

Issue	Relevant norms
<p>Appointment and tenure</p> <p>1. Introduction</p> <ul style="list-style-type: none"> - As you may know, Germany is a federation (called "<i>Bund</i>") of states called "<i>Länder</i>"; each Land has its own republican government including all three branches executive, legislative and judiciary - There are hence 16 <i>Länder</i> executives including ministries of justice and a federal executive branch including a federal justice department - The court system is organized in a different way: there are courts of the <i>Länder</i> that provide original and appellate jurisdiction and then there federal courts which are supreme courts of further appellate jurisdiction and subject-matter jurisdiction for instance on constitutional matters; that is the federal constitutional court <p>2. Now, that being said, I turn to appointment:</p> <ul style="list-style-type: none"> - Due to this tier system of many <i>Länder</i> courts and a much smaller number of supreme federal courts, an overwhelming majority of German judges (including me) are judges being appointed by the <i>Länder</i>, - to be precise by the respective minister of justice - General rules of appointment are provided by federal law, that is the Federal Judiciary Act (DRiG); so uniformly, for appointment <ul style="list-style-type: none"> • a four-year course of legal studies at a university, 	<p>FJA Section 9 Preconditions for appointments Judicial tenure may only be given in the case of a person who</p> <ol style="list-style-type: none"> 1. is a German in terms of Article 116 of the Basic Law, 2. makes it clear that he will at all times uphold the free democratic basic order within the meaning of the Basic Law, 3. is qualified to hold judicial office (sections 5 to 7), and 4. has the requisite social skills. <p>FJA Section 5 Qualification for judicial office (1) Whoever concludes his legal studies at a university by taking the first state examination as well as a</p>

- excellent results in a comprehensive first state exam,
 - a two year preparatory training with theoretical courses and practical stages and
 - excellent results in another comprehensive examination, the second state exam
- are required by candidates for the judgeship. Requisite social skills are also a precondition for the so-called "higher judicial service"
- 3. Appointment process and probation service**
- Appointment as a judge on probation follows a successful application to the Ministry of Justice; last year, 219 judges were appointed as judges on probation in Baden-Württemberg which is my home Land; under our authority are more than 3 000 judges and prosecutors;
 - The selection process is based on the merit system, an important principle for public service recruitment and consideration for promotion with constitutional rank; thus, state exam grades dominate the decision
 - Appointment is then being delivered through a deed
 - Now, appointment for lifetime is being followed by a three to four year term of probation before lifetime tenure is awarded
 - The practical difference between a judge on probation and a judge holding lifetime tenure is that the judge on probation can be employed without his consent at every court, at a court administration authority or at a

subsequent period of preparatory training by taking the second state examination shall be qualified to hold judicial office; the first state examination comprises a university examination covering areas of specialisation and a state examination covering compulsory subjects.

(2) University studies and preparatory training shall be harmonised in content.

**FJA Section 12
Appointment on probation**

- (1) Whoever is later to be employed as a judge for life or as a public prosecutor may be appointed as a judge on probation.
- (2) Five years at the latest after his appointment, a judge on probation shall be appointed a judge for life or, on being given civil service tenure for life, he shall be appointed a public prosecutor. This time-limit shall be extended for any unpaid leave taken.

**BL (GG), Article 33 Par. 2
[Equal citizenship – Public service]**

Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.

**FJA Section 10
Appointment for life**

- (1) Whoever has worked as a judge for at least three years after acquiring the qualification to hold judicial office may be appointed a judge for life.
- (2) In respect of the period of time referred to in subsection (1) account may be taken of work done
1. as a civil servant in the higher civil service,
 2. in the German civil service or in the service of an international or supranational institution, provided that the type and significance of the work done was similar to that involved in the execution of an office within the higher civil service.

- public prosecution office; other than that, he fulfils the same tasks, duties and workload as senior judges
- Within the court, the presidium, a council consisting of senior judges, assigns the judge on probation to his or her chamber
- A judge on probation is being evaluated every six to eighteen months during his probation by the court president; he or she can put the judge under further consideration by assessing him or her as "not yet fit for higher judicial service"; very rarely, this verdict "not fit" stands and leads ultimately to dismissal

3. as a teacher of law at a German scientific institution of higher education, being a teacher qualified to give instruction at a university,
 4. as counsel, as a notary, or as a lawyer having acquired the qualification to hold judicial office (Assessor) assisting counsel or a notary,
 5. in other professions, provided that the type and significance of the work done was, like the work mentioned under numbers 1 to 4, fit for imparting knowledge and experience for exercising judicial office.
- Taking account of more than two years of such work shall presuppose special knowledge and experience on the part of the person to be appointed.

Promotion, transfer and dismissal systems

1. Introduction

- The internal hierarchy in the judicial service is tiered into different "status offices". These statuses are recognized by titles such as "Judge" (which means an associate judge such as me), "Presiding Judge", "Vice President" and "President"; judges at appellate courts hold higher offices.
- The aforementioned merit system governs every selection process in public service
- Actors in career decisions are the Minister of Justice, a Presidential Council representing the judges, court presidents who evaluated the

Judges assigned to their court and a conflict dissolution body called the electoral committee (Richtertwahlausschuss)

- Promotional decisions are based on regular evaluations of a judge's performance; every four years, all judges are being evaluated with respect to

- output in relation to his or her workload
- his or her professional qualification
- his or her ability to resilience and motivation
- his or her manners while dealing with parties to a lawsuit and treating colleagues and subordinates

- his or her managerial skills
- his or her extracurricular activities at the court

- **Evaluations have to be well-founded according to a sophisticated and detailed set of rules; each evaluation conclude with a grade; there is a certain percentage of qualifying judges affixed to each grade tier in order to ensure equability in grading; these percentages are not binding, however**

2. Promotion

- To prepare a promotion, the Ministry of Justice makes the availability of an office qualifying for promotion known to all judges in order for them to apply; their respective court president is evaluating all candidates.

- If there is more than one applicant, the Ministry of Justice will select the judge with the best performance according to his or her evaluations; it has to give reasons for its decision.
- The selection is then being brought before the presidential council, a committee of judges elected by their colleagues, for review
 - If the presidential council accepts the candidate, he or she will be promoted to the higher office
 - If the presidential council rejects the proposal, an attempt for conciliation is being made;
 - If that conference between the council and the Minister of Justice fails, the law (of the Land Baden-Württemberg, for instance), calls for an electoral committee of judges, attorneys and members of parliament to reach a common decision
- So basically, the inclusion of other branches of government and stakeholders in the decision process is a check against the executive branch in case of a conflict between the judiciary and the executive.
- In practice, a Minister of Justice will for political reasons refrain from appointing political candidates; I should mention, though, that this process applies only to the Baden-Württemberg judiciary – the election of federal judges works in a different but similar way

- Candidates whose applications fail, can appeal the decision in front of a court of law: evaluations and reasons for the selection are subject to judicial scrutiny

3. Transfer

- In general, a transfer is based on a voluntary stand; transfers against the will of a judge almost never occur;
- A judge for life can be transferred to another office against his will only under very limited circumstances and only with his full salary – that is guaranteed by the German Constitution:
 - changes in court organization (i.e. redistricting, changes in jurisdiction) allow a transfer, but to a lower office only when inevitable
 - cases of hardship: when “facts unconnected with his judicial occupation make a measure of this kind imperative in order to avoid grave prejudice to the administration of justice” warrant the transfer
 - disciplinary proceedings/impeachment proceedings may lead to a transfer, but only when there is a final verdict of such order against a judge
- transfers for disciplinary reasons require a formal disciplinary proceeding in pursuit of the disciplinary act and the involvement of the presidential council (see below under dismissal)

BL Article 97

[Judicial Independence]

- (1) Judges shall be independent and subject only to the law.
- (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

FJA Section 30

Transfer and discharge from office

- (1) A judge for life or for a specified term can only be transferred to another office or discharged from office without his own written consent
1. in judicial impeachment proceedings (Article 98 paragraphs 2 and 5 of the Basic Law),
2. in formal disciplinary proceedings,
3. in the interests of the administration of justice (section 31),

4. on changes being made in the organisation of the courts (section 32).

(2) Save in the case of subsection (1) number 4, a transfer or discharge from office can only be ordered on the strength of a judicial decision that has entered into final and binding effect.

(3) Where a judge who holds several judicial offices is discharged from an office, such discharge shall be equal to a transfer.

FJA Section 31

Transfer in the interests of the administration of justice

A judge for life or for a specified term can be

1. transferred to another judicial office with the same final basic salary,
2. provisionally retired, or
3. retired

where facts unconnected with his judicial occupation make a measure of this kind imperative in order to avoid grave prejudice to the administration of justice.

FJA Section 32

Changes in the organisation of the courts

(1) Where a change is made in the organisation of the courts or their districts another judicial office can be conferred on a judge for life or for a specified term who is attached to the courts concerned. Where employment is not possible in a judicial office with the same final basic salary, a judicial office with a lower final basic salary can be conferred on the judge concerned.

(2) Where it is not possible for another judicial office to be conferred on the judge concerned he can be discharged from office. A new judicial office can be conferred on him at any time, including one with a lower final basic salary.

(3) Conferment of another judicial office (subsection (1)) and discharge from office (subsection (2), first sentence) shall be effected not later than three months after the change has entered into force.

FJA Section 33

Retention of full salary

(1) In the cases stated under section 32 the judge shall be paid his previous final salary including any pensionable or irrevocable service allowances and shall continue to move up the seniority scale within his previous salary grade. Remuneration for service, shall otherwise be made in accordance with the general provisions of the law relating to salaries. So far as remuneration for service is dependent on a judge's official place of residence, the judge's last official place of residence shall be decisive in a case of discharge from office (section 32 subsection (2), first sentence).

(2) A judge who has been discharged from office shall be deemed to be a retired judge for the purposes of application of the provisions concerning suspension of pension payments and concerning the concurrence of several pensions.

4. Dismissal

- German judges, even though it is called "lifetime tenure" retire when reaching a legally prescribed retirement age;
- Aside from that, without his own written consent a judge for life may only be dismissed on the strength of a judicial decision that has entered into final and binding effect.
 - The legal bar for dismissal of judges on probation is set lower; he or she can be dismissed when the presidential council refuses lifetime appointment; he or she can move for a court decision;
- A judge appointed for lifetime loses his office automatically by force of a criminal court verdict, under certain circumstances, namely if
 - he or she is sentenced to one year's imprisonment for a criminal offence with intent,
 - he or she is sentenced to imprisonment for certain crimes against the state (e. g. high treason, jeopardizing the democratic constitutional state, espionage) or
 - if the criminal court verdict declares his or her disqualification from public office as a consequence of certain criminal offences; criminal law statutes must expressly allow such a declaration

FJA Section 21

Dismissal from service

(1) A judge shall be dismissed

1. where he loses his status of being a German in terms of Article 116 of the Basic Law,
2. where, except as otherwise provided by statute, he enters the service of, or takes up office with, another public employer, or
3. where he is appointed a professional soldier or a soldier serving for a specified term.

In cases under number 2 the highest service authority concerned can, with the agreement of the new service employer and with the consent of the judge, direct that judicial tenure shall continue in addition to the new service position or office held.

(2) A judge shall be dismissed

1. where he refuses to take the judicial oath (section 38),
2. where at the time of his appointment he was a member of the German Bundestag or of a Land parliament and did not resign his parliamentary seat within the reasonable time-limit set by the highest service authority concerned,
3. where he was appointed after reaching retirement age,
4. where he requests his own dismissal in writing,
5. where he has reached retirement age or is unfit for service and the service relationship has not ended in his retirement, or
6. where he takes up abode or permanent residence abroad without the consent of the highest service authority.

- Other than that, it is set under constitutional law that a judge can be removed from office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws.
- Such a statute for impeachment are the disciplinary acts and the judicial acts enacted by all Länder;
 - according to the Baden-Württemberg disciplinary act impeachment is the severest sanction
 - five other less intensive measures are available that range from a mere censure to a transfer including a demotion
- Disciplinary proceedings are strictly formalized:
 - An administrative body investigates the alleged deeds and then determines further proceedings, court president
 - If dismissal is in question, the highest authority, which is the Ministry of Law conducts the administrative proceedings
 - The law requires hearing of the judge at the beginning and at the end of proceedings;
 - he or she may request involvement of the presidential council;
 - if the administrative procedure comes to the conclusion that impeachment is in order, the Ministry of Justice files a motion for impeachment to the judicial service court

(3) In the absence of his own written consent a judge for life or for a specified term can only be dismissed on the strength of a judicial decision that has entered into final and binding effect. Dismissal pursuant to subsection (1) of a judge for life or for a specified term can only be alleged after a court declaration having final and binding effect.

FJA Section 22

Dismissal of a judge on probation

(1) A judge on probation can be dismissed on expiry of six, twelve, eighteen or twenty-four months following his appointment.

(2) A judge on probation can be dismissed on expiry of the third or fourth year

1. where he is not suited to hold judicial office, or
 2. where a judicial selection committee refuses to give him judicial tenure for life or for a specified term.

(3) A judge on probation can in addition be dismissed where he has conducted himself in a manner which would lead, in the case of a judge for life, to a disciplinary measure impossible in formal disciplinary proceedings.

(4) The time-limits stipulated in subsections (1) and (2) shall be extended to cover any period of unpaid leave.

(5) In the cases under subsections (1) and (2) the judge shall be notified of the dismissal order at least six weeks before the day of dismissal.

FJA Section 24

Termination of service by judicial decision

- as only a court of law, i. e. the judicial service court, is allowed to order dismissal of a judge against his will for disciplinary reasons
- the judicial service court has subject-matter jurisdiction only over cases of impeachment or a file for transfer for disciplinary reasons
- the judicial service court is sitting with judges named by the court it is attached to and by attorneys, not by the Ministry of Justice
- proceedings are very similar to a criminal court trial
- the decision of the judicial service court can be appealed to the judicial service court of appeals;
- ultimately, the judge can file a complaint to the federal constitutional court

Deliberation processes, hierarchy and dissent

1. rules for the judicial deliberation process are set forth in the courts constitution act

- there are mostly formal rules and proscriptions, the law does itself not stipulate any material requirements for the deliberation and judicial reasoning
- in practice,
 - a case is assigned to a specific judge not by order of the president or a presiding judge but by abstract rules. These case distribution rules have to be agreed upon within the court in advance as there

Where judgment is given against a judge by a German court within the area of application of this Act imposing

1. a sentence of at least one year's imprisonment for a criminal offence committed with intent,
2. a sentence of imprisonment for a criminal offence committed with intent and punishable in accordance with the provisions concerning the ban on wars of aggression, high treason, jeopardy to the democratic constitutional state or concerning espionage and jeopardy to external security,
3. disqualification from holding public office, or
4. forfeiture of a basic right under Article 18 of the Basic Law,

judicial tenure shall cease upon entry into final and binding effect of such judgment without any need for a further judicial decision.

**Court Constitution Act
Sixteenth Title
Deliberations and voting**

CCA Section 192

- (1) Only the statutory number of judges may participate in decisions.
- (2) At hearings of lengthy duration, the presiding judge may order that additional judges be called in to attend the hearing and take the place of a judge in the event that he is unable to be present.
- (3) These provisions shall also be applicable to lay judges.

CCA Section 193

- is a constitutional right that no one's case shall be removed from the lawful jurisdiction of a judge
- when a panel of judges (which we call a "chamber") decides on a case, each case is assigned to a rapporteur who will lead the proceedings towards oral hearings
 - before the court goes in session for oral hearings the professional judges sitting on the bench will convene and go through the merits of the case; often there will be a first draft of an opinion based on the facts as presented before the hearing
 - if the court also includes lay judges they will be briefed in advance
 - after the hearing the court will reconvene for deliberation;
 - all votes have equal force; the presiding judge is simply a primus inter pares; he presides over the hearing and deliberation
 - by law no judge or lay judge is allowed to refuse voting on a question
 - each of the aforementioned steps has to remain secret by statutory order or, as the judiciary act prescribes: *"A judge shall preserve secrecy regarding the course of deliberations and voting also after his service has ended."*
 - Violation of the secrecy imperative constitutes grounds for disciplinary action against a judge

(1) Except for the judges who have been appointed to give the decision, only those persons who are employed at the same court for the purposes of their judicial training and the specialist auxiliary staff who are employed there may be present during deliberations and voting, insofar as the presiding judge permits them to be present.

(2) Foreign professional judges, public prosecutors and attorneys-at-law who have been assigned to a court in the context of a study visit may be present during deliberations and voting at the same court, insofar as the presiding judge permits them to be present and they are placed under an obligation pursuant to subsections (3) and (4). The first sentence shall apply mutatis mutandis to foreign jurists who are undergoing training in the seconding state.

(3) The persons designated in subsection (2) shall upon their application be placed under a special obligation to observe secrecy. Section 1 subsections (2) and (3) of the Obligations Act of 2 March 1974 (Federal Law Gazette I, page 469, page 547 - Article 42) shall apply mutatis mutandis. Persons who have been placed under a special obligation pursuant to the first sentence shall be deemed to be the equivalent of persons with special public service obligations for the purposes of application of the provisions of the Criminal Code on the violation of private secrets (section 203 subsection (2), first sentence, number 2, section 203 subsection (2), second sentence, section 203 subsections (4) and (5), and section 205), exploitation of secrets of another (sections 204 and

<ul style="list-style-type: none"> - the judgment is rendered by the signature of all judges, even those who opposed it, have to sign it; the reasoning usually is drafted by the rapporteur but then again discussed among all professional judges and agreed upon – to the public the judgment stands as a decision of the court - every decision within court proceedings made by a judge is detracted from supervision by any other authority within the court or the judicial administration; <ul style="list-style-type: none"> • very commonly a losing party will file an informal complaint against judges to the court president or even higher authorities; • the court president will then review only the professional conduct by a judge, but never address his or her judgment or any act within the proceedings of a case; • the judge will be given an opportunity to comment on the complaint - Dissenting or concurring opinions are not allowed in general; <ul style="list-style-type: none"> • only at the Federal Constitutional Court, justices are allowed to write dissenting and concurring opinions which are being published along with the majority opinion - Judicial reasoning and methods of constitutional and statutory interpretation are not prescribed in detail by law but established by longstanding tradition and persuasive authority of precedential cases; analysis and 	<p>205). violation of official secrecy (section 353b subsection (1), first sentence, number 2, section 353b subsection (1), second sentence, and section 353b subsections (3) and (4)) and violation of tax secrecy (section 355).</p> <p>(4) The obligation shall be imposed by the president or by the supervising judge of the court. He may transfer this authority to the presiding judge of the adjudicating body or to the judge to whom the persons designated in subsection (2) have been assigned. A renewal of the obligation shall not be required for the duration of the study visit. In the cases of section 355 of the Criminal Code, the judge imposing the obligation shall be entitled to file a complaint collateral to the aggrieved party.</p> <p>CCA Section 194</p> <p>(1) The presiding judge shall preside over the deliberations, ask the questions and collect the votes.</p> <p>(2) Differences of opinion concerning the subject matter, wording and sequence of the questions or concerning the result of the vote shall be resolved by the court.</p> <p>CCA Section 195</p> <p>No judge or lay judge may refuse to vote on a question because he was in the minority when a vote was taken on a previous question.</p> <p>CCA Section 196</p> <p>(1) The court shall give its decisions by an absolute majority vote unless otherwise provided by statute.</p>
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discussion of court decisions within the jurisprudence at universities and within law journals is common

- Recent cases of politicians commenting on court orders have caused outrage by the media and the public; in general, the executive and legislative branch will refrain from any conflict with courts as the judiciary is considered a trustworthy institution by the public and judges enjoy a high reputation as being impartial and well-reasoned officers

(2) If more than two opinions emerge in connection with amounts to be decided and no one of them can command a majority, the number of votes cast for the largest amount shall be added to the votes initially cast for the next smaller amount(s) until a majority is reached.

(3) If more than two opinions emerge in a criminal matter, aside from the question of guilt, and no one of them can command the necessary majority, the votes cast for the decision most unfavourable to the accused shall be added to those initially cast for the next less unfavourable decision(s) until the necessary majority is reached. If two opinions emerge on the question of sentencing and neither can command the necessary majority, the more lenient opinion shall prevail.

(4) If there is a tie at a court composed of two judges and two lay judges on an issue to be decided by a simple majority, the presiding judge shall have the casting vote.

CCA Section 197

The judges shall vote in order of seniority, and in a case of equal seniority in order of age, whereas the honorary judges and lay judges shall vote in order of age; the younger one shall vote before the older one. The lay judges shall vote before the judges. If a rapporteur has been appointed, he shall vote first. The presiding judge shall vote last.

**FJA Section 4
Incompatible duties**

(1) A judge shall not simultaneously perform duties of adjudication and legislative or executive duties.

Extra-jurisdictional activity, out-of-court remuneration

- There have been discussions lately when Federal Judges' extrajudicial

Lead come under scrutiny by the press; reports leave spaces that some judges even were money giving speeches and writing books than by remuneration; Rules are the same as for officers of the government in general with few specialities regarding judges:

- every activity that is not part of the official duties is in general subject to a permit by the court president
- smaller activities need no permit (less than 1200 € per year) but have to be notified to the court president
- the decision to grant or not grant permission follows certain rules:
 - > these mustn't be any conflict of interest
 - > extrajudicial activity mustn't be suited to impact on the impartiality
 - > it mustn't be suited to prevent any future commitment or post the judge might hold
 - > it mustn't damage the reputation of the judicial office or service
- for judge, by federal law, it is also prohibited to provide legal advice or expert opinion
- also, judge cannot hold any legislative or executive office; when they get elected, their judicial office must be suspended for the duration of the other office.
- judges may without permit publish books, engage in scientific research or give lectures at universities
- violation of these rules constitute grounds for disciplinary actions
- each year, every judge has to give a statement about his extra-judicial activity through not to the public, but to his or her service authority

(2) Besides duties of adjudication a judge may, however,

1. perform duties involving court administration,
2. perform other duties assigned by statute to the courts or judges,
3. undertake research and give instruction at a scientific institution of higher education, at a public teaching institution, or at an official teaching institution,
4. perform duties in matters concerned with examination,
5. act as chairman in conciliation agencies and in corresponding independent agencies within the meaning of section 104, second sentence, of the Federal Personnel Representation Act.

Section 41

Expert legal opinion

(1) A judge shall not draw up expert legal opinions, nor shall he give legal advice for remuneration outside the course of his official duties.

(2) A professor of law or of political science who has civil servant status and who is also a judge may draw up expert legal opinions and give legal advice with the permission of the highest public authority administering the courts. Such permission shall only be granted generally or in an individual case where the judicial activity of the professor does not exceed the scale of an additional activity and it is not to be feared that official interests are being impaired.