a function as a public prosecutor for bulk cases (traffic offences, small crimes), that are dealt with by a single judge court. They should have an experience for at least four years as juridical clerk and send a letter and their CV to the selection committee. After passing the psychological assessment and with a positive advice of their Chief Public Prosecutor, they will be appointed by the Crown.

5.5 Numbers on selection and recruitment of judges and public prosecutors.

The table below shows *the number of law school graduates* that were recruited, selected and appointed as for training as judges and public prosecutors during the years 1993 – 2003.²⁰

The procedure for recruitment and selection for judges changed in 2000, hence the numbers from 2000 onwards are not entirely comparable with the numbers from before 2000. Until 2000 the number of *participants* in psychological assessments was counted. From 2000 onwards, the number of *applicants* for secondary selection was counted (step 2 in paragraph 5.1). As shown in the numbers for 2001, 2002 and 2003, about 60% of the candidates that passed the assessment (step 3 in paragraph 5.1) are recommended for appointment.

²⁰ Source: Raio Selectiecommissie/Frank Bottenberg Raad voor de Rechtspraak.

Table 5-1. number of law school graduates

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Nr of applicants on advertisement	*	*	*	*	*	1197	865	*	*	*	*
Nr. of applicants after selection according to letter/CV	*	*	*	*	*	639	767	*	*	*	*
Nr. of participants/ applicants for analytical psychological test	649 par tici pants	854 par tici pants	873 par tici pants	1146 par tici pants	1092 par tici pants	549 par tici pants	652 par tici pants	430 <u>appli-</u> <u>cants</u>	251 <u>appli-</u> <u>cants</u>	232 <u>appli-</u> <u>cants</u>	258 <u>appli-</u> <u>cants</u>
Nr. selected for preliminary interview	*	*	*	*	*	*	*	*	127	118	135
Assessment	*	*	*	*	*	*	*	*	103	94	113
Selection Interview	172	177	177	191	187	163	205		80	79	104
Nr. of recommended candidates	75	63	58	55	62	44	78		48	52	67
Nr. appointed	50	50	50	49	50	38	77	*	*	*	*

A * means: no data available.

Of course, the selection process is not the only cause of the reduction in numbers of candidates during the process, but candidates may also accept other jobs and quit the procedure.

As far as the recruitment of experienced lawyers for judicial function is concerned, only figures for the year 2002 are available. The CALRM (Committee for recruitment of members of the judiciary) recruited 285 applicants.

Table 5-2. Nr of Applicants

Applicants	Male	Female
For appeal court	23	6
Recommended for training at a court:	20	5
For a first instance Court	137	119
Recommended for training at a court:	102	101

Of these candidates, 82 were advocates, 102 were public servants, 68 worked as company lawyers, 28 worked in education and 8 had 'other' backgrounds.

For public prosecutors annually about 10-15 experienced lawyers are selected to be appointed as a deputy public prosecutor. That is about 30% of the applicants. This means that the selection procedure is quite tough.

6. TRAINING & EDUCATION OF JUDGES AND PUBLIC PROSECUTORS

The education of judges and public prosecutors starts with the ordinary training for lawyers at a law faculty. In order to be admissible to the recruitment procedure, one has to follow courses in Civil, Criminal and Administrative or Tax law. Selected candidates will have to follow courses organized by an agency of the Ministry of Justice, originally called 'Stichting Studiecentrum rechtspleging', nowadays called 'SSR'²¹. This agency has a management board in which the Council of the Judiciary and the College of Procurators General are represented. The courses offered are not only intended for so called *raios* (judges in training), but also for experienced lawyers that want to qualify as judges, for court staff and judges. Although originally the focus was on juridical courses, nowadays some attention is paid to organizational and managerial issues (E.g. time management, communication). Typically, the Council for the Judiciary organizes its own management courses for managerial 'high potential' judges (sometimes mockingly called "the Councils' Class").

For public prosecutors, management training is organized separately and on an individual basis.

"Education Permanente" is a part of the personnel policies of the Council for the Judiciary and the College of Procurators General. Both organisations focus on an ongoing professionalisation, organisation development and interaction with stakeholders and go through considerable efforts to prepare and train their functionaries to live up to those perspectives.

²¹ Instellingsbesluit tijdelijk agentschap studiecentrum rechtspleging, d.d. 06 03 2002, Staatscourant 14 03 2002, p 7.

7. APPOINTMENT OF JUDGES AND PUBLIC PROSECUTORS

Judges in the Netherlands are appointed by the crown. This has been arranged for in the law on the legal position of judicial public servants.²² Generally speaking, they are appointed to a specific court.

Public prosecutors are appointed by the crown. Deputy public prosecutors are appointed by the Minister of justice.

7.1 Appointment of judges

The management board of the court where the vacancy exists generally prepares a list of three candidates for this appointment. For this, they may ask advice from the Courts' assembly, consisting of all judges attached to a court. Occasionally only one candidate is proposed. Generally, being the first name on the list leads to an appointment.

They send the list of recommendations to the Council of the Judiciary. The Council presents this list to the government. This does not apply to the members of the Dutch Supreme Court (Hoge Raad) however: they are appointed by the crown, according to a list of presentation of three, prepared for by the Lower House of Parliament (Tweede Kamer) following a list of six candidates presented to them by the Supreme Court (Constitution art. 118, section 1).

This means that for candidates, the recruitment and selection process is oriented towards being mentioned on the list to be drawn by the management board (the president) of the court that has the vacancy.

7.2 Appointment of public prosecutors

After the conclusion of the selection process, the College of Procurators-General sends the list of selected persons to the Ministry of Justice. The Minister of Justice will generally propose appointment to the cabinet, and selected persons will be appointed almost automatically.

Before that stage of the process, selected candidates will have to talk with the Placement Committee and with the Chief public prosecutor of the district where they want to be appointed. However this does not apply for Chief public prosecutors and Chief Advocates General. They are appointed by the Crown on recommendation by the College of Procurators General and advice of the Minister of Justice.

²² Wet rechtspositie rechterlijke ambtsdragers, law of November 28, 1996.

8. EVALUATION OF JUDGES AND PUBLIC PROSECUTORS

The ways of evaluating judges and public prosecutors is different. This has to do with a somewhat bigger respect for the professional autonomy (and constitutional independence) for judges as compared to public prosecutors.

8.1 Evaluation of judges

Evaluation of judges takes place in different ways.

First of all, a program has been implemented for judges to support each other's professional functioning. We call it 'intervision', but I think the right English term is 'mutual coaching' or 'peer review'. The idea is that from time to time a colleague will come and observe the way a judge conducts a court hearing, and give the judge the results of his observation. One can do the same with judgments. It is essential that this takes place amongst equals. The trick is to help each other to improve functioning, and not to mention qualifications (good or bad).

The Council pursues a policy that all courts encourage this way of 'keeping professionals on track'. This does not work without commitment of the management boards of the courts; they should somehow stimulate and facilitate 'mutual coaching' on a regular basis. 'Mutual coaching' takes time and skill, and hence opportunities are offered to judges to learn this skill.

Especially concerning the appointment of judge to the position of vice president or to a managerial function (e.g. president, sector chair) an assessment of talents and skills takes place; access to management training is granted only under condition of a positive outcome of an evaluation.

As a part of personnel management and professionalisation policies, the tool of periodical individual functioning talks is being implemented. This means that efforts are being made that sector chairs have annual talks with 'their judges' about the functioning of the judge and their career development. Using this tool also takes time and skill, and hence opportunities are offered to judges to learn this skill.

Currently under development is the implementation of the quality system of the Dutch judiciary. Most of the courts of today are familiar with the EFQM-model. This is a managerial model for organization development.²³ It is to be combined with a system for measuring the quality of how judges function at (the) court level. This model consists of the following factors:

- Impartiality and integrity of judges
- Rapidity and timeliness per sector, as far as judges are capable of influencing this.

²³ www.efqm.org

- Legal unity (of jurisprudence by a court)
- Expertise
- Treatment of the cases of clients and professionals by judges

These factors are made operable by formulating standards and designing measurement instruments. For example: (Judicial) *Expertise*:

The quality system is directed at evaluations at the court level. The implementation is still in its final phase. This means that at first, several courts have volunteered to try out different measurement systems. The results of these experiments were encouraging, and to date almost all courts have implemented the system so far. The implementation process is expected to be completed by 2007.

Table 5-3. (Judicial) Expertise

Factor determining success	Achievement indicator	Standard (5 point scale)	Measuring Instrument	Weights	Comment
Expertise	Observed Expertise		Observer Client assessment Study		
	Percentage of appeals/annulments in relation to the total number of cases settled		Registration		
	Percentage of definitive annulments		Registration		Allow pilot law courts to develop a method of registration
	Ratio of single chamber to multiple chamber cases handled		Registration Questionnaire among judges and secretaries	1	Measure both objectively and subjectively in pilots
	Policy implementation with regard to expertise and experience of judges who preside alone	1. There is no policy 2. There is a policy	Audit	3	

There are a few things special about this system of quality measurement. This has to do with the way in which it was developed. The main incentive and the argument that convinced judges of the inevitability of this system is that if they

want politics to invest in the courts, they should prove and show if, and if so, how, financial pressure for efficiency is affecting the quality of their work negatively. The designers of this system were well aware that it would only work, if the quality indicators would be chosen and defined by the judges themselves. Next to that, they also knew that developing trustworthy and reliable measurement systems to make these quality indicators work also implies the involvement of judges in the development process. Thus fears for abuse of this system by the central management could be reduced.

In principle, however, the system could be operated at the level of an individual judge. Thus it could be revealed how well or how badly a judge is functioning. From the implementation of a Pilot at the Roermond District Court, however, a major preference can be seen to be chosen not to make outcomes operable at the level of an individual judge. As they say, the system is designed to improve the functioning of the court, not to judge performances of an individual judge or even of a court sector.

Nonetheless, to date many judges are convinced that courts as public service organizations do need adequate quality control policies, not only for the sake of accountability, but also as a consequence of their responsibility in society and towards the general public.

The Council and its bureau fulfil a coordinating and facilitating role in this process. Formally, the desired outcome will be established if all the courts have courts statutes and sector statutes, stating subjects of the primary process, policy processes and supportive processes in such a manner that they may live up to quality standards in a measurable way. Until then, courts will go on with user-surveys and organization development according to the EFQM-model. The Prisma bureau of the Ministry of Justice facilitates the organization and analyses of user surveys (citizens, lawyers) by the courts. The courts that actually did it see the outcomes as a learning opportunity.

8.2 Evaluation of Public Prosecutors Offices and public prosecutors

The Public Prosecutions Offices at the districts and ressort level apply the EFQM management model. With the aid of the 'Prisma' audit office of the Ministry of Justice they analyze their organizational position regarding e.g. leadership, personnel & personnel-policies, resources, strategy & policy, customer-focus, societal appreciation, results and learning & improving from periodical surveys and measurements.

The outcomes of these procedures have consequences for the personnel policies: human resources are considered as a crucial factor in the success or failure of the PPD and the PPO's. During the last 8 years, the PPD and PPO's have invested a lot of money and effort into organization development. Today, the PPD

stresses the need for adequate juridical expertise, in order to meet the increasing complexity of fighting crime.

Apart from that, individual public prosecutors will have talks about their functioning every year and career prognoses talks every three years with their superiors.

9. CAREER DECISIONS FOR JUDGES AND PUBLIC PROSECUTORS

Although arranged for in the same Statute Act, career decisions for judges and for public prosecutors are nowadays prepared in a different manner. This shows that the PPD and the organization of judges are growing apart.

9.1 Career-decisions for judges.

Judges are appointed for life. The actual situation is a situation of change. Formally, career decisions are not related to performance measurement of individual judges. In the Netherlands, there are several ranks for members of the judiciary.

At the court level:

- judge
- vice president
- coordinating vice president (sector chair)
- vice-president senior (judicial function, held by the same person as the president)
- president (management function)

At the appeal court level:

- councillor-judge
- vice president
- coordinating vice-president (sector chair)
- vice-president senior (judicial function, office held by the same person as the president)
- president (management function) ²⁴

Salaries may differ somewhat in the managerial functions, according to the size of the district court. Generally speaking judges at higher courts have a higher salary compared to judges at a district court. Recently, the Council of the Judiciary

²⁴ Unfortunately no numbers are available as to how many judges and public prosecutors currently have a certain rank.

launched a policy to give first instance judges a better salary perspective in order to stimulate good first instance judges to keep their positions and not to apply for career functions at the appellate courts. The Council considers it desirable to maintain and improve judicial quality at the first instance courts.²⁵

The crown appoints judges, so, in order to make a career step, one must apply for a function if a vacancy exists. The procedure formally is the same: the management board (of a court) draws a list of (most of the time) 3 persons and sends it to the Council of the Judiciary. The Council sends the list to the Minister of Justice. To date, I do not know how such a procedure evolves if one applies to a function within one's own court; local procedures apply and national uniformity is desirable here as well. However, to place an advertisement for a function is obligatory, and in principle everybody may apply - I do not know if a selection committee of a court goes for the best candidate or that 'good working relations' with members of the management board enhances one's chances. The 'courts' assembly may be asked for advice if one of the candidates is not a judge yet. So, it is possible to make career steps from one court to another. This is not specifically encouraged or discouraged, however. But making a career also is not self-evident. It always was reserved for the best judges and the best lawyers. To date, I do not know if this culture will hold, because judicial skills and managerial skills are of a different character and not often combined in one person.

A relevant question would be if there is a special policy in this respect – my presumption is that to become a leading figure anywhere in the judiciary you must have seen different aspects of the organization. However that may be, the president and the management board of the court have important competences and power in this respect.

Currently, following the newly developed personnel policies special competency profiles are being developed for the managerial functions. They will be applied shortly. Judges with career aspirations follow management courses, organized and financed by the Council of the Judiciary (mockingly called: 'the Councils' Class').

9.2 Career decisions for public prosecutors

Public prosecutors are judicial public servants, but they are not appointed for life. Although professionals, they function in a typical bureaucratic hierarchy.

The general policy of the College of Procurators General is that career decisions are based on merit and talent. Within the Public Prosecutions Department, there are the following ranks at the level of the district - public prosecutions offices:

- Public prosecutor for single judge-court cases

²⁵ A first instance judge earns a gross monthly salary of € 4740 – 6143 (after ten years). The salary of a Supreme court judge is € 8423.

- Substitute public prosecutor
- Public prosecutor
- Public prosecutor first class
- Functioning chief public prosecutor
- Chief public prosecutor

At the level of the resorts, there exist the ranks of:

- Resort- advocate general
- Substitute chief advocate general
- Chief advocate general.

Next to that there is the possibility of being appointed as a deputy in most of these ranks, except the chief positions. Deputy positions are generally temporary functions related to training on the job or to special projects. A major exception to these facts is that the Judicial Organization Act assigns each member of a prosecutions office in a district or resort as a deputy in all other districts or resorts, in order to create some organizational flexibility.

The Crown, on the recommendation of the chief-public-prosecutor, takes career decisions in the ranks of public prosecutor for single judge-court cases, substitute public prosecutor and public prosecutor. Single judge court public prosecutors wanting to get ahead will have to follow the same assessment procedure as everybody within the public prosecutions department willing to be a public prosecutor at a three-judge-court. So, on the one hand, being a public prosecutor for single judge court cases is the final career stage for elder juridical clerks in a PPO. On the other hand, it may be also the starting point of a career in the ranks of public prosecutors for talented law clerks with at least 4 years experience at a PPO.

For the higher ranks, the policy of the College of Procurators General is that candidates should have passed so called ‘career prognoses talks’ with their chief public prosecutor or chief advocate general. These managing prosecutors are assisted by a management development advisor from the PPD, resulting in a career prognoses, and an inquiry in order to assess their professional capabilities. Without going through these procedures, no career decision is possible. This policy is executed and maintained by the College of Procurators General. As a consequence, having good relationships with the Chief Public Prosecutor/ Chief Advocate General or with members of the College of Procurators General is not enough to make a promotion.

For the functions of Chief Public Prosecutor and of Chief Advocate General, the College of Procurators General prepares the recommendation itself. The Minister of Justice generally will have an interview with recommended candidates before advising appointment by the cabinet: they are considered of high political importance, although usually he follows the advice of the College.

Apart from vertical 'career' – decisions, horizontal mobility is stimulated. This means that public prosecutors can specialize according to organizational and /or juridical differentiations.

10. DISMISSALS OF JUDGES AND PUBLIC PROSECUTORS.

Dismissals exist in various kinds related to the reason for dismissal. A judge may be dismissed by the crown after reaching the age of 70. Of course, a judge may request for dismissal by the crown earlier.

10.1 Dismissal of judges

Judges may also be dismissed by the Supreme Court after being unfit for work (because of illness) for two uninterrupted years. Loosing Dutch Nationality is also a reason for dismissal.

Formally, judges may be suspended from their office when they are formally accused of committing a crime. If convicted they will be dismissed by the Supreme Court. However, these special procedures never have occurred. Occasionally a judge will be prosecuted for a crime, but in such a case the judges resign from office 'voluntarily', thus sparing themselves the humiliation and shame of a public sentence stating their dishonourable dismissal.

Dismissal of keepers of managerial offices at the courts and at the Council for the Judiciary.

Since 2002 the Judicial Organisation Act makes a distinction between judicial functions and managerial functions for the judiciary. Judges hold most managerial offices at the Council of the judiciary and at the Courts. The functioning of these managerial office holders is embedded in a system of vertical checks and balances. This means that malfunctioning of a member of the Council may lead to removal from office by the Crown on proposal of the Minister of Justice. The functionary whom it concerns can appeal against such a decision at the Supreme Court. Malfunctioning of the management board of a court or of a member of a courts' management board may lead to a proposal for removal from office by the Council of the Judiciary to the Minister of Justice and the Crown. The managing judge involved may also appeal against such decision at the Supreme Court. Such removals, however, would not lead to removal from judicial office, but only to removal from the managerial position.

This system of vertical checks gives the Minister of Justice a formal overweight in its relation to the judicial organization. It is a typical feature of Dutch public

administration that such competences are seldom used explicitly; they play an implicit role in bureaucratic relations.²⁶

10.2 Dismissal of public prosecutors

Dismissal of public prosecutors is arranged for in the Decision concerning the legal position of judicial public servants, a Royal Decree based on art. 36 of the Statute Act on the legal position of judicial public servants. Dismissal can have very different causes, from reaching the age of 65, to accepting a function that is irreconcilable with the function of public prosecutor (e.g. becoming a member of parliament), to being unfit for work because of health problems for more than two years, to being convicted for committing a crime. Those who choose a political function have the right to return to their position in the public prosecution service, once they leave their political function.²⁷

But being unfit for the job is also a cause for dismissal. So, just as ordinary public servants, a public prosecutor may be dismissed from office because of malfunctioning. Of course this is not a decision taken in one day. The superiors of a malfunctioning public prosecutor will have to gather evidence and give plenty of possibilities for improvement, e.g. by offering courses.

Dismissal formally takes place by the office that appoints. So deputy public prosecutors are dismissed by the Minister of Justice. All other public prosecutors are dismissed by the Crown.

11. CRITICISM

First of all, it should be stressed that the Dutch Judicial Organization and the Public Prosecutions Department are institutions in the process of organization development. Not everything is going all right, but both organizations do their best to improve their functioning and their services to their clients. A major factor is that they are very much aware of their societal positions.

Regarding the recruitment and selection, both organizations are in a process of attuning the recruitment and selection processes to their needs. These needs are related to the organizational professionalisation. In other words: professional lawyers in the judicial professions are increasingly embedded in an organization in which they have to play a leading role.

However, the recruitment and selection processes within the organization of courts and judges are not very transparent yet. The same holds for career decisions

²⁶ Apart from decisions on dismissal, the Minister of Justice also has controlling competences concerning the budget of the Council.

²⁷ E.g. Wet Incompatibiliteiten Staten-Generaal en Europees Parlement, art. 7.

in that organization. Compared to the organization of courts and judges, the Public Prosecutions Department is way ahead in this respect by focusing consequently on a high quality of human resources especially for career positions and at the same time creating equal career chances for the brightest, most talented and motivated persons.

Such a transparency is especially necessary in a relatively small country such as the Netherlands. The current 1809 fte judges amount to the population of a small village. Formally, an external body takes appointment and career decisions of judges: the crown on proposal of the minister of justice. But in effect a few leading judges play a major role in proposing the persons for career appointments. One may wish and expect that during the next few years these decisions will be part of the same professionalisation processes and that conditions and properties for the fulfilment of functions will be made accessible and transparent, so that decision makers can account for selection and career decisions.

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Chapter 6

RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN SPAIN

Marta Poblet and Pompeu Casanovas*

1. PRELIMINARY REMARKS

Spain is a parliamentary democracy with a population of roughly 42 million citizens. With 493,486 square kilometres, it is divided into 17 Autonomous Communities. The Spanish population includes a large majority of Castilian speakers and smaller groups of Catalan, Basque, and Galician speakers. Given such a cultural variety, Spain is best described as a multinational state.

The nineteenth and twentieth centuries in Spain featured many changes of political regimes, oscillating between long periods of authoritarianism and ephemeral governments of [more] liberal forces. In 1939, following the victory of the “national” forces in the Civil War (1936-1939), Spain came under the rule of General Francisco Franco. The so-called Caudillo had led the military uprising of July 18th of 1936 that eventually overthrew the II Republic (1931-1939) and

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concentrated the posts of Head of State, Prime Minister, leader of the Movimiento Nacional and Head of the Military. Franco's single party regime would last until his death in November 1975.

As is well known, General Franco's death in November 1975 opened the way for the transition to democracy in Spain. Despite uncertainty and political tensions, the vast majority of Spaniards endorsed the political reforms of Adolfo Suárez and ultimately approved a new Constitution, which was the result of complex negotiations between political parties. Nevertheless, the newly inaugurated democracy did not bring about a substantial transformation of the judicial system. The Administración de Justicia—the official name of the Spanish judicial system—that Spaniards inherited in 1978 was, despite some discontinuous and partial reforms, roughly two centuries old (Poblet, 2001; Toharia, 2003). Its judges and prosecutors, regardless of their conservative or progressive ideological values, were routinely used to coping with old and intricate procedures, budget shortages, staff vacancies, growing caseload, and, as public polls would increasingly show, public opinion scepticism.

The first democratic governments, concentrating their reform efforts in areas other than judicial institutions and organisations, did not essentially alter the landscape.¹ In addition, the basic statute regulating the organisation of justice—Ley Orgánica del Poder Judicial [henceforth 1985 LOPJ]—was not passed until 1985, seven years after the enactment of the Constitution. The significance of this seven-year gap cannot be underestimated when describing both the organisation and functioning of today's Spanish judicial system, since it inevitably expanded the transition period within the judicial organisation. At present, the Administración de Justicia consists of a complex mix of continuities and novelties in all relevant areas, including recruitment, professional evaluation, and career of judges. In the pages that follow we will first outline the Spanish judicial organisation in order to describe how Spanish judges and prosecutors are currently recruited and trained. We will continue by examining the present mechanisms of evaluation and disciplinary sanctions and, finally, we will provide some concluding remarks.

2. THE SPANISH JUDICIAL ORGANISATION

2.1 The General Council of the Judiciary [Consejo General del Poder Judicial, henceforth CGPJ] governs the judicial branch of the state. Its creation was a real innovation of the 1978 lawmakers, for the CGPJ has no real precedent in the

¹ The most significant measure adopted by the Ministry of Justice before the approval of the 1978 Constitution was the readmission, in October 1976, of all those magistrates who had been expelled from their careers or who were in exile after the war. With few exceptions, the subsequent governments adopted a "clean slate" policy that would not be challenged until the enactment of the 1985 *Ley Orgánica del Poder Judicial*.

Spanish legal system.² The CGPJ deprived the Ministry of Justice of its traditional powers over judiciaries, and all matters relating to the judiciary—selection, evaluation, promotion, etc.—were transferred to it. But, unlike the birth of the Constitutional Court, the labour of the CGPJ was prolonged and painful. Article 122 of the 1978 Constitution specifies only ground rules: the CGPJ “shall be composed of the President of the Supreme Court, who shall preside over it, plus twenty members, appointed by the King for a five-year period.”³ The Constitution also establishes that twelve members are to be judges and the other eight jurists or members from the legal professions, but no further provisions are made regarding the election of them. Parliament had therefore to legislate on the subject.

Two different statutes in five years (1980 and 1985) reflect one of the biggest [still unresolved] controversies about the judiciary in the new democratic period: the composition of the self-governing body of the judicial branch. The 1980 Act established that the 12 members of judicial origin would be elected “by the members of the judiciary themselves”. The socialist majority promoted instead the 1985 Act, which set out that those twelve judges, as well as the remaining eight members from the legal profession, should all be elected by the two houses of Parliament with a qualified majority of three-fifths. Despite initial proclamations to change this, the Popular Party—in power from 1996 to 2004—has made no attempt to return to the previous system. As the World Bank puts it:

While the experience in Spain suggests that there is no single right answer to the question of how to select council members, it does point to several considerations that any solution should reflect. First, if, as in Spain, the Constitution allows lawmakers a broad latitude when deciding how members are to be elected, the method adopted—whether Parliamentary selection, election by judges, or some other option—should be determined by agreement between the majority and the opposition. In Spain, whenever an effort has been made to amend the law governing the Council before an inter-party consensus has emerged, the result has been public controversy—undermining the Council’s authority and legitimacy (World Bank, 2001).

Lack of consensus among political parties, indeed, makes it difficult to address this and other unsettled issues regarding the judicial system. In May 2001, however, the two major parties (Socialist and Popular parties) agreed to sign the

² Some remote precedents may be considered, though. The earliest is the *Junta Central o Suprema*, created by Decree of December 6th 1849, la *Junta Organizadora del Poder Judicial*, established by Royal Decree of October, 20th 1923 and, specially, the *Consejo Judicial*, also created by Royal Decree of March 18th 1917. The *Consejo* would have a discontinuous life: abolished in the early days of the II Republic (Decree of March 19th 1931), the Francoist Regime would reestablish it by Law of December 20th 1952, and it would be functioning until the restitution of democracy. The competencies of all these organs, however, were highly restrictive, compared to the present CGPJ.

³ The members of the CGPJ cannot be re-elected, with the exception of the President.

Pacto de Estado por la Justicia. The agreement contained some basic compromises to cope with deficiencies and foster the modernisation of judicial structures (following some previous proposals of the CGPJ). The parties also agreed on parliamentary selection of council members from a list of 36 candidates nominated by the professional associations of judges. Two years later, political disputes led the Pacto to the edge of collapse.⁴ The victory of the Socialist party in March 2004 added more controversy, since it promoted a reform of the voting systems within the CGPJ that required larger majorities to select candidates on a discretionary basis (three fifths instead of 50% of votes from the plenary session).

2.2 The basic design of the CGPJ relies on Italian, French, and Portuguese analogous models. In Spain, the Constitution and the 1985 LOPJ assign the following tasks to the CGPJ:

1. Selection, education, and continuous training of judges and magistrates
2. Promotion and appointment of judges and magistrates
3. Disciplinary control over the judiciary
4. Elaboration of the judicial budget (but administered by the Ministry of Justice)
5. Management of the courts' system

The Consejo is located in Madrid. Nevertheless, and following a policy of decentralisation, since 1997 Barcelona hosts the Judicial School and San Sebastián the Center of Judicial Documentation (CENDOJ). As regards personnel, the CGPJ is composed of the following categories:

Table 6-1. Personnel categories in the CGPJ

Category	Total
Members (Vocales)	21
High level	93
Medium level	42
Administrative level	74
Auxiliary level	87
Assistant level	32
Temporary personnel	51
Non civil-servants personnel	31
Total	431

Source: CGPJ (2005)

2.3 The Spanish Constitution establishes the principle of unitary jurisdiction, which means that the court system has a national scope. The CGPJ, therefore, is fully responsible for all decisions concerning the career of judges in any area of the peninsula. Nevertheless, the Constitution also establishes that the Autonomous

⁴ See, for instance, "*El PSOE 'se siente desvinculado' del Pacto por la Justicia y dice 'no tener voluntad' de seguir en él,*" Diario El Mundo, September 22th, 2003.

Communities may have judicial competences transferred to the autonomous level. These competencies refer to management of the judicial system as organization: human resources management, maintenance of buildings, facilities, case management systems and other office resources. In those Autonomous Communities which no competences have been transferred yet, the Spanish Ministry of Justice remains in charge. At present, there are eight Autonomous Communities fully responsible for the management of the judicial system within its territory: the Basque Country, Catalonia, Galicia, Andalusia, Navarra, the Community of Valencia, the Canary Islands, and Madrid. More territories are expected to get similar competencies in the near future.

This multi-competency system adds some complexity to the organization of judicial units. Judges are a national body of civil servants governed by the General Council; judicial secretaries and prosecutors depend on the Ministry of Justice, and judicial staff is managed by the Autonomous Communities, which are also responsible for designing and developing case management systems. The map below highlights the Autonomous Communities with competencies on justice matters and case management systems used in each area.



Figure 6-1. Spanish Autonomous Communities and Case Management Systems (CMS)

Source: General Council of the Judiciary

2.4 According to article 117 of the SC, “[j]ustice stems from the people and is rendered by Judges and Magistrates on behalf of the King”. Establishing a clear break with the Francoist past, the constitutional text guarantees the principle of unitary jurisdiction (art. 117.5) and prohibits special ad hoc courts, as well as

courts of “honour”. The 1985 LOPJ also states that there is one single jurisdiction. As a result, the judicial system in Spain is currently organised in the following types of Juzgados and Tribunales:

Table 6-2. The Spanish Court System

Court*	Law area	Geographic scope
Juzgados de Paz	Civil and criminal	Municipal
Juzgados de Primera Instancia e Instrucción**	Civil and criminal	Judicial district
Juzgados de lo Penal	Criminal	Judicial district
Juzgados de lo Contencioso-Administrativo	Administrative	Province
Juzgados de Menores	Juvenile justice	Province
Juzgados de Vigilancia Penitenciaria	Prisons	Province
Juzgados de lo Social	Labor	Province
Audiencias Provinciales	Civil and criminal	Province
Tribunales Superiores de Justicia	Administrative	Autonomous Community
Audiencia Nacional	Criminal	Nacional
Tribunal Supremo	Civil, criminal, social, administrative	Nacional

* Courts filled by one single Judge or Magistrate are called Juzgados, whereas those constituted by a collective body of Magistrates are either Tribunales or Audiencias.

** In large cities, these courts are divided into two: Juzgados de Primera Instancia and Juzgados de Instrucción. Large cities also have Juzgados de Familia for family cases.

2.5 Public prosecution in Spain [Ministerio Fiscal, hereinafter MF] operates as a separate structure within the judicial branch (article 1 of the Estatuto del Ministerio Fiscal calls it “functional autonomy”). The MF is a hierarchically organised body headed by the General Attorney [Fiscal General del Estado], who is freely appointed by the government. The Fiscal General has two advisory bodies: the Board of Prosecutors or Junta de Fiscales de Sala, composed of those prosecutors at the highest hierarchical level (17 at present), and the Council of Prosecutors [Consejo Fiscal], a representative body elected by all the prosecutors of the MF, composed of 21 members. The MF has a somewhat Janus-faced role within the Spanish judicial system, since it both represents the government and guarantees the protection of the public interest and the rights of the citizens.

Since 1985, as we shall see, judges and prosecutors have been considered two different professions in terms of selection, training, evaluation and promotion. In spite of keeping parallel systems of professional categories and salaries, judges and prosecutors cannot move from one position to the other.

2.6 In Spain, the number of both judges and prosecutors remained fairly stable during the years of political transition. Access to prosecution, in fact, had been practically frozen from 1975 to 1981 (only nineteen new positions in seven years).

Afterwards, the evolution lines for judges and prosecutors are slightly different. The following chart shows the annual numbers for the period 1978-2003.

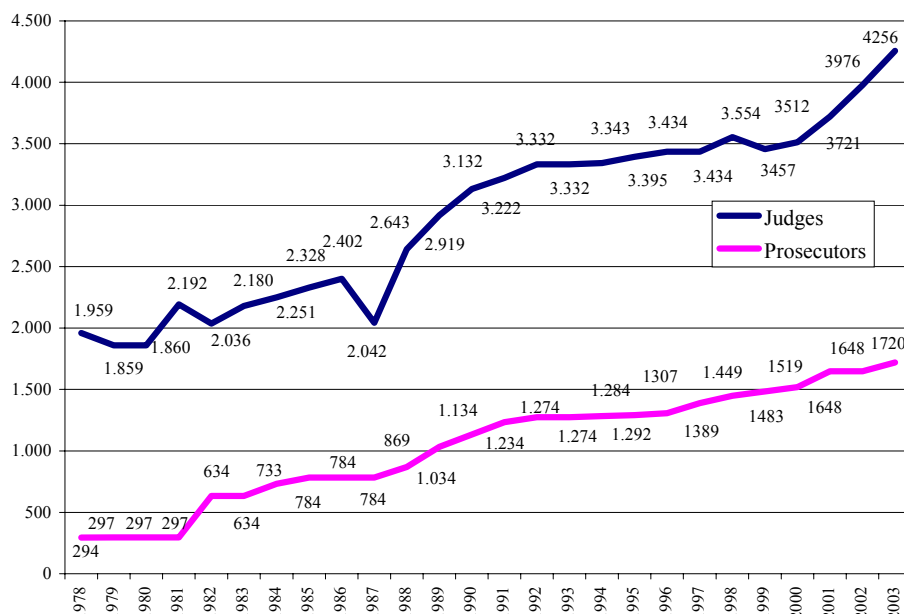


Figure 6-2. Numbers of judges and prosecutors (1978-2003)

Source: Annual Reports of the CGPJ, FGE, and Official Journal of the State

In contrast with the steady and moderate increase of prosecutors, the irregular numbers of annual incorporation within the judiciary registered from 1975 to 1986 dropped suddenly at the end of that year with the forced retirement of judges older than 65 year-old. This measure, together with the additional provisions of the 1988 Ley de Demarcación y Planta Judicial, which reorganised both the territorial distribution of courts and the number of judges required, created a deep professional shortage that was only partially overcome during the 1990s. The “massive” increase in judges took place only in the late 1980s, bringing a younger profile to the judiciary. The significant increase of judges in the new century (2000-2003) is also intended to fulfil the final provisions of the 1988 Ley de Demarcación y Planta Judicial.

At the end of 2003, the CGPJ counted 4,256 judges and magistrates, and the MF 1,720 prosecutors.

3. RECRUITMENT AND SELECTION OF JUDGES AND PROSECUTORS

The 1994, 2000, and 2003 reforms of the 1985 LOPJ have not dramatically altered the prerequisites to access the judicial career. Candidates have to be older than 18 years old, be of Spanish nationality and hold a law degree. No previous professional experience is required and no psychological test or assessment is made.⁵ This also holds true for candidates for the public prosecution service. Contrary to other European countries (e.g. The Netherlands) Spain does not encourage particular groups to access the judiciary (e.g. women) or implements policies of positive action for social or ethnic minorities, with the exception that 5 percent of vacancies are reserved for successful candidates with physical disabilities compatible with the functions of the judiciary.

3.1 Access to the category of judge: competitive examination or “oposición libre”

The 2003 reform, preserving a roughly two-centuries old tradition, maintains the competitive examination called “oposición libre” as the standard recruiting system for judges (that is, the lowest category within the judiciary). Since 2000, both judge and prosecutor candidates have to face the “oposición libre”; successful candidates will then have to choose which career they prefer. Not without controversy, the 2003 reformers eliminated access to the category of judge from the ranks of the legal professions.⁶ Since 1985, both judicial secretaries and legal professionals with a minimum of six years of work experience had been able to become a judge (these ways of selection were known as “segundo” and “tercer

⁵ The only impediments to become a candidate are: physical or psychical impairment to perform the judicial task, and being found guilty of a crime.

⁶ The 1994 reform had already reduced the vacancies reserved for legal professionals (from 33% to 25%) and, yet shorter than the competitive examination of the “oposición libre”, it required candidates to pass an oral examination and follow the regular initial training at the Judicial School. It is interesting to note that openings addressed to legal professionals were far from being covered by the applicants (the reason being failing marks from the Selection Committees). According to the 1985 LOPJ, those remaining vacancies are to be covered by candidates from the “oposición libre”. The table below summarizes the number of openings for each selection:

	1998	1999	2000	2001	2002	2003
Vacancies	57	75	75	63	31	13
Applicants presented	389	330	478	530	448	389
Applicants accepted	73	280	455	468	414	360
Applicants selected	6	11	10	14	9	8

Source: Annual Reports of the CGPJ and Judicial School

turno”). The “tercer turno” was an innovation of the 1985 LOPJ, which aimed to broaden the sociological profile of judges and magistrates by attracting other legal professionals (lawyers, law professors, etc.). The “tercer turno”, nevertheless, had never enjoyed a good reputation among the members of the judiciary from the “oposición libre”.⁷

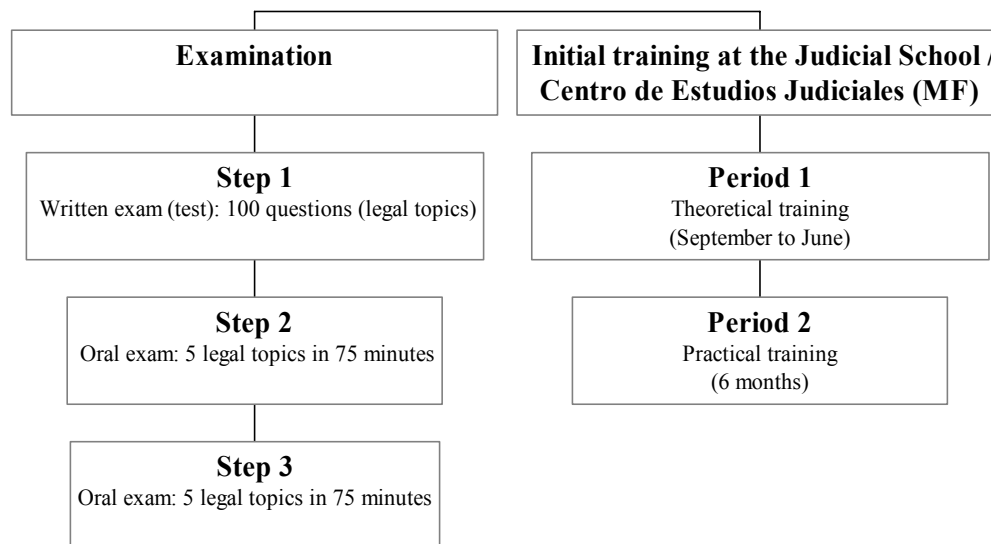


Figure 6-3. Selection process for candidates of the “turno libre”

Source: GCPJ

The selection process as shown above largely relies on the assessment of the candidate’s ability to memorise things. Legal topics basically cover the same topics covered by the law school curricula: civil, criminal, constitutional, and general law (Steps 1 and 2); civil and criminal procedure, administrative, commercial and labour law (Step 3). In oral examinations, candidates are required to “recite”—to “sing”, in the judicial jargon—five different topics selected at random (out of 300) within a specific amount of time. According to data from the Judicial School, candidates have spent up to four years after graduation preparing for the competitive examination. To do so, they normally hire a “coach” or “preparador” (usually, a senior judge or prosecutor) who teaches them how to “sing” properly and provides useful tips for recitations that are carefully rehearsed once or twice a week. As Jiménez Asensio (2002: 3) puts it:

⁷ The conservative *Asociación Profesional de la Magistratura* had been asking for its elimination.

Little wonder if, at the end, successful candidates will have developed a strong capacity for endurance. But, by the same token, some of them will also develop some kind of psychical alteration (generally, incidental and, exceptionally, more severe): anxiety, emotional imbalances, anguish, etc. It is a tough experience, even if judges tend to overcome it very quickly. Those hundreds or thousands who fail, in contrast, will have used years preparing for the examination with neither compensation nor guarantees to access the job market.

The selection process takes place at least every two years. Once recruited, judges will perform the initial training at the Judicial School (dependent on the CGPJ) and prosecutors at the Centro de Estudios Judiciales of the Ministry of Justice. The selecting committees, as we shall see, include representatives of both the General Council and the Ministry of Justice.

3.1.1 Selecting tribunals.

The Commission of Selection of the CGPJ⁸ appoints the selecting tribunal of candidates to be judges and prosecutors. Usually, the number of candidates requires the appointment of more than one tribunal (14 in 2001, 11 in 2002). The selecting tribunals are composed of nine members: one President (a Supreme Court magistrate or a Fiscal de Sala) and 8 deputies (two magistrates, two prosecutors, one senior law professor, one lawyer of the state, one lawyer with a ten-year professional experience, and a judicial secretary). The institutions of origin of all members make the proposal of candidates to the Commission.

The Commission of Selection is entitled to propose the content of the exams and to set them. A satisfactory mark in the written test allows candidates to get into the oral exercises. The tribunal deliberates on how to grade each of the recitations (from one to five points), but no further criteria of evaluation are made.

Table 6-3. Statistics on competitive examinations or “turno libre”

	1998	1999	2000	2001	2002	2003	2004
Vacancies	228	225	225	189	93	52	100
Applicants presented	5126	5618	N. A	N. A.	5167	4996	-
Applicants accepted	5069	5577	5593	5374	5122	4970	-
Applicants selected	217	254	297	210	232	95	-

Source: Annual Reports of the CGPJ and Judicial School

⁸ The Selecting Commission of the General Council is composed of eight members: one member from the General Council, one high level member of the MF, one magistrate, one prosecutor, the Director of the Judicial School, the Director of the Centro de Estudios Jurídicos of the Ministry of Justice, one member from the technical services of the CGPJ, and a high level civil servant from the Ministry of Justice. Its members are appointed by the institutions of origin for a four-year period.

3.2 Access to the category of magistrate

Although access to the category of magistrate from the legal professions (formerly known as “cuarto turno”) received similar criticism from the ranks of the judiciary, the 2003 reform maintained this secondary way of selecting magistrates.⁹ Thus, one out of four vacancies for the category of magistrate (civil, criminal, labour, and administrative jurisdictions) is for jurists from a solid legal background (at least ten-years legal experience related to the aforementioned areas). The reform, nevertheless, also reserved one third of this 25 percent for judicial secretaries. Candidates are ranked on the basis of their curricula, and the merits considered are:

1. Law degrees (grades are taken into account)
2. PhD. in Law
3. Years of professional experience related to the specific vacancies
4. Years of academic experience in law schools
5. Courses of specialisation
6. Scientific publications within the legal field
7. Professional experience before the courts, reports, or legal consulting done (number of cases, type of cases, etc.).

Qualified candidates have to attend an oral interview (no more than one hour) before a selection committee that will reassess their curricula. The LOPJ establishes that this interview “will not be a general exam of legal topics”. After the interviewing process, the selection committee have to publish the contents, criteria of evaluation, and results of the interviews. Before 2003, this way of entering the judiciary did not require any further period of training for successful candidates. Starting in 2004, however, it was foreseen that newly recruited magistrates would have to pass some specific courses at the Judicial School, but as yet the contents have not been determined.

Table 6-4. Statistics on access to the category of magistrate from the legal professions

	1998	1999	2000	2001	2002	2003
Vacancies	15	118	-	56	-	40
Applicants presented	261	932	-	619	-	492
Applicants accepted	236	879	-	577	-	464
Applicants selected	11	101	-	30	-	22

Source: Annual Reports of the CGPJ

⁹ The 1994 reform had already helped to temper corporative criticisms by requiring legal professionals to adjust their curricula to the specialties of the vacancies.

Selecting tribunal. The select tribunal of magistrates from the ranks of the legal professions is very similar to that of evaluating candidate judges and prosecutors. It is also composed of nine members (one president and eight deputies) but a Supreme Court or Superior Court magistrate substitutes the Fiscal de Sala and a second law professor substitutes one of the two prosecutors appointed by the Fiscal General.

Apart from this general procedure, prosecutors may also access the judiciary with the category of magistrate by participating in the selective process for specialised magistrates of the labour and administrative jurisdictions.

3.3 Access to the category of magistrate of the Superior Courts (civil and criminal sections)

In the civil and criminal sections of the Superior courts of each of the 17 Autonomous Communities, one out of three vacancies are reserved for jurists of solid prestige with no less than ten years professional experience in the aforementioned areas. Parliaments of the Autonomous Communities have to propose three candidates to the CGPJ, and then the Council selects one of them on a discretionary basis. Since the parliamentary proposals are the result of negotiations between political parties, the appointments refresh issues about the controversial “politicisation of the judiciary”.

3.4 Access to the category of magistrate of the Supreme Court

The “quinto turno” opens 20% of the Supreme Court vacancies to jurists with a solid legal reputation (more than fifteen years of expertise in a legal career). This way of access stems from the “discretionary” power that the General Council holds over appointments to the highest positions of the judicial hierarchy. The CGPJ thus evaluates the merits of the candidates and appoints them on the basis of their “well-known prestige”. Although the appointment of Supreme Court magistrates is less contested than the previous “turnos” (it also enjoys a longer tradition within the Spanish judicial system) the lack of public and explicit criteria of selection makes it difficult to objectively ascertain the decisions of the CGPJ (Jiménez Asensio, 2002: 220).

3.5 Initial training

Formal training is a relatively recent phenomenon in Spain. The Francoist State created the first Judicial School in 1944 to train the post-war generations of judges and prosecutors. Its main objective was to forge a “law militia (...) identified with the firm ideals of the National State”, in the words of Minister of Justice Eduardo

Aunós.¹⁰ But the School did not manage to achieve either the fulfilment of such an emphatically expressed objective nor the transmission of substantive technical and professional knowledge. Plagued with internal disputes from the very beginning, its first class of judges would only graduate in 1952. José Juan Toharia (1974: 332-333) concluded that, after two decades of functioning, the School's life was "dull and uneventful" and the candidates staying there considered it "a mere formal requisite prior to [their] first assignment, providing for some relaxed months in Madrid with no other obligation than attending the courses" (Idem: 334).

The educational impact of the Judicial School on judges and prosecutors, in sum, did not greatly alter the traditional and well-established forms of professional training: namely, the apprenticeship among senior colleagues at the judges' first post. This informal system did not change with the coming of democracy. Only in 1994, by Act 16/94 of November 8, did the General Council, responsible for the training of judges, initiate a reform of the judges' educational programme. The law made the Judicial School responsible for the initial selection and further training of judges and for international co-operation in judicial education. Since 1997, the School is located in an entirely new building on the hills surrounding Barcelona, following a policy of decentralisation negotiated with the Catalan government. The School, nevertheless, has kept an establishment in Madrid for the continuing training programmes.

So far, the School has already graduated seven classes of judges. According to the CGPJ, the average age of the newly recruited judges is 28-29 years (28 years in 2000, 28'5 in 2001, and 28'6 years in 2002). Former judges of the "tercer turno", who until 2003 followed the same training at the School, were older: 39 years in 2000, and 40 years in 2001 and 2002. With regard to gender, data from the Judicial School show a sustained trend towards feminisation of the judiciary: since 1997, more than 60% of newly recruited judges have been women.

While at the Judicial School judges are already considered civil servants and paid a salary. Training at the School was initially planned to cover a period of 2 academic years (from September to June). The second year, nevertheless, has never extended beyond six months, the reason being to facilitate a quicker coverage of vacancies.¹¹ The initial period consists of full-time attendance of courses, lectures, seminars, and conferences. The School has a permanent faculty composed of both judges and legal scholars (selected by the CGPJ), but it also invites associated professors to teach specific seminars and to give lectures. The core of theoretical training consist of three regular courses—"constitutional law", "the court of first instance", and "the court of instruction"—based on the case-study method. Judges also follow one-week seminars on a variety of legal and non-legal topics: family law, forensic medicine, mediation, general economy, bioethics, drug dependencies,

¹⁰ See Eduardo Aunós, *Proyecto de ley de Creación de la Escuela Judicial*. [Quoted in José Juan Toharia (1974: 332-333)]. See also Perfecto A. Ibáñez (1980: 38-39).

¹¹ The reform was formally adopted by 9/2000 Act of 22nd December.

etc. Additional activities includes simulation of trials, multimedia training and, on a voluntary basis, Catalan, Basque, Galician, or legal English (see table below). The last part of this initial period (from one to three months during the academic year) consists of visiting different legal institutions—courts, prosecution and police offices, prisons, and law firms—to get in touch with the broader context of their future daily work.

Table 6-5. Training at the Judicial School (Year 1)

Activities	Topics	Calendar
Regular courses	Court of Instruction	Sept. to June (58 sessions)
	Court of First Instance	Sept. to June (58 sessions)
	Constitutional Law	Sept. to June (20 sessions)
Complementary courses	Judicial organisation	Sept. to June (6 sessions)
	Forensic medicine	Sept. to June (9 sessions)
	Economy & accountancy	Sept. to June (9 sessions)
Instrumental courses	Multimedia & Databases	September (starting course)
	Spanish languages	Sept. to June (voluntary)
	Legal English	Sept. to June (voluntary)
Special courses	Ordinary trial	Visiting professors
	Oral trial	Visiting professors
	Family law	Visiting professors
Other courses	European Law	Visiting professors
	Civil Register	Visiting professors
	Immigration law	Visiting professors
	International Legal Cooperation	Visiting professors
Conferences	Different topics	Visiting professors
Trial simulations	As part of regular courses	Up to 40
Seminars	Different topics	Once a week (4 hours). At least 3 seminars are compulsory

Source: Judicial School

Papers and draft resolutions submitted to professors form the basis of students' grades in this initial period. At the beginning of the second academic year judges are appointed as "assistant judges" or "jueces adjuntos" to "first instance" courts spread throughout the country. During this period, judges will have to assist and collaborate with the judge or magistrate of the court by proposing draft resolutions and participating in judicial tasks such as oral hearings. They may also direct oral proceedings under the responsibility of their mentors. During this training period, judges will have to send to their professors at the School proposals of judicial decisions and keep a diary of activities. These exercises, together with the evaluation report written by the tutor, will be considered in the final evaluation of the candidate. If the evaluation of the tutor happens to be negative, the assistant judge will have to repeat the training (no cases, however, have been reported so far).

At the end of the two-year training both at the School and in court, students are given a mark which, combined with the score achieved with the entrance examination, results in the final rank order of each new batch of judges (the so-called “escalafón”). Then, the CGPJ makes public a list of vacancies (although some temporary shortages led to a legal reform establishing a new category of judge: the “judge expecting the appointment”).¹² The higher a judge scores in the ranking the broader choice he has when selecting the available vacancies (for instance, if they score highly and she/he is Catalan, then they may be able to choose a Catalan court). Typically, the judges holding the lowest scores have no choice: they are sent to the courts that nobody else chooses (i.e. the vacancies of the Basque Country courts, which require judges to adopt security measures such as bodyguards). The scores obtained after the initial training at the School may be appealed before the administrative courts.

Cases of evaluation resulting in dismissal are very rare, not exceeding one or two per year (unfortunately, the Judicial School does not publish the figures). If a judge happens to fail the requirements of the training period, they have the right to attend the School for a second time, but if they fail again they will be definitively excluded from the judiciary.

As said earlier, newly recruited prosecutors have to attend the Centro de Estudios Judiciales of the Ministry of Justice, located in Madrid.¹³ In 2003, 98 prosecutors attended the one-year initial training at the Centro (75 in 2002).

3.6 Continuing education

The Judicial School and the Centro de Estudios Judiciales are also entitled to organise the continuing education programmes of judges and prosecutors, respectively. The School has a specialised commission (“Comisión Pedagógica”) which is appointed every year by the Director of the School. The Commission is composed of ten members: three from the Judicial School (one of whom presiding over it), one representative for each of the three professional associations of judges—Asociación Profesional de la Magistratura, Jueces por la Democracia, and Asociación de Jueces Francisco de Vitoria—and four magistrates from each jurisdictional order (civil, criminal, administrative, and labour jurisdictions).

The programme of continuing education for judges is approved every year by the plenary session of the CGPJ. The objectives of the courses offered in Madrid are twofold: fostering the specialisation of judges and magistrates of the ordinary jurisdictions, and getting judges in touch with emerging legal areas (i.e. biotechnologies, e-crime, telecommunications law, etc.) The topics are thus

¹² These are the “*jueces en expectativa de destino*” of the 9/2002 Act of December 22 (modifies article 308 of the 1985 LOPJ).

¹³ The *Centro* depends on the Ministry of Justice and also trains judicial secretaries, forensic doctors, and other personnel of the administration of justice.

organised in six areas: civil law, criminal law, administrative law, social law, European law, and interdisciplinary issues (doctrinal issues, practical problems, etc.). Generally, courses last for a week and attendance is voluntary (professional competence is not evaluated). Courses for prosecutors are organised on a similar basis at the Centro de Estudios Judiciales in Madrid.

In recent years, judges and prosecutors may also follow decentralised courses that are jointly organised by the School or the Centro and the Autonomous Communities, the bar associations, the law schools, etc. The School also offers on-line courses on Catalan and Basque civil law, economy, auditing, and foreign languages.

4. THE JUDICIAL CAREER

“Judge” is the generic term to refer to any of the three categories of professional judges. The lower category is “judge” or “juez”; “magistrate” or “magistrado” is a higher category, normally achieved by seniority, and “magistrate of the Supreme Court” (“magistrado del Tribunal Supremo”) is the highest category (it encompasses both magistrates of the Supreme Court and presidents of the High Courts of the Autonomous Communities). Categories of prosecutors are hierarchically equivalent: “abogado fiscal” is equivalent to “judge”, “fiscal” to “magistrate”, and “fiscal de sala” to magistrate of the Supreme Court. The term “fiscal” owes its origin to one of the historical functions of the 19th century Spanish prosecutors: tax collection on behalf of the monarchy.

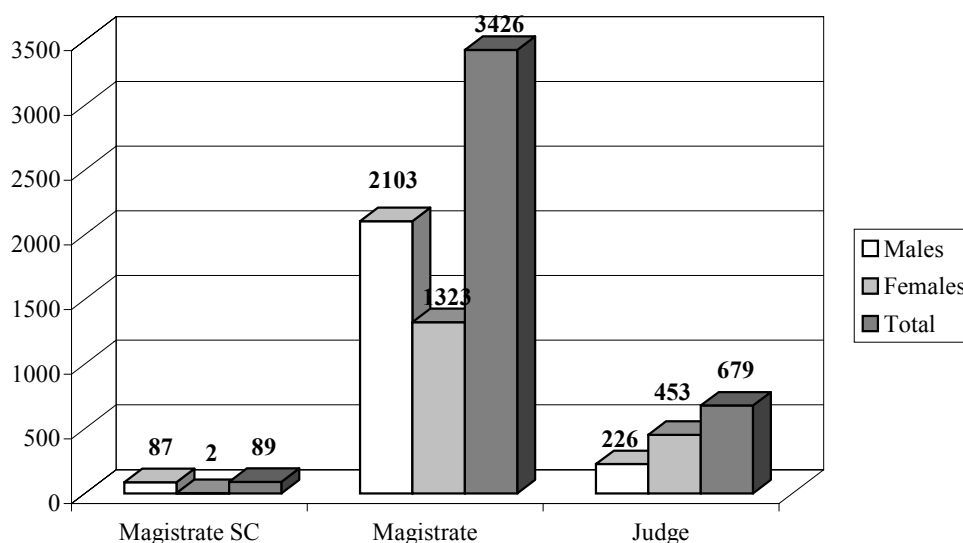


Figure 6-4. Judges by categories and gender

Source: CGPJ 2004 Annual Report

Table 6-6. Prosecutors by category

Category	Total
Fiscal de Sala	17
Fiscal	1156
Abogado fiscal	567
Total	1740

Source: Official Bulletin of the State (07-06-2004)

4.1 Retirement

The compulsory age of retirement for both judges and prosecutors is, since the last reform of 1992, 70. However this has not always been the rule. In 2000, the General Council decided to raise the compulsory age of retirement for judges from 70 to 72 years. This was a temporary measure aimed at avoiding an increasing number of vacancies not covered by the new batches of judges.¹⁴ Equating judges to all other civil servants, the 1985 LOPJ had forced the retirement of those

¹⁴ The reform was introduced by the 9/2000 Act of December 22. The compulsory age of retirement is risen to 72 years until December 31st, 2003, and the lowered to 71 years until December 31st, 2004.

magistrates older than 65 years old (before 1985, judges were able to remain in office until age 75). Most senior magistrates considered this measure to be a veiled purge. The conservative Asociación Profesional de la Magistratura complained about the “lamentable emptying and throttling of the career with the massive and premature retirement of so many valuable fellows”.¹⁵ In similar terms Rafael de Mendizábal (1999: 204-205)—former magistrate of the Constitutional Court—complained:

The 1985 Act cut off the head of the judicial career by means of a massive purge that forced retirement at 65 years old instead of 75 years (...). Besides, the second Council for the Judiciary, sectarian and demagogic, removed the President of the National Audience, because he was not among those “renewable”, breaking therefore the Constitution—and renewed instead more than half of the Presidents of Audiencias. Such a judicial purge, affecting 450 people in five years, has been quite properly labelled as a “witch-hunt”.¹⁶

Nevertheless, the measures undertaken in 1985 had less practical effects than might have been expected. Ironically enough, the subsequent shortage of judges after the removal of the higher echelons of the judiciary required filling the judicial vacancies with those same magistrates forced to retire, who therefore became experienced substitute judges within the same Courts they had served for years. Thus, within the following years, one out of four magistrates of the Supreme Court would be senior substitute judges.¹⁷ Whether intended or not, the real impact of the so-called “purge” of 1985 would not be very different from the previously attempted experiences of former regimes. But, contrary to those experiences, the coexistence of these older generations in the highest positions of the judiciary—entirely acculturated within the Francoist regime—with the newest generations at the bottom echelons of the pyramid would foster an unprecedented cultural diversity among the judiciary.

The voluntary age of retirement for judges and prosecutors is 65 to 70 years. Nevertheless, the vast majority of members of the judiciary remain in office until the age of forced retirement. As the table below shows, voluntary retirements are minimal:

¹⁵ See Asociación Profesional de la Magistratura. *Estudios e Informes* (1987-1989).

¹⁶ [*“La Ley Orgánica del Poder Judicial en 1985 desmochó por arriba la Carrera Judicial, en una masiva depuración, rebajando diez años la edad de la jubilación forzosa, que pasó de los 75 a los 65 años, con un escalonamiento transitorio a los 68, hasta quedarse luego en los 70. Por su parte, el segundo Consejo General del Poder Judicial, sectario y demagógico, destituyó sin base alguna en la Ley al Presidente de la Audiencia Nacional, puesto que no estaba entre los “renovables” quebrantando directamente la Constitución (...) y, a la vez, “renovó” más de la mitad de las presidencias de Audiencias Territoriales y Provinciales, Salas y Secciones, revisión ésta que sí autorizaba la Ley. Tal hecatombe judicial, que en cinco años alcanzó a 450 personas, ha sido calificada como “caza de brujas” no sin fundamento.”*].

¹⁷ Asociación Profesional de la Magistratura, *supra* note 15, at 38.

Table 6-7. Retirement of judges

	Forced retirements	Voluntary retirements	Retirements due to permanent incapacity
1999	46	3	7
2000	37	4	7
2001	0	6	5
2002	7	3	4
2003	62	3	2

Source: Annual Reports of the CGPJ

4.2 Professional evaluation of judges and prosecutors

As a global, detailed, and coherent policy of personnel, professional evaluation of the judiciary hardly exists. The 2003 reform of the 1985 LOPJ addresses this question and envisages a new model by establishing some basic principles and guidelines. Simultaneously, the GCPJ is currently developing a system of qualitative indicators to evaluate the performance of judges (Public Procurement Contract 2003/5 97 086935).

The new model, not yet in place, may replace the quantitative system of “productivity modules” that assigns ideal objectives (namely, number of decisions given) to judges and magistrates, depending on the specific type of court and jurisdiction served. Modules are defined by the CGPJ as “rules of good practices to evaluate the performance of judges and magistrates, so that to fulfil the objectives corresponding to each judicial unit implies to obtain a qualification of satisfactory performance” (CGPJ 2004 Annual Report). In 1987, the CGPJ first established these “quantitative modules” to set the ideal workload of all judicial units and, therefore, the performance of judges and magistrates (strictly speaking, nevertheless, modules were not assigned to judges, but to the courts they served). The quantitative modules were applied until 1998, and then refined and updated every year. When the objectives are met, judges and magistrates receive salary benefits (see paragraph 4.3 below). The “modules of productivity”, nevertheless, had been a controversial issue within the judiciary.¹⁸

¹⁸ In 22nd October 2003, the Plenary Session of the CGPJ decided to stop the application of the “modules of productivity” for the period 2003-2004 (approved the previous 8th October). The Asociación Profesional de la Magistratura (APM) had requested the suspension of the modules because “they challenged the professional qualification of judges and magistrates (...), and did not adjust to the real possibilities of functioning and performance of the judicial units.” (APM, communiqué of 23rd October 2003 [available at http://www.apmagistratura.com/apm/comite/com_231003.htm]).

4.3 Salaries

The General Budget of the State establishes the salaries of both magistrates of the Supreme Court and prosecutors of equal category on annual basis. The salaries of the remaining judicial categories are regulated in the 15/2003 Act and include a basic retribution, complements (destination, responsibility, etc.), variable payments related to the fulfilment of modules of productivity, and special retributions. Variable payments may consist of 5 to 10 percent of the basic salary (whenever the performance exceeds 20 percent of the quantitative modules), but if 80 percent of the objectives are not fulfilled the basic salary is diminished in 5 percent.

Table 6-8. Monthly retributions before taxes of judges and magistrates (in €)

Position	Basic salary	Destination (*)	Representation	Total
President of the Supreme Court	2033,34		8699,55	10732,89
Magistrate of the Supreme Court	1890,45		6840,24	8730,69
President of the Audiencia Nacional	1956,33	2501,74	2569,64	7027,71
President of Section of the Audiencia Nacional	1853,38	2501,74	1328,18	5683,3
President of Tribunal Superior de Justicia	1851,57	2402,47	1302,14	5556,18
Magistrate	1645,84	2094,96	720,98	4461,78
Judge	1440,11	1591,64	120,12	3151,87

Source: 15/2003 Act of 26th March

(*) Group 3 (middle-size cities such as Valladolid, Vigo, Granada or Córdoba)

Table 6-9. Monthly retributions before taxes of prosecutors (in €)

Categories	Basic Salary	Destination (*)	Representation	Total
Fiscal Supreme Court	1890,45		6840,24	8730,69
Head of Prosecutors in Tribunal Superior de Justicia	1851,57	2452,69	1302,14	5606,4
Fiscal	1645,84	1982,04	720,98	4348,86
Abogado Fiscal	1440,11	1591,64	120,12	3151,87

Source: 15/2003 Act of 26th March

(*) Group 3 (middle-size cities such as Valladolid, Vigo, Granada or Córdoba)

4.4 Promotion

For the sake of clarity, we may distinguish between “administrative” and “discretionary” forms of promotion within the judiciary. Administrative promotion is achieved either through seniority or competitive examination. Discretionary promotion of candidates, as said earlier, corresponds to the CGPJ.

4.4.1 Seniority

To be sure, the seniority rule enjoys a very long tradition within the Spanish judiciary as a way of promotion. To date, the prevalent criterion of promotion from “judge” to “magistrate”—as well as from “abogado fiscal” to “fiscal”—continues to be seniority. In this regard, the 2003 reform of 1985 Act does not alter the preference for the seniority rule when judges are promoted to the category of magistrate. The schema, as the law puts it (art. 311 LOPJ), is the following:

- 50 percent of vacancies in the category of magistrate (of the civil and criminal jurisdictions) shall be covered by newly recruited judges who have already spent three years in office. Judges, therefore, are compulsorily given the category of magistrate, according to their rank order. It is possible for a judge to refuse automatic promotion to the magistracy (for instance, because he prefers not to move to another court or city). In that case, he will be able to submit a petition to stay in the same judicial unit for two more years (in any case, he can only refuse promotion three times, so that it is not possible to remain in the same judicial unit for more than eight years).
- Another 25 percent of vacancies shall be covered by judges engaged in competitive selection to become magistrates of the civil and criminal jurisdictions, as well as “specialised magistrates” in the administrative and the labour jurisdictions (see paragraph 4.4.2 below). The advantage with regard to automatic promotion by seniority is that only two previous years in office are required. Furthermore, those magistrates will have preference over automatic promotion when vacancies at the Audiencias Provinciales become available.
- The remaining 25 percent of vacancies are reserved for secondary access of legal professionals with at least ten years professional experience (the formerly known “cuarto turno”; see paragraph 3.2 above). Judicial secretaries are included in this.

4.4.2 Competitive selection

Judges may become magistrates of the civil and criminal jurisdictions by means of a selection examination. They may also apply to a position of “specialised magistrates” in the administrative and the labour jurisdictions (this is also possible for prosecutors who wish to access the judicial career), and to the newly created commercial courts (of the civil jurisdiction). The selection process, which takes place at the Judicial School, may be based on written essays, drafting decisions (and defending them), oral presentation of legal topics, and similar exercises. Successful candidates will have to enrol in a three-month course at the Judicial School before taking office. The only compulsory courses are those organised for judges having been promoted to positions of magistrate of the civil, criminal,

administrative, labour, and commercial courts (or magistrates moving to another judicial function).

Selection committees are appointed by the CGPJ. The President of the Supreme Court presides over them (he may delegate to a member of the Supreme Court or the Superior Courts), the other members being two magistrates, one prosecutor, two senior law professors, one lawyer, one lawyer of the state, one judicial secretary, and one lawyer from the technical services of the CGPJ.

Promotion to civil and criminal jurisdictions through competitive selection does not enjoy great success within the judiciary. Since promotion by seniority does not require waiting too long (and, furthermore, since neither the civil nor the criminal jurisdictions provide judges with a special status within the rank order) the effort made by candidates in preparing the exercises does not compensate the expected results. As the CGPJ acknowledges in its 2003 Annual Report:

The competitive selection to the civil and criminal magistracies attracted only two candidates, and only one of them succeeded. He gained his promotion the day before he would have been promoted anyway through seniority. This should lead to open a debate on the convenience of a deep reform of the systems of promotion and specialisation.

Promotion to labour and administrative courts, which entails priority when promoting to magistracy of those sections in the Audiencias, Tribunales Superiores de Justicia, and the Audiencia Nacional, is slightly more popular. In 2002, five candidates were promoted to magistrates of the administrative jurisdiction, and two more to the labour jurisdiction (from 33 and 36 candidates admitted).

4.4.3 Promotion to magistracy at the sections of the Audiencias, Tribunales Superiores de Justicia, and the Audiencia Nacional

Magistrates wishing to apply to these posts have to submit an application form to the Permanent Commission of the CGPJ. This will appoint candidates on the basis of: (i) specialisation (those candidates to the Audiencia with a six-year experience in the same jurisdictional order—eight years in the case of the Audiencia Nacional and ten years in the case of Tribunales Superiores de Justicia— will have preference over those without specialisation), and (ii) the rank order. Decisions may be appealed before the Plenary Session of the Council, and, still, before the administrative jurisdiction.

4.4.4 Discretionary promotion

The appointment of presidents of the Audiencias, Tribunales Superiores de Justicia, and the Audiencia Nacional, as well as that of Presidents of Sections of the Supreme Court and magistrates of the Supreme Court rely on the discretionary

power of the General Council for the Judiciary, which takes into account the specialisation rules. As in the previous case, candidates have to submit an application form to the Permanent Commission of the CGPJ (they may also apply for more than one post, ranking their preferences in the application form), including those credentials they consider most relevant (degrees, publications, professional experience, etc.). The appointments are proposed by the Plenary session of the CGPJ (a qualified majority of three fifths is required) and made public through Royal Decree.

Article 343 LOPJ states that four out of five vacancies to the magistracy of the Supreme Court will be covered by members of the judiciary who have been magistrates for a minimum of ten years (the five vacancy corresponding to collateral access of jurists, as seen in 3.4 above). Two of those vacancies are reserved to magistrates having obtained previous specialisation in the civil, criminal, administrative, and labour areas, and the other two are open to magistrates fulfilling the general conditions of article 343.

Promotion from “fiscal” to “fiscal de sala” is granted freely by the Prosecutor in Chief (“Fiscal General”). The Consejo Fiscal is the organ entitled to elaborate the proposals for appointments and, generally, is responsible for the elaboration of promotion reports for all members of the public prosecution (article 14 Estatuto del Ministerio Fiscal).

Finally, the President of the Supreme Court (who is also the President of the CGPJ) is appointed by the King, and the Prosecutor in Chief by the government.

5. DISMISSALS OF JUDGES AND PUBLIC PROSECUTORS

As in most European countries, Spanish judges are appointed for life and may only be dismissed for a number of specific reasons:

1. Resignation
2. Loss of the Spanish nationality
3. Disciplinary proceedings causing separation from the career
4. Conviction for having committed a crime (if it entails less than six months of prison the CGPJ may reconsider the case and propose a sanction instead of dismissal)
5. Being unfit for work (according to law provisions)

5.1 Disciplinary proceedings

Articles 414 to 427 of the 1985 LOPJ regulate disciplinary proceedings. The opening of a criminal proceeding for the same facts does not interfere with the disciplinary one, but any decision will eventually depend on a sentence of acquittal

from the criminal jurisdiction. In any case, judges cannot be punished twice for identical facts.

Legal provisions classify misconduct or improper fulfilling of duties and responsibilities as “very serious”, “serious”, and “minor”.

5.1.1 Very serious breaches of conduct (art. 417, 1985 LOPJ).

Judges incur in very serious misconduct in the following cases:

1. Breach of the duty of fidelity to the Constitution, declared by legal decision.
2. Affiliation to political parties or unions, or doing work for them.
3. Repeated provocation of serious clashes with the authorities of the district in which the judge performs his duties, by reasons not related to the jurisdictional function.
4. Orders or pressures on another judge.
5. Actions or omissions leading to civil liability (legally declared).
6. Exercise of incompatible activities.
7. Propitiating an undue appointment in case of incompatibility.
8. To remain on duty in situations of incompatibility or prohibition
9. Unjustified delay in the initiation or in the processing of legal procedures.
10. Being out of office, for more than a week, without official leave of absence or permission.
11. Being untruthful when requesting permissions, authorisations, compatibility statements, diets, and economic aids.
12. Revealing facts or data in the exercise of the jurisdictional function.
13. Abuse of the condition of Judge to obtain favourable and illicit deals from authorities, officials, or professionals.
14. Unjustified ignorance in the fulfilment of the judicial duties.
15. Lack of legal reasoning (opinion of facts) in sentences and rulings requiring it.
16. Incurring three times any misconduct previously sanctioned—or not cancelled from the records—as “serious” (see paragraph 5.1.2. below)

5.1.2 Serious breaches of conduct (art. 418, 1985 LOPJ)

1. Lack of respect to the superiors in the hierarchical order, either before them, in writings addressed to them, or publicly.
2. Recommendations addressed to another Judge.
3. Congratulations or criticisms addressed to authorities, public officials or members of corporations, with abuse of the condition of judge.
4. Correcting the application or interpretation of legislation done by the lower courts, unless exercising the jurisdiction.

5. Excess or abuse of authority, or serious lack of consideration regarding citizens, prosecutors, judicial secretaries, forensic doctors, administrative personnel of courts, lawyers, legal professional, and officials of the judicial police.
6. Using inappropriate, disrespectful, or offensive linguistic expressions in judicial decisions.
7. Not promoting the disciplinary responsibility of judicial secretaries and subordinate personnel when learning about serious breaches of conduct.
8. Revealing facts or data in the exercise of the jurisdictional function when do not incur in a very serious breach of conduct.
9. Being out of office, for three to seven days, without official leave of absence or permission.
10. Unjustified breach of the public schedule of audience and procedural acts, when do not constitute a very serious breach of conduct.
11. Unjustified delay in the initiation or in the processing of legal procedures, if does not constitute a very serious breach of conduct.
12. Repeated inattention to requests from the General Council, the President of the Supreme Court, the National Audience and the Superior Courts of Justice, or blocking of their inspecting functions.
13. Not fulfilling the obligation to keep records of pending cases.
14. Exercise of any incompatible activity.
15. Illicit abstention, when thus declared by the governing room of the court.
16. Making decisions only aimed at inflating statistics on judicial caseload.
17. Preventing or impeding inspection of judicial units by the organs of the CGPJ.
18. Incurring three times any misconduct previously sanctioned—or not cancelled from the records—as “minor” (see paragraph 5.1.3 below).

5.1.3 Minor breaches of conduct (art. 419, 1985 LOPJ)

1. Lack of respect to hierarchical superiors in circumstances which would otherwise qualify as a serious breach.
2. Inattention or lack of respect towards equals or colleagues lower in the hierarchical order; towards citizens, prosecutors, forensic doctors, lawyers and paralegal professionals, members of the judicial police, etc.
3. Breach of legally established deadlines to dictate resolution of any class.
4. Being out of office, for one to four days, without official leave of absence or permission.
5. Inattention to requests from the General Council, the President of the Supreme Court, the National Audience and of the Superior Courts of Justice.

5.1.4 Mechanisms

Presidents of The Supreme Court, *Audiencia Nacional*, Superior Courts of the Autonomies, the governing boards of the courts, the Disciplinary Commission of the CGPJ or its Plenary Session, reports of public prosecutors, and formal complaints of citizens may all initiate disciplinary proceedings against a member of the judiciary. The Inspection Service of the CGPJ is responsible for processing any incoming formal complain and producing a report, in which it may propose to the governing organ of the court (or the Disciplinary Commission) to close the file, carry out preliminary investigations, or open a disciplinary proceeding¹⁹. Preliminary investigations simply consist of obtaining information about the facts, while disciplinary proceedings are open only in presence of circumstantial evidences. If preliminary investigations and disciplinary investigations are to be open, the governing organ of the court will designate an “instructor” (a judge or magistrate of equal category), and (if required) a secretary to assist him. The instructor is responsible for gathering any evidence needed to determine and qualify the facts. A lawyer may assist the defendant at any time.

If the instructor finds evidence of improper conduct, he may formulate charges against the defendant judge, who has eight days to present further counter-evidences. Having heard the opinion of the public prosecutor, the instructor will eventually propose a decision to the judicial organ that initiated the proceedings. This organ may execute the decision, transfer the case to a higher organ (depending on the seriousness of the sanction), or ask the instructor to add more evidences, complete the investigation, or formulate additional charges against the defendant. This process should not exceed a six-month period, but if it does the instructor will have to report the details of the investigation to the judicial organ every ten days. The final decision will be communicated to both the prosecutor and the defendant judge, who may file either an administrative or a jurisdictional appeal (or both). Citizens having reported the facts may only appeal the decision before the courts. Although professional associations representing judges and magistrates do not participate in disciplinary proceedings, they may appeal before the courts on behalf of their members.

Sanctions imposed on judges under disciplinary proceedings may range from warnings, fines (up to 6,000 €), transfer to another judicial unit (100 km. away from the previous one), suspension, and dismissal. Every sanction is registered in

¹⁹ According to art. 21 LOPJ, the competent organs for the disciplinary decisions are: a) Warnings: the Presidente of the Supreme Court, of the *Audiencia Nacional* and the *Tribunales Superiores de Justicia* to judges and magistrates belonging to those courts; b) Fines or warnings corresponding to minors breaches of conduct: the governing boards of the Supreme Court, of the *Audiencia Nacional* and the *Tribunales Superiores de Justicia* to judges and magistrates belonging to those courts; c) Serious breaches of conduct: the Disciplinary Commission of the General Council; d) Very serious breaches of conduct: the Plenary Session of the General Council.

the judges' file, but it is cancelled after a certain lapse of time (except separation). Warnings are cancelled in six months, and the remaining sanctions in 1 to 4 years, depending on the seriousness of the misconduct.

5.1.5 Statistics

Table 6-10. Disciplinary sanctions

	Infringements			Total	Sanctions	Acquittals	Pending
	Very serious	Serious	Minor				
1994	n.a.	n.a.	n.a.	30	17	37	-
1995	20	2	7	29	8	17	4
1996	n.a.	n.a.	n.a.	36	n.a.	n.a.	n.a.
1997	27	10	11	48	24	21	3
1998	16	24	2	42	21	21	-
1999	21	20	11	52	22	24	6
2000	24	13	16	53	26	23	4
2001	21	17	13	51	32	19	-
2002	26	25	11	62	37	19	6
2003	22	25	16	63	26	33	5

Source: Annual Reports of the CGPJ

Table 6-11. Complaints, cases filed, and preliminary investigations opened

	Complaints received	Complaints filed	Preliminary investigations
1994	1435	827	608
1995	1377	876	501
1996	1413	899	514
1997	1557	1034	523
1998	1454	953	501
1999	1417	950	467
2000	990	527	463
2001	788	312	476
2002	1198	355	729
2003			

Source: Annual Reports of the CGPJ

5.2 Legal responsibilities

Any citizen may sue any member of the judiciary deemed to have committed a crime in the exercise of their functions. According to the category of the judge, the case will be held by a section of the Supreme Court or by a section of the Superior Courts.

5.3 Disciplinary proceedings for public prosecutors

The Statute of the Ministerio Fiscal, reformed in 2003, adapts the disciplinary proceedings system of judges to prosecutors. As a hierarchically organised institution, the Prosecutors Chief of each Fiscalía are entitled to open disciplinary proceedings against a subordinate. The Board of Prosecutors will hear appeals on any resolution from a Chief. The Fiscal General may also remove those Chiefs from their posts if they have been sanctioned for a very serious or a serious infringement.

Contrary to the Annual Reports of the CGPJ, the Fiscalía General del Estado does not publish statistics on disciplinary sanctions to public prosecutors, which remain confidential data.

6. CONCLUDING REMARKS

The 2001 State Agreement for Justice (“*Pacto de Estado por la Justicia*”) made different proposals to address the ever-pending modernisation of the administration of justice. The document was preceded by a series of reports from the CGPJ addressing the same issues (namely, the 1997 *Libro Blanco de la Justicia and CGPJ*, 2000a). Among the most salient issues, the Agreement proposed the elaboration of a new Statute for Judges and Magistrates that would establish new criteria regarding recruitment, training and evaluation of members of the judiciary. It therefore suggested selective examinations that would allow a broader assessment of maturity, analytical skills, and culture of candidates. It also required a careful and objective assessment of capacities and professional experience of those legal professionals accessing the judiciary, who would have to spend more time training at the Judicial School. Generally, the Agreement envisages broader training programmes for all members of the administration of justice (including secretaries and administrative personnel) greater connections between universities and judicial professions.

The 2003 Reform of the 1985 *Ley Orgánica del Poder Judicial* (LOPG) adopts in its preamble the principles agreed in the 2001 *Pacto de Estado*. First, the 2003 reformers state that competitive examination or “*oposición*” remains the general system of accessing the judiciary, since it “best guarantees objective and rigorous selection” of Spanish judges. The most relevant change regarding access to judiciary is the suppression of secondary access of legal professionals to the basic category of judge (formerly known as “*tercer turno*”). Second, it confirms that “seniority will no longer be the exclusive criterion” for Spanish judges to gain promotion and access new positions. Seniority will therefore be combined with evaluation of merits and specialisation (either through examinations or evaluation of previous experience in specialised jurisdictions—administrative, labour, and

commercial courts). Third, the reform gives more competencies to judicial secretaries (management of judicial units and administrative personnel) so that judges may concentrate their efforts on judicial activities and decision-making. Finally, it introduces some minor changes in disciplinary proceedings of judges.

As it is generally the case with periodical reforms of the Spanish judicial system, the 2003 reform does not imply a dramatic break with the past. The venerable tradition of the “*oposición*” is not only preserved as a general system of accessing the career, but clearly reinforced at the expense of secondary access of legal professionals, in place since 1985. Inevitably, this may fuel a tenacious corporate trend within the Spanish judiciary. Specialisation and evaluation of merits are given more weight in promotion processes, but automatic promotion and discretionary rules remain important — and contested — mechanisms of the system.

The gradual introduction of new technologies of information and communication (ICTs) envisaged by the law will certainly pave the way for further reforms of judicial units (case management systems, procedures, implementation of legal decisions, relationships with citizens and external institutions, etc.). At a very practical level, therefore, new professional profiles will be required of any member of the Spanish judicial system and it is not unlikely to expect a certain class with skills, capacities, and merits currently required of judges, secretaries, and professional staff. Even though it is too early to assess the real scope of the new legal provisions, it seems clear that the 2003 Act leaves the door open for successive reforms of the Spanish Judicial system.

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APPENDIX RESEARCH OUTLINE

1. RECRUITMENT OF JUDGES AND PROSECUTORS.

1.1. Describe the system(s) of selection: how are the selecting commissions composed, who appoints them, the type of exams, the grading method, etc. Indicate the prerequisites required to the candidates [degree, age, health, moral standards, previous professional experience (if any) etc.]. In some of the 5 countries here considered part of the judges and prosecutors are recruited, at various levels of the jurisdiction, from the ranks of the legal or para-legal professions. Describe separately also such systems of selection by providing all the information requested in 1.1 through 1.5.

1.2. provide any information available on the nature of the evaluations made in the recruitment process and on how reliable they are.

1.3. provide detailed information on the number of candidates and the number of openings for each selection in the last 5 or, if possible, 10 years. Indicate also the average age of the newly recruited judges and prosecutors.

1.4. Indicate who does what in the process of recruitment: Ministry of justice, Higher Council of the Magistracy, etc.).

1.5. provide any further information useful for evaluating the efficacy of the recruitment system such as: are the selecting committees appointed for each process of recruitment? Are there more or less permanent structures in charge of this task? Are the processes of selection organized so as to be conducted within specified time limits?

2. INITIAL TRAINING.

2.1. Describe the learning experiences that the newly recruited have to undergo before they begin to perform specific judicial functions and the time required for such training. In case there are various systems of recruitment, describe this phase for each of them. In particular indicate the amount and variety of on the job training required, the specific training (if any) provided for those to be assigned to specific judicial functions, the programs (if any) to promote the acquisition of relational capacities, forensic skills, the acquisition of knowledge of non juridical subjects and to the use of information technologies (.....).

2.2. Describe the evaluations (if any) made during and/or at the end of the training period. Indicate also whether such evaluations are used as a further means of selection and/or to determine the kind of judicial functions that are best suited for the newly recruited. In case such evaluations might result in dismissals, please indicate both the quantitative relevance of such dismissals and provide some examples of the reasons that have led to such dismissals (are aptitudes for the job taken into account?).

2.3. in case definitive tenure in the judiciary is decided after a period of the actual exercise of judicial functions, please indicate on what basis such a decision is taken.

3. JUDICIAL CAREER.

3.1. Indicate the compulsory age of retirement and the number of years that on the average judges and prosecutors remain in office (with reference to those that remain until compulsory retirement).

3.2. Provide a detailed description of the professional evaluation of judges and prosecutors in the course of their working life and of how such evaluations are related to the various levels of jurisdiction.

3.3. Describe the relationship between the evaluations of professional performance of judges and prosecutors on the one hand and their destination to the higher levels of jurisdiction on the other (a brief description of the of the jurisdictional ladder is, of course, needed).

3.4. Describe the relations that exist (if any) between the content of professional evaluations and the assignment to specific judicial roles

3.5. Describe the mechanisms (if any) through which judges and prosecutors can be dismissed either as a consequence of a negative professional evaluation in the course of their career, or due to physical/mental health, or as a result of disciplinary proceedings. Provide the quantitative data on such dismissals for the past 10 years (provide also a brief description of disciplinary proceedings and sanctions).

3.6. Indicate if and to what extent representatives of judges and prosecutors are included in the bodies that are in charge of professional evaluations connected to the career system, or in charge of disciplinary proceedings.

3.7. indicate if and how judges and prosecutors can challenge and obtain a review (judicial or administrative) of their professional evaluations or disciplinary sanctions.

4. CONTINUING EDUCATION.

4.1. Describe the programs of continuing education specifying also: whether participation is voluntary or compulsory; whether attendance in such programs is also an occasion to evaluate professional competence; whether specific programs are provided or compulsory for those that move from one judicial function to another of a different nature.

5. JUDICIAL COUNCILS.

Most of the countries included in this research have created higher judicial councils, and some, like Italy, also judicial councils at the local (district) level. Describe accurately:

- a) their composition;
- b) the powers that such councils have in matters concerning the governance of judicial personnel (recruitment, initial and continuing education, professional evaluations, discipline, transfers from one judicial position to another, dismissals) and the extent to which such powers (like recruitment, initial and continuing education, professional evaluations and promotions) are reserved to other agencies (for example, Ministry of Justice, special committees, heads of courts or prosecutor's offices, or others);
- c) the relation of the Councils with the Ministry of Justice and the degree in which they have autonomous initiative and decisional powers.

CRITICISMS

Describe the criticisms (if any) that are levied in your country with reference to the various aspects of the judicial system mentioned above, and the reform initiatives (if any) currently underway.