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**Legal experts in public service:
Functions at the Ministry Level and their Influence
on the Making and Development of Law
– Experiences from EU States, especially Germany***

*Jan ZIEKOW***

Abstract

The function and role of legal expert at ministry level of European states is very different. The following considerations focus on two major states of central European administration style, France and Germany. Main results of the study are:

Among senior civil servants of the ministries, jurists are clearly predominant in Germany. Conversely, in France they do not play a significant role, as the recruitment of senior civil servants is done via the central training at ENA. The basis of both models however is the same: to ensure the highest possible degree of comparability in the qualifications of newly appointed officials. The EC recruits their jurists similar to the German model, that is based on their legal qualifications.

Following from this, the role of jurists in drafting bills is also different: In Germany their role is central, in France it is marginal and instead the influence of ENA graduates is dominant. In the EU Commission, jurists in the Directorates-General have, like in Germany, great influence on the elaboration of draft bills.

In both France and Germany the training of senior officials in the ministries is largely the same as the training of judges for the administrative courts.

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Introduction

The role of legal experts in the public sector and their role in the development of administrative law and administrative jurisdiction, also from an international comparative perspective, is a highly interesting topic. It is an issue that can give us a fundamental understanding of the administrative culture of the respective state.

Since this article will highlight the influence of legal experts on law making, it will not address the levels of administration that have the task of executing administrative law. Instead, the sections will concentrate on the public officials at the ministry level of government, with a focus on the situation in Germany and its consideration also from a comparative perspective, specifically to the situation in France.

1. Training and recruitment of ministry officials

In Germany, all positions in the ministries that have influence on the content and design of laws are staffed with officials of the higher civil service. The formal pre-requisite for gaining such positions is a university degree¹⁾, except in cases where the candidate is promoted internally²⁾ within the administration. Furthermore, the training and recruitment channels may differ depending on the course of study, that is, whether the candidate is a jurist or graduate of another discipline.

Despite the introduction of the Bologna Process, which has strongly changed the structure of study for other disciplines³⁾, for judicial education Germany has kept the model of the so-called “fully qualified” lawyer – “Volljurist” in German. This model comprises four-years of study at the department of law of a German university.⁴⁾ This course of study is completed by passing the first state examination in law⁵⁾; to reiterate, it ends with a state examination and not an academic university examination.

Subsequently, the prospective counsellors have to complete a practical legal preparatory service, the so-called legal clerkship or “Referendariat” in German.

1) See § 17 (5) Nr. 1 Federal Civil Service Act (Bundesbeamtengesetz (BBG)); § 21 (1) Nr. 2, (2) Federal Regulation on Public Service Careers (Bundeslaufbahnverordnung (BLV)).

2) See §§ 35-41 Federal Regulation on Public Service Careers (Bundeslaufbahnverordnung (BLV)).

3) In the winter semester 2015/2016 about 90% (16.397) of all study programmes (18.044) concluded with a bachelor’s or master’s degree (cf. *Hochschulrektorenkonferenz* (ed.) (2015), *Statistische Daten zu Studienangeboten an Hochschulen in Deutschland – Studiengänge, Studierende, Absolventen und Absolventinnen – Wintersemester 2015/2016*, Bonn, p. 9: „Tabelle 1.1 Entwicklung der Studienangebote, Wintersemester 2007/2008 bis Wintersemester 2015/2016” (Source: https://www.hrk.de/uploads/media/HRK_Statistik_WiSe_2015_16_webseite.pdf)).

4) §§ 5 (1), 5a (1) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

5) §§ 5 (1), 5d (2) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

This traineeship lasts two years⁶⁾ and consists of practical placements at a civil court, a criminal tribunal or public prosecutor's office, an administrative authority, and at a law firm and an elective practical stage, the last selected by the trainee. Once again, this preparatory service culminates in a state examination, the so-called second state examination.⁷⁾ Compared to university studies ending with an academic university examination, the failure rates of the legal state examinations are very high⁸⁾, approximately six to seven times higher than the average rate of university examinations⁹⁾ and more than double that of even the university examinations with the highest failure rates¹⁰⁾.

As the teaching and exam contents are almost identical Germany-wide¹¹⁾, after completing the second state examination, all jurists have a comparable theoretical and practical knowledge. This is a great advantage for the employability of new recruits. According to the German constitution the selection of persons for the public service must follow the "principle of the best"¹²⁾, which can be controlled

6) § 5b (1) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

7) §§ 5 (1), 5d (3) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

8) Cf. *Bundesamt der Justiz*, Referat III 3, Ausbildungsstatistik 2015, with the results of the first state examination (p. 2, „Anl 1a Staatliche Prüfung neu“) with failure rates dependent on the respective federal state between 20,9 % and 37,9 % and of the second state examination (p. 7, „Anl 2 Ergebnis 2. Staatsprüfung“) with failure rates between 4,2 % and 21,7 % (Source: https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Juristenausbildung_2015.pdf;jsessionid=1C0FA10EEA13CE6178BC1276054C361D.1_cid377?__blob=publicationFile&v=5).

9) See *Wissenschaftsrat – Geschäftsstelle* (2012), Prüfungsnoten an Hochschulen im Prüfungsjahr 2010 (Drs. 2627-12), p. 37, „Übersicht 1: Prüfungsnoten an deutschen Hochschulen 2000 und 2005-2011 (alle Hochschularten und Abschlüsse, ohne Promotionen)“ with the average failure rates of all university examinations between 1,2 % (2006) and 3,1 % (2011) (Source: <https://www.wissenschaftsrat.de/download/archiv/2627-12.pdf>).

10) Cf. <http://www.spiegel.de/lebenundlernen/uni/abschlusspruefung-die-studienfaecher-mit-den-hoechsten-durchfallquoten-a-1054508.html> with failure rates (2014) e. g. in chemistry of 12,4 % and in energy technology of 11,8 %.

11) §§ 5a (2), (3), 5b (2) German Judiciary Act (Deutsches Richtergesetz (DRiG)) lay down nationwide the main areas of legal training (e. g. civil law, criminal law, public law, procedural law) and § 5 d (1) sent. 2 German Judiciary Act (Deutsches Richtergesetz (DRiG)) stipulates the uniformity of the test requirements and of the performance assessment.

12) Art. 33 (2) Basic Law (Grundgesetz (GG)): „Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.“ and e. g. BVerfG, order of 11. 05. 2011 – 2 BvR 764/11 (paragraph 10); BVerwG, order of 15.02.1990 – 1 WB 36/88 (paragraph 21); BAG, judgement of 10.02.2015 – 9 AZR 554/13 (paragraph 12).

for by the administrative courts. As all junior employees have essentially learned the same material the main criterion for employment is the final grade. This method is facilitated by the distribution of grades reached in the legal examinations. Unlike courses of study in, for example, the social sciences, where the majority of students achieve a grade of 2 or better¹³⁾ (on a scale where 1 is the highest possible and 6 the lowest), it is extremely rare for a legal examination to receive a grade of 1 or 2: grade 1 is achieved in 0,2 percent of the examinations and grade 2 in 2,5 percent of cases. Even a 3, the lowest of the so-called distinction grades is attained only by approximately 15 percent of graduates.¹⁴⁾

This effective pre-screening for the “principle of the best” through the results of the legal examination¹⁵⁾ allows the administration to waive any additional state entrance examination for jurists seeking public service employment. Naturally, prospective employees will still be chosen from among a pool of candidates through a structured procedure, typically an assessment centre¹⁶⁾, but an examination in a narrow sense of the word does not take place.

The German model of the so-called unitary jurist, which is what I referred to, results from the fact that all German jurists undergo the same training. Therefore, all jurists in the public service¹⁷⁾, judges¹⁸⁾ and counsellors¹⁹⁾, have a comparable background of training and experience. Among the implications of this is that all

13) See *Wissenschaftsrat – Geschäftsstelle* (2012), *Prüfungsnoten an Hochschulen im Prüfungsjahr 2010* (Drs. 2627-12), p. 58, „Abbildung 7: Notenverteilung in ausgewählten Studiengängen der Fächergruppe Rechts-, Wirtschafts- und Sozialwissenschaften 2010”, which displays results of various study fields, among them sociology and law (Source: <https://www.wissenschaftsrat.de/download/archiv/2627-12.pdf>).

14) The German Ministry of Justice has published the results of the state examinations of all federal states from 2001 till 2015 on https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Juristen/Ausbildung_node.html.

15) Cf. BVerwG, judgement of 03.03.2011 – 5 C 15/10 (paragraph 14); BAG, judgement of 24.01.2013 – 8 AZR 429/11 (paragraph 65–66); LAG Hamm (Westfalen), judgement of 17.11.2005 – 89 SA 1213/05 (paragraph 24).

16) *Der Präsident des Bundesrechnungshofes als Bundesbeauftragter für Wirtschaftlichkeit in der Verwaltung* (ed.) (2014), *Gutachten zum Verfahren der internen und externen Personalauswahl in der Bundesverwaltung*, Kohlhammer, Bonn, 4.4.3; BVerfG, non-acceptance order of 11.05.2011 – 2 BvR 764/11 (paragraph 12).

17) Cf. § 21 (2) Federal Regulation on Public Service Careers (Bundeslaufbahnverordnung (BLV)), which refers to § 5 (1) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

18) Cf. § 5 (1) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

19) Cf. § 4 Nr. 1 Federal Lawyers’ Act (Bundesrechtsanwaltsordnung (BRAO)) which refers to § 5 (1) German Judiciary Act (Deutsches Richtergesetz (DRiG)).

the laws that are drafted in the ministries generally do not cause problems for legal practitioners and the prosecution. Due to their comparable backgrounds, the laws as formulated by ministerial jurists are readily understood by other jurists.

In addition to jurists, other topical experts can be found among the ministry staffs as well, mainly economists but also business economists, political and social scientists, natural scientists and engineers. A prerequisite for employment in the higher echelons of the ministries is a master's degree²⁰. As these other study courses do not culminate in a state examination, students from these fields will sit a university examination. Thus when selecting from these persons for the higher civil service the process will look much more closely at the content-related competences of the respective candidates. This is sometimes assessed through entrance examinations.

For engineers and similar fields a so-called technical internship²¹ is mandatory, somewhat resembling the preparatory service of the jurists. This two-year technical internship is completed with a state examination²². In the past, economists and social scientists also had a mandatory so-called administrative preparatory service ending with a state examination. However, this is now the case only for some states of the federation²³. A one and a half to two year trainee program now frequently substitutes for the administrative preparatory service.²⁴

In France, the training of jurists differs significantly from the German model and does not result in unitary jurists. Rather it is characterized by a high degree of specialization. Apart from additional qualifications like the *Diplôme d'Enseignement Supérieur Spécialisé* (DESS)²⁵, the course for legal studies in France lasts four years as well. It consists of two parts: the 1er (premier) Cycle constitutes basic studies and the 2e (second) Cycle consists of the main studies.²⁶ At the end of the

20) Cf. § 17 (5) Nr. 1 Federal Civil Service Act (Bundesbeamtengesetz (BBG)).

21) Cf. § 6 (2) Nr. 2 Federal Regulation on Public Service Careers (Bundeslaufbahnverordnung (BLV)).

22) Cf. § 17 (1) Federal Regulation on Public Service Careers (Bundeslaufbahnverordnung (BLV)).

23) For example North Rhine-Westphalia: Training regulations for Senior Service in Public Administration (Ausbildungsverordnung höherer allgemeiner Verwaltungsdienst Land (VAPhD)).

24) For example <https://www.berlin.de/karriereportal/berlin-als-arbeitgeberin/verwaltung/traineeprogramme/traineeprogramm-fuer-master/>.

25) Or Master 2 Professionnel in the new Bachelor-Master-system.

26) Cf. Bernhard *Bergmans* (2016), *Juristenausbildung in Frankreich*, in: Bernhard *Bergmans* (ed.), *Rechtslehre – Jahrbuch der Rechtsdidaktik 2015*, Berliner Wissenschaftsverlag, Berlin, pp. 225 (227).

first year of the main studies, that is, after three years of study, the Licence de Droit is awarded.²⁷⁾ In terms of content it covers the whole scope of legal areas including civil, criminal and public law. During the fourth year the student specializes in a particular legal area, after which they are awarded the Maîtrise en Droit.²⁸⁾

Both, the License and the Maîtrise allow the graduate to participate in a competitive examination called a Concours. This is a structured entrance examination for profession-specific training as a lawyer or a judge, for example. After passing the Concours, specific training follows. For future judges of civil and criminal courts this takes place at the École Nationale de la Magistrature (E.N.M.)²⁹⁾ in Bordeaux. This training lasts two years³⁰⁾ and culminates in a final ranked examination³¹⁾. It is important to know that not only graduates of legal study courses are eligible to participate in the Concours but also Maîtrise-graduates from other study courses³²⁾ as well as higher administration servants who have worked for a certain duration in the public administration³³⁾.

27) Cf. Bernhard *Bergmans* (2016), Juristenausbildung in Frankreich, in: Bernhard *Bergmans* (ed.), *Rechtslehre – Jahrbuch der Rechtsdidaktik 2015*, Berliner Wissenschaftsverlag, Berlin, pp. 225 (227).

28) Cf. Bernhard *Bergmans* (2016), Juristenausbildung in Frankreich, in: Bernhard *Bergmans* (ed.), *Rechtslehre – Jahrbuch der Rechtsdidaktik 2015*, Berliner Wissenschaftsverlag, Berlin, pp. 225 (228). Most students continue their post-graduate studies for a second year in order to obtain a master's degree.

29) Established by Art. 14 Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature under the name „centre national d'études judiciaires” and renamed into l'École nationale de la Magistrature by Loi organique no 70-642 du 17 juillet 1970 relative au statut des magistrats.

30) The whole training lasts 31 months (Art. 40 (1) sent. 2 Décret n°72-355 du 4 mai 1972 relatif à l'Ecole nationale de la magistrature) with the examinations taking place after two years to be followed by a one-month theoretical course and another internship, before the graduate is appointed judge or prosecutor. (cf. Programme Pédagogique (Février 2017), p. 32: Calendrier de la formation (Source: http://www.enm.justice.fr/sites/default/files/catalogues/Prog_pedago_2017.pdf)).

31) Art. 21 Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature and <http://www.enm.justice.fr/formation-initiale-francais>.

32) See Art.16 Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature and <http://www.enm.justice.fr/?q=Devenir-magistrat-etudiants>.

33) For more information on access of professionals to EMA see Art.18-1 Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature and <http://www.enm.justice.fr/?q=Devenir-magistrat-pro>.

Employment in the civil service of the ministries in France is not possible once one merely graduates from legal studies. Like the graduates of all other study courses, also the jurists have to undergo a *Concours* as part of a selection procedure. Their continuation depends on the result of the examination: The best go on to complete a two-year programme of study³⁴⁾ at the *École Nationale d'Administration* (ENA)³⁵⁾, the prestigious Strasbourg-based *Grande École* of the French administration. The other graduates, those not making it into ENA, continue their studies at one of the five institutes of the *Instituts régionaux d'administration* (IRA)³⁶⁾, which are designated to train graduates for the French central administration as well³⁷⁾. However, only graduates from ENA are eligible for senior positions³⁸⁾ in the ministries, such as head of division. Graduates from the IRAs will be employed as advisers. After having worked successfully for several years they may apply for ENA. About a third of the available positions at ENA remain for applicants who have already been working for the administration.³⁹⁾

Studies at ENA are interdisciplinary and cover a wide range of fields.⁴⁰⁾ The

34) Art. 37 (2) Décret n° 2015-1449 du 9 novembre 2015 relatif aux conditions d'accès et aux formations à l'Ecole nationale d'administration.

35) Established by Art. 5 Ordonnance n° 45-2283 du 9 octobre 1945 relative à la formation, au recrutement et au statut de certaines catégories de fonctionnaires et instituant une direction de la fonction publique et un conseil permanent de l'administration civile.

36) Established by Art. 15 loi n° 66-892 du 3 décembre 1966 d'orientation et de programme sur la formation professionnelle.

37) See Art. 2 and 7 Décret n°84-588 du 10 juillet 1984 relatif aux instituts régionaux d'administration *IRA*.

38) Cf. Art. 37 (1) Décret n° 2015-1449 du 9 novembre 2015 relatif aux conditions d'accès et aux formations à l'Ecole nationale d'administration: „The aim of education at the Ecole Nationale d'Administration is to train students [...] in the management methods necessary for the performance of senior public service jobs.”

39) Cf. Art. 2 (1–3) Décret n° 2015-1449 du 9 novembre 2015 relatif aux conditions d'accès et aux formations à l'Ecole nationale d'administration.

40) See Art. 7 Annexe of the Arrêté du 4 décembre 2015 portant approbation du règlement intérieur de l'Ecole nationale d'administration: „[...] the following topics: management of public administrations; design, implementation and evaluation of public policies; deontology, ethics and public service values; legal reasoning and drafting; economic reasoning and decision-making; financial and budgetary analysis and management; roles and modalities of public action at central and local level; European and international issues and work processes. [...] the following tools and methods: team building; human resources and social dialogue skills; project management, particularly in information systems; public innovation and modernization of government practices including digital technology; crisis management; negotiation; communication.”

aim is to provide the same training for all senior executives in the French civil service and to ensure that they have an identical understanding of French administrative culture irrespective of which course of study they previously followed. The aim, therefore, is very similar to the German one: the governmental departments are composed of civil servants whose training is common and comparable⁴¹⁾, thus enabling a high level of predictability of the recruited staff's skills for the administration. However, the institutional solutions differ: Germany relies on the standardized university study course to train the unitary jurist at various universities in Germany, France relies on ENA as a central institution.

2. The role of jurists in the ministries

In Germany one often hears, with critical undertones, reference to the so-called monopoly of jurists⁴²⁾ in especially the federal ministries. This term does not imply there is a monopoly in a legal sense, but reflects the empirical fact that approximately 60 percent of the civil servants of the federation on the ministry level⁴³⁾ and approximately half of the civil servants of the Länder on the ministry level are jurists⁴⁴⁾. For some time now various efforts have been made to open access to careers on the ministry level to graduates of other disciplines, but without major success so far.⁴⁵⁾

41) Cf. Hellmut Wollmann (2002), Verwaltungspolitische Reformdiskurse und -verläufe im internationalen Vergleich, in: Klaus König (ed.), *Deutsche Verwaltung an der Wende zum 21. Jahrhundert*, Nomos, Baden-Baden, 489 (507), who speaks of a cognitive and mental homogeneity of the French elites.

42) Walter Leisner, Das Juristenmonopol in der öffentlichen Verwaltung, in: Peter Eisenmann/Peter Rill/Peter Badura (eds.) (1987), *Jurist und Staatsbewusstsein: Beiträge der Tagung „Jurist und Staatsbewußtsein“ der Akademie für Politik und Zeitgeschehen der Hanns-Seidel-Stiftung*, v. Decker and C. F. Müller, Heidelberg, pp. 53–67.

43) Katja Schwanke/Falk Ebinger (2006), Politisierung und Rollenverständnis der deutschen administrativen Elite 1970 bis 2005, in: Jörg Bogumil/Werner Jann/Frank Nullmeyer (eds.), *Politik und Verwaltung, Sonderheft 37 der Politischen Vierteljahresschrift*, Springer VS, Wiesbaden, p. 228 (233).

44) Cf. Sylvia Veit (2012), Zwei getrennte Eliten? Karrieremuster von Exekutivpolitikern und Spitzenbeamten in den deutschen Bundesländern, *Gedächtnisband für Hans-Ulrich Derlien*, in: Dieter Schimanke/Sylvia Veit/Hans Peter Bull (eds.), *Nomos*, Baden-Baden, pp. 175 (179).

45) Klaus König (2007), Verwaltungsstrukturen und Verwaltungswissenschaften, in: Klaus König/Christoph Reichard (eds.), *Theoretische Aspekte einer managerialistischen Verwaltungskultur*, 1. Symposium des Arbeitskreises „Theoretische Verwaltungskultur“, Deutsches Forschungsinstitut für öffentliche Verwaltung, Speyer, p. 1 (14).

If we look for the reasons for the stability of this high rate of jurists, we could initially think it is due to self-reproduction: jurists tend to employ other jurists. However, this does not seem to be the case, as employment policy could be modified by an accordingly amended personnel concept.

More important, certainly, is the administrative culture. Internationally we distinguish between several different basic forms of administrative cultures, a topic on which the German Research Institute for Public Administration in Speyer has conducted a large research project for several years.⁴⁶⁾ For example, the most important example of managerialism in administration is the USA. This type of administrative culture is mainly characterized by an understanding of the administration as a business-like organization, which has to be optimized according to criteria of efficiency and effectiveness using the tools of economics. Such an understanding of administration naturally has a fundamentally different conception of the role of jurists than in other administrative cultures.

Germany is a prototypical example of the so-called legalistic administrative culture⁴⁷⁾. It is characterized by the perspective that law is a central administrative element of governance and control. This view is based on concepts from democracy theory on the content-related legitimacy of the administration by a strict obligation to act in accordance with the relevant acts decided upon by the people's representatives.⁴⁸⁾ Of course, this particular emphasis on legality implies a different role for jurists in public administration than that which they have in managerialism. However, this does not explain why jurists are so strongly represented in the ministries, otherwise the over-representation would be true at all levels, because naturally laws in Germany bind also the local-level agencies. Yet here the number of jurists is much smaller⁴⁹⁾, confined mainly to legal departments for controlling the legality of the actions of the other professional departments.

Yet this comparison with the local administration points us toward the reasons for the predominance of jurists in the German ministries. It is a matter of the tasks

46) Klaus König/Sabine Kropp/Sabine Kuhlmann/Christoph Reichard/Karl-Peter Sommermann/Jan Ziekow (eds.) (2014), *Grundmuster der Verwaltungskultur*, Nomos, Baden-Baden.

47) See for example Sabine Kuhlmann/Hellmut Wollmann (2014), *Introduction to Comparative Public Administration*, Edward Elgar, Cheltenham (UK), Northampton (US, Mass.), p. 17.

48) Cf. Art. 20 (3) Basic Law (Grundgesetz (GG)): „The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”

49) Ernst Pappermann (1982), *Juristen in der Kommunalverwaltung*, Archiv für Kommunalwissenschaften, 21:1, 1 (4 sqq.).

on the respective administrative level. In Germany, the ministries have almost no executive function. Their tasks comprise mainly political-strategic control and the preparation of laws. As jurists in Germany are trained with a very broad knowledge, they lack a high degree of specialization. The jurists are considered to be generalists who can easily gain the knowledge and expertise of any specialist field.⁵⁰⁾ In federal ministries, for example the Federal Ministry of the Interior, there exists a policy providing for the periodic rotation of all civil servants⁵¹⁾ including the leading executives to new specialized fields of work. This model is intended to avoid a narrowing of the civil servant's strategic perspective due to over-specialization.

At the same time – as already mentioned – the major political work of the ministries consists of drafting legislation. For this reason, jurists, whose knowledge is most closely related to the formulation of draft laws within highly complex legal systems like the German one, are commonly preferred to fulfil the tasks in the government agencies.

The French model of training for civil servants on the ministerial level leads to a situation in which legal studies are largely irrelevant. Civil servants who completed legal studies are very seldom found in the ministries. In the ENA competitions it is usually graduates of broader study courses that are successful, especially those graduating from Science Po⁵²⁾, the elite university for political sciences in Paris. The required expertise for taking on tasks in the French ministries is not merely specific legal knowledge but almost exclusively the full range of skills taught at ENA (or IRA). However, the tasks of the French ministries differ from the tasks of the German administration, with the French central administration having a much greater role in executive functions.

50) Cf. Christoph Reichard (2014), Das Personal der legalistischen Verwaltung, in: Klaus König/ Sabine Kropp/Sabine Kuhlmann/Christoph Reichard/Karl-Peter Sommermann/Jan Ziekow (eds.) (2014), *Grundmuster der Verwaltungskultur*, Nomos, Baden-Baden, p. 47 (55).

51) The personnel development of the German Federal Ministry of the Interior is designed to promote the versatility and flexibility of the employees in the company. This requires all employees to be prepared to abandon their duties after a certain period of time and to get involved in new areas of work. (Source: http://www.bmi.bund.de/DE/Ministerium/BMI-als-Arbeitgeber/Personalentwicklung/personalentwicklung_node.html).

52) <http://www.sciencespo.fr/public/fr/actualites/ena-82-des-nouveaux-admis-viennent-de-sciences-po>: „82 % of new admissions come from sciences po”.

3. The design of laws by civil servants in the ministries

In view of the tasks in the ministries and the role of jurists in the ministerial administration it is obvious that the influence of jurists on the development of law and the design of administrative law is significant. In order to give a better understanding I would like to illustrate a typical regulatory process in Germany.

The major proportion of draft laws, specifically approximately two-thirds of all drafts, are not introduced from the parliament but as government proposals⁵³⁾. A quite complex procedure to elaborate the government bill precedes its eventual introduction. The most crucial step is the elaboration of the so-called *Referentenentwurf*, a ministerial draft bill, which is the first official draft of a bill that is presented to the public. This draft is worked out by the division, this is the expert unit within the respective ministry that is responsible for the policy field covered by the draft. German ministries are divided into directorate-generals according to professional competences and these are subdivided into divisions.⁵⁴⁾ Thus, the lowest level of a ministry elaborates the draft bill.

The complex legal system of Germany means it is almost impossible that a civil servant without legal studies created a draft bill. In order to draft a bill the writer must have mastery of the commonly used terminology of laws and know the inner structure of laws, as well as be able to determine the relationship any new regulatory approach has with already existing legislation.

These requirements are no problem if the professional division, which is responsible for the factual issues, drafts the bill. In such cases a single source creates the whole draft. This is the rule in, for example, the Ministry of the Interior. However, there are other ministries wherein non-jurists run a large number of the divisions. These are experts from other disciplines, such as economists, natural scientists, or educationalists, who are able to assess professional content-related issues. In these cases, the respective directorate-generals commonly have one or more so-called regulatory divisions, consisting of lawyers. Their task is to “translate” the policies developed in the directorate-general into the proper legal form of a draft bill.

53) Cf. *Datenhandbuch des Deutschen Bundestages*, Kapitel 10.1 Statistik zur Gesetzgebung v. 26.09.2014 (Source: https://www.bundestag.de/blob/196202/3aa6ee34b546e9ee58d0759a0cd71338/kapitel_10_01_statistik_zur_gesetzgebung-data.pdf).

54) Cf. § 7 (1) Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien (GGO)*): „In principle, Federal Ministries break down into directorates-general and sections, [...]”

However, this “translation” by jurists into legal rationality is not a mere technical process, there is no simple transformation button. It is self-evident that the juridical civil servants who draft the bills will influence their content. This is partially unavoidable from a legal perspective; without it, a new draft bills could not be integrated into the legal system. In some instances, however, jurists have a different opinion on content issues than the subject matter experts of a department resulting in the blockage of their regulatory approach. In such a case, it is very difficult for the division manned with non-jurists to issue a draft bill. In the line organization the only way to solve this problem is to pass the issue onto the next higher level of the hierarchy, the head of directorate-general. If the head of directorate-general refuses to take action – and there might be different reasons for this – then the division who works without jurists can only arrange the draft bill with the support of legal experts from outside the ministry.

Vice versa, jurists who prepare draft bills cannot do without the professional input of experts from other disciplines within the ministry, from other ministries or external experts. Jurists are not trained to analyze life science or economic correlations, for example. In some cases, they are not able to find a content-related solution to the problem at hand.

Only after passing this initial phase consisting of the elaboration of the ministerial draft is the draft bill thoroughly examined in respect to its political-strategic dimensions. The minister or the state secretary then releases the draft bill.

This exploration may have shown that the impact jurists in the ministerial administration have on legislation and thus on the development of administrative law in Germany is very significant, and moreover is greater than the impact of other professional disciplines.

In practice, the influence goes further than the aforementioned structural relationships. In some areas the law, including administrative law, has been shaped by the senior servants who have presided over the responsible department for years. The literature consisting of comments on laws constitutes another avenue of influence. These books explain a law in detail, so that legal practitioners and courts have more guidance for the application of laws. Especially for new bills that are not merely modifications of existing laws, the first and therefore very influential comment is in many cases written by the civil servants who drafted the bill. In doing so, ministerial servants also affect the application of laws to a significant extent.

In France, legal expertise does not play a role in the ministerial administration in general nor in the drafting of laws. Here, the education provided at ENA has a

central place. Only graduates from ENA are eligible to draft laws in the ministries. For this purpose ENA teaches the subject of legistics.⁵⁵⁾ Moreover, the Conseil d'Etat reviews draft bills to ensure their proper usage of legal terminology and compliance with legal consistency.

4. Administrative lawyers and administrative jurisdiction

A further characteristic of the German administrative judicial system is the dominant position of administrative jurisdiction. It is often seen as the essential element completing the constitutional state. German administrative jurisdiction is separate from the other jurisdictions such as civil and penal jurisdiction. Administrative jurisdiction is not exercised by judicial bodies of the general jurisdiction but by independent administrative courts with three levels.⁵⁶⁾ However, this does not change the fact that administrative courts are courts and therefore part of the judicial system. They do not belong to the administration⁵⁷⁾; they control the administration.

Because of the German training model of the unitary jurist, the judges of the administrative jurisdiction have the same education as all other jurists including those in the ministry administrations. In some federal states (for example Bavaria⁵⁸⁾), but not all, it is mandatory that before becoming a judge at an administrative court a jurist has worked in the administration for several years. This is to ensure that an administrative judge knows how decision-making processes work so that administrative decisions will not be hastily repealed.

In Germany, the impact of the administrative jurisdiction on the development of administrative law is extremely significant. Germany follows the system of legal

55) See Charles-Henri *Montin* (2012), *Legistics and the Quality of Legislation in France*, pp. 2-3 (Source: <http://www.montin.com/documents/legistics.pdf>).

56) Cf. § 2 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung (VwGO)): „Courts of administrative jurisdiction in the Länder shall be the Administrative Courts and one Higher Administrative Court each, in the Federation they shall be the Federal Administrative Court [...]”

57) Cf. § 1 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung (VwGO)): „Administrative jurisdiction shall be exercised by independent courts separated from the administrative authorities.”

58) In their first years trainees will learn the business of the Bavarian Ministry of Interior. A later change between administration and administrative jurisdiction is part of the Ministry's personnel development concept. (cf. https://www.stmi.bayern.de/assets/stmi/min/ausbildungundkarriere/stmi_juristen_a5.pdf).

protection of individual rights. This means if a citizen may feel an administrative act may affect their subjective rights they may bring a lawsuit before the administrative court⁵⁹). However, administrative jurisdiction has extended the scope of subjective rights so far that the administrative courts can rule on almost the entire body of administrative law. Compared to verdicts in, for example France, German administrative courts provide detailed reasoning for their verdicts. The main reason for this is the so-called guideline function of administrative jurisdiction. Both the administration and the administrative courts comprehend the task of the administrative courts as being not only to decide on a concrete case but to provide the administration with guidelines to ensure its future actions are lawful.

Given that the development of administrative bills is mainly, but not solely, shaped by jurists in the ministries, the role of jurists from the administrative jurisdiction in the interpretation and application of statutes is absolutely dominant. The crucial issue here is not only the application of statutes but also the further development of administrative law. The confidence of ministerial jurists in the successful interaction with their colleagues in the administrative jurisdiction is so strong that some individual questions are not even regulated in the legislative texts. In such cases the grounds of the law state that the clarification of the question shall be left to the administrative jurisdiction (and to the science of administrative law).

Similarly in France the equivalence of the legal training for ministerial civil servants and administrative judges is ensured, too. In France, this uniformity in training is, of course, guaranteed by the unified ENA training. Administrative law judges and especially the judges at the Conseil d'État are in most cases recruited from the pool of ENA graduates.

The Conseil d'État is not only the highest French administrative court⁶⁰), but, as the term *conseil* implies, has also a wide range of counselling functions for the government. For example it peer reviews all the government's draft bills⁶¹) as well

59) Cf. § 42 (2) Code of Administrative Court Procedure (Verwaltungsgerichtsordnung (VwGO): "the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission".

60) Art. L111-1 Code de justice administrative.

61) Art. 38 (2) sent. 1 Constitution de la République française du 4 octobre 1958 and Art. L112-1 (1) sent. 1 Code de justice administrative [ordinances]; Art. 39 (2) Constitution de la République française du 4 octobre 1958 and Art. L112-1 (1) sent. 1 Code de justice administrative [government bills].

as decree laws⁶²⁾ and has further advisory functions⁶³⁾. It is also responsible for, on its own initiative, drawing the government's attention to essential reforms.⁶⁴⁾

After completing studies at ENA a list ranking the graduates is drawn up.⁶⁵⁾ The best graduates will be able to choose from among the top positions in the civil service of the central government, wherein the Conseil d'État has the highest reputation. Following from this procedure⁶⁶⁾, approximately 80 percent of the members of Conseil d'État consists of ENA graduates⁶⁷⁾. The rest of the positions are occupied by government selected ministerial civil servants. Positions with shorter terms of service are filled with qualified legal practitioners, such as judges from the courts of general jurisdiction who, nonetheless, must have attended ENA, or with law professors.⁶⁸⁾ Thus, the training at ENA has the central role for the mutual understanding of the French ministerial administration and the administrative jurisdiction.

5. The impact of member states on the EU administration

The European unification project and its present incarnation, the European Union, have led to a structure of supranational international law⁶⁹⁾ that is historically and globally unique. However, it must be borne in mind, as the exit of the United Kingdom highlights, that the EU is only as strong as the member states allow it to be. From the beginning of the European unification process, this truth led to member states to struggle to get their own institutional and personnel-related administration concepts and ideas of regulation uploaded to the EU level. This has

62) Art. 37 (2) Constitution de la République française du 4 octobre 1958 and Art. L112-1 (2) sent. 1 Code de justice administrative [decrees].

63) Art. L112-2 Code de justice administrative; cf. Jérôme *Pause* (2008), *Der französische Conseil d'État als höchstes Verwaltungsgericht und oberste Verwaltungsbehörde*, Peter Lang, Frankfurt am Main, p. 158.

64) Art. L112-3 Code de justice administrative.

65) Art. 40 (1) sent. 1 Décret n° 2015-1449 du 9 novembre 2015 relatif aux conditions d'accès et aux formations à l'Ecole nationale d'administration.

66) Cf. Art. L133-6 Code de justice administrative.

67) Jérôme *Pause* (2008), *Der französische Conseil d'État als höchstes Verwaltungsgericht und oberste Verwaltungsbehörde*, Peter Lang, Frankfurt am Main, p. 142, mentions the fact that in 1998 only 4 out of the 90 conseillers d'Etat who were auditeurs before becoming conseillers did not come via the ENA.

68) For this so-called „tour extérieur” see Art. L133-3 till Art. L133-5 and L133-7 Code de justice administrative.

69) Cf. BVerfG, judgement of 12.10.1993 – 2 BvR 2134/92, 2 BvR 2159/92 (paragraph 79).

created an EU administration that is a blend of mainly German, French⁷⁰⁾ and British⁷¹⁾ influences. In Europe, the entirety of this model and its inherent interdependencies is captured under the term “European Administrative Space”⁷²⁾.

If a comparison is to be drawn with the national administrations, the European Commission in Brussels is most comparable to the ministries of the individual states. As it performs comprehensive executive functions alongside its right of initiative to propose Community legislation⁷³⁾ its portfolio resembles more the French model than the German. Functionally, the Commission is divided into more than 30 Directorates-General⁷⁴⁾, each of which is presided over by a commissioner and which are to a certain extent comparable to the national ministries⁷⁵⁾.

Like in France, the selection of the civil servants is conducted by means of a *Concours*, a general selection process⁷⁶⁾. The candidates are appointed in the order of their rank in the results of the selection process. Unlike in France, the professional training of the applicants plays a decisive role in even admittance to the selection process. The majority of the official posts in the Commission are advertised with so-called career profiles, one of which is the career profile “law”⁷⁷⁾. As a prerequisite for a post with this profile the applicant must have graduated from a law study programme.

At the Commission, jurists are employed as jurists, like in Germany. They also

70) Chris Shore (2006), *Building Europe: The Cultural Politics of European Integration*, Routledge, London and New York, p. 172 (with regard to the EU’s Commission internal regime); Klaus H. Goetz (2000), *European Integration and National Executives: A Cause in Search of an Effect?*, *West European Politics*, 23:4, pp. 211–231.

71) Peter Nedergaard (2007), *European Union Administration: Legitimacy and Efficiency*, Martinus Nijhoff, Leiden, p. 2.

72) Cf. e. g. András Torma (2011), *The European Administrative Space (EAS)*, *European Integration Studies*, 9:1, p. 149 (149).

73) For a comprehensive overview of the Commission’s tasks see https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en#what_does_the_commission_do? and http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.8.html.

74) For a list of all directorates see <https://ec.europa.eu/info/departments>.

75) Cf. John Peterson (1999), *The Santer era: the European Commission in normative, historical and theoretical perspective*, *Journal of European Policy*, 6:1, 46 (49), who points out that the responsibilities are more narrowly drawn between the Directorates-General than those of national ministries.

76) https://epso.europa.eu/how-to-apply_en: „Permanent contracts [...] are awarded after a rigorous open competition procedure.”

77) https://epso.europa.eu/career-profiles/law_en.

do not receive any additional education, as they do in France at ENA. Jurists are employed in significant numbers⁷⁸⁾ not only in the juridical service of the Commission, which counsels the Commission on legal questions, but also directly in subject-specialized Directorates-General. Their core activities herein is the elaboration of draft bills.

Based on these facts, one could accurately say that the personnel structure of the EU Commission follows the middle road between the German and the French model.

78) Cf. Antoine *Vaucher* (2008), *The Force of a Weak Field: Law and Lawyers in the Government of The European Union (For a Renewed Research Agenda)*, *International Political Sociology*, 2:2, p. 128 (133).

