JUDICIAL RECUSATION IN THE FEDERAL REPUBLIC OF GERMANY

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I

The much debated problem of the qualification of judges has two aspects: First, the general qualification of an individual to be a judge and, second, his qualification to be a judge in a specific case. Upon consideration of the first aspect it is necessary to scrutinize the nature of judicial appointments in general. On the one side is the moral strength of the individual and his willingness to resist the temptation afforded by the inherent security of life tenure to devote less than his total ability to his judicial duties. On the other hand is the possibility that the lack of life tenure and the necessity of reelection or reappointment will subject him to pressures which could easily interfere with his judicial objectivity. As to individual judicial appointments under any particular system, it would then be necessary to inquire whether the individual under consideration is generally well educated, aware of contemporary problems, sufficiently trained in the law, and sufficiently intelligent to apply and develop his knowledge. Consideration also would have to be given to whether he has the physical strength to endure heavy work without losing his alertness and to whether he has sufficient moral character to avoid involvement in matters which are unsavory or would impede his judicial independence.

The second aspect, the qualification to be a judge in a specific case, has recently become the object of special attention. This aspect has nothing to do with the nature or method of judicial appointments or the appointment of an individual person and arises only after the appointment stage has passed. The problem has been stated with cogence and breadth by Mr. Justice Frankfurter:

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feelings on every aspect of the case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through train-

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ing, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact.1

The breadth of this statement lies in the demand that the administration of justice should not only be disinterested in fact but should also reasonably appear to be so.

An exhaustive study2 has examined the ways in which Anglo-American common law and American statutory development have dealt with this problem and the extent to which the solutions reached by these systems have satisfied the imperative demands that were stated above. The study also deals with the less subtle involvements of a judge, such as direct pecuniary interest in the case, relationship to the parties and prior participation in the proceedings, all of which commonly lead to the exclusion of the judge in American law.3 With regard to prejudice and bias in the more refined meaning of Justice Frankfurter’s statement, the study reveals in detail the astounding variety of rules, prerequisites, and procedures in force in the United States controlling the disqualification of judges.4 The objective of the present article is to examine the manner in which the law of the German Federal Republic (West Germany) has dealt with this problem.

II

German law regulates the subject of judicial recusation within a framework of broad codifications. In both the Code of Civil Procedure (Zivilprozessordnung)5 and the Code of Criminal Procedure

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2 Disqualification of Judges For Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311 (1969) [hereinafter cited as Disqualification of Judges]. For a thorough bibliography of the American commentary on this subject see id. at 407-10.
3 Id. at 323-27.
4 Id. at 332-48.
the problem is treated under the identical title headline, "Exclusion and Disqualification of Court Personnel." Both Codes were promulgated in 1877 and have been in force since October 1, 1879. Although both Codes have been changed considerably, the titles with which this article is concerned have been changed only slightly. That title of the Zivilprozessordnung was the subject of only one minor substantive change in 1898. Several substantive changes in the Strafprozessordnung were made between 1943 and 1964. These will be dealt with later.

As the words "Court Personnel" in the title headlines indicate, these provisions also are applied to persons other than professional judges. These include associate lay judges in commercial matters (Handelsrichter), jury men (Schöffnen) and jurors (Geschworenen), elevated clerks of the courts to whom certain minor judicial functions in civil proceedings are delegated (Rechtspfleger), ordinary clerks of the courts (Urkundsbeamten der Geschäftsstelle) and other persons who take down the minutes of the proceedings, experts, interpreters, arbiters in arbitration proceedings and the officials entrusted with the service of process and the execution of judgments and court orders (Gerichtsvollzieher). The provisions of the Zivilprozessordnung are, in principle, also applicable to the personnel active in administrative and other special proceedings. Neither the exclusion nor the disqualification provisions are applicable to prosecutors or to attorneys. With regard to matters of so-called noncontentious jurisdiction
(Freiwillige Gerichtsbarkeit) such as guardianship, administration of estates, registration of commercial firms and associations, and land registration, disqualification by the parties has been expressly denied.\(^7\)

III

German law makes a clear distinction between exclusion and disqualification.\(^8\) Exclusion of a judge, or other persons within the ambit of the provisions, is defined in terms of the law’s excluding him from exercising his judicial authority.\(^9\) The grounds for exclusion in German law correspond roughly to the limited grounds allowed by American common law for exclusion or disqualification, \textit{i.e.} where the judge has a direct pecuniary interest in the outcome of the litigation, has a close family relationship to any of the parties or has been previously involved in some way at a prior stage of the litigation.\(^10\)

In German civil proceedings a judge is excluded on the grounds of pecuniary interest in cases where the judge himself is a party, or where he has a joint interest in the claim or may be subject to a joint obligation, or where he may have to indemnify any party.\(^11\) Here, “party” is defined as every person upon whom the decision will be binding.\(^12\) This definition would not include shareholders in a corporation which is a party to the suit.\(^13\) Yet the formal, somewhat narrow meaning of “party” is vastly enlarged by extending the exclusion to all court personnel who have any of the above proscribed financial relations to a party. In the Freiwillige Gerichtsbarkeit Gesetz instead of “party” the phrase “person interested” is used.\(^14\) However, this change in wording should not result in any substantive change.

The analogous exclusion in German criminal proceedings is ordered when the judge himself is injured by the punishable act,\(^15\) \textit{i.e.} when any

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\(^{17}\) Law of May 17, 1898, Concerning Matters of Noncontentious Jurisdiction (Freiwillige Gerichtsbarkeit Gesetz) [FGG] § 6 para. 2, cl. 2, [1898] RGBI. 189. For treatment of the constitutionality of this provision see notes 86-90 infra and text.

\(^{18}\) For a more detailed discussion of disqualification see Part IV infra.

\(^{19}\) ZPO § 41; StPO §§ 22, 23.

\(^{20}\) Disqualification of Judges, supra note 2, at 323-27.

\(^{21}\) ZPO § 41.


\(^{23}\) A. Baumbach & W. Lauterbach, supra note 22, at § 41, annot. 2(A); Stein-Jonas, supra note 22, at § 41, annot. III, (b).

\(^{24}\) FGG § 6, para. 1, No. 1 [1898] RGBI. 189.

\(^{25}\) StPO § 26.
legal interest of the judge has been directly encroached. An exception exists in those cases in which the judge is merely a shareholder of a corporation or a member of another juridical person against whom the crime was directed. The Bundesgerichtshof (Federal Supreme Court) has declared by way of dictum, however, that a judge is not excluded if the defendant, while committing a crime, also slanders his prospective judge with the intention to thereby exclude him.

It might appear strange that section 22 of the Strafprozessordnung does not include a provision requiring the exclusion of a judge whenever he is the person accused. However, it has been said that such a rule would be superfluous since, as a matter of principle, no one can be his own judge. This principle would apply not only to a judge who has been officially accused but also to one who, without such an accusation, has actually committed the crime or participated in it to any degree.

With regard to the exclusion based on consanguinity or collateral affinity, in civil procedure and in matters of noncontentious jurisdiction, the word "party" is replaced in the statute by the phrase "in cases of a spouse," etc. Leading commentators interpret this to mean that the spouse, etc., must be a "party" within the meaning described above. The exclusion based upon marriage also continues when the marriage "no longer exists." This definition embraces every type of marriage dissolution; be it by death, divorce or annulment. Consanguinity, affinity and relation through adoption exclude the judge (1) in all degrees of straight-line kinship, (2) with collateral consanguinity to the third degree and (3) with collateral affinity to the second degree. Again, this exclusion also continues in any case where the marriage "no longer exists."

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26 Judgment of July 26, 1951, 1 BGHSt. 299.
29 Löwe & Rosenberg, supra note 27, at § 22, annot. I (6).
30 Id.
31 ZPO § 41, Nos. 2 & 3; FGG § 6, para. 1, Nos. 2 & 3, [1898] RGBI.
32 A. Baumbach & W. Lauterbach, supra note 22, at § 41, annot. (2) (B); Stein-Jonas, supra note 22, at § 41, annot. III, (2). See also, notes 21 & 22 supra and text.
33 See note 31 supra.
34 See A. Baumbach & W. Lauterbach, supra note 22, at § 41, annot. 2 (B); Stein-Jonas, supra note 22, at § 41, annot. III (2).
35 See ZPO § 41, Nos. 2 & 3; FGG § 6, para. 1, Nos. 2 & 3, [1898] RGBI. The counting is always made according to the civil law method, i.e., up to the common ancestor and down again. Bürgerliches Gesetzbuch [BGB] §§ 1589, 1590, Schönfelder, Deutsche Gesetze (C.H. Beck Supp. Nov. 1971) (W. Ger.).
36 ZPO § 41, No. 3; FGG § 6, para. 1, No. 3; BGB § 1590, para. 2.
These same rules of exclusion pertaining to familial relationship prevail in criminal proceedings with the substitution of the phrase "the accused or injured person" for the word "party." The exclusion in criminal proceedings for reasons of familial relationship is subject to criticism because it does not overcome two old doctrines of the German Civil Code. These are that an illegitimate child is related only to his mother and her relatives and not to his natural father; and the familial relationship rules of exclusion are inapplicable where the judge is the finance of the accused or injured person, a situation omitted in the express provisions of the Codes. This criticism is equally valid with regard to the analogous exclusion in civil proceedings.

If a judge has been authorized to appear in an individual civil or noncontentious proceedings, either as a lawyer by choice or by appointment, or as a legal representative of a party, he is excluded. He is also excluded in criminal proceedings if he is or has been the guardian of the person accused or injured, or if, in the same criminal proceedings, he has acted as a prosecutor, a police official or as a lawyer of either the complainant or the accused.

In civil and criminal proceedings a judge is excluded if he has actually testified as a witness or as an expert at any stage of the same proceedings. A special provision makes it clear, however, that the mere fact that the expert has previously testified as an ordinary, non-expert witness is not grounds to prevent his giving expert testimony at a later time. The Freiwillige Gerichtsbarkeit Gesetz does not provide for an exclusion for having testified as a witness or expert, possibly because in some instances, for example in family matters, the judge may have to use his own observations about the persons, living conditions or other

37STPO § 22, Nos. 2 & 3.
40ZPO § 41, No. 4; FGG § 6, para. 1, No. 4.
41STPO § 22, No. 2.
42Judgment of Nov. 4, 1959, 14 BGHSt. 219, 222; SCHWARTZ & KLEINKNECHT, supra note 27, at § 22, annot. 5.
43STPO § 22, No. 4.
44ZPO § 41, No. 5; STPO § 22, No. 5.
45ZPO § 406, para. 1; STPO § 74, para. 1. As a rule an expert will be disqualified if he privately and for remuneration renders an opinion to one of the parties to the proceeding before he testifies at the request of the court. Judgment of July 20, 1965 (BGHSt.), [1965] MDR 926 (W. Ger. 1965).
circumstances involved and to a certain extent become a witness in the proceedings. It is questionable whether this remains good law for all proceedings that are handled under this Act.\textsuperscript{46}

Also, in both civil and criminal proceedings, a judge is excluded at the appeals stage if he has taken part in the lower court's decision in the case. This principle is extended in civil proceedings to any participation in a decision in an arbitral proceeding which is later appealed to the ordinary courts.\textsuperscript{47} An exclusion based on judicial involvement at the lower level refers only to former participation in the same proceedings.\textsuperscript{48} Strangely, the \textit{Freiwillige Gerichtsbarkeit Gesetz} does not contain an analogous provision, although this Act does provide for appeal.\textsuperscript{49}

Because of certain aspects of German criminal procedure, the exclusion based on participation in the decision of a lower court regarding the case has been extended to judges in special situations. In Germany, as in the United States, final criminal judgments from which a regular appeal is no longer possible can be overturned under certain restrictive conditions.\textsuperscript{50} There will be no attempt here to record in detail that portion of the \textit{Strafprozessordnung} which regulates post-conviction relief. However, in connection with the exclusion of judges, it is important to note that, as a rule, in these special proceedings it is the court whose decision is attacked, and not an appellate court, which renders the decision made in this extraordinary post-conviction remedy.\textsuperscript{51} The exclusion provision which prohibits a judge from sitting in proceedings in which he has participated previously in a lower court is not applicable here.

The special post-conviction criminal proceeding is divided into several stages. At the first stage the court decides whether the facts alleged and the means of proof offered constitute a sound basis for the special proceeding, and if it finds that they do not, the application is rejected as "inadmissible."\textsuperscript{52} If the application is considered "admissible," evidence offered at the second stage to overturn the conviction is heard by the court, and the court decides whether the resumption of the proceedings is "justified." If the resumption is declared "justified" the third stage is usually a new trial, although under certain circumstances the person sentenced may then be acquitted without a new trial.\textsuperscript{53}

\textsuperscript{46}See notes 86-89 \textit{infra}, and text.
\textsuperscript{47}ZPO § 41, No. 6; StPO § 23, para. 1.
\textsuperscript{48}Judgment of Feb. 6, 1961, 15 BGHSt. 372.
\textsuperscript{49}FGG § 19.
\textsuperscript{50}StPO §§ 359-73 (a).
\textsuperscript{51}StPO § 367.
\textsuperscript{52}Id.
\textsuperscript{53}Id. §§ 369-71.
Until the resumption of the proceedings is declared to be “justified” there is a presumption in favor of the original judgment. Because the same court which issued the original judgment decides both the admissibility and justification issues in the post-conviction proceedings, it is extremely difficult to be successful in an attempt to force a resumption of proceedings or to be successful when the resumption has been forced. In 1964 a provision was adopted which excludes any judge from participating in decisions on the resumption of a proceeding if he has participated in the decision attacked. Also excluded is any judge who has participated in the decision of a lower court which is then decided by a higher court and that decision is subjected to post-conviction attack. This exclusion is also applicable to the first stage of the special proceedings in which the “admissibility” of the resumption proceedings is decided. On the other hand, a judge who has participated only in an appeal on questions of law rather than of fact is not excluded from sitting in a court which hears the appeal from a denial of the resumption proceedings. No changes were made in the existing law with regard to the corresponding special proceedings in civil cases attacking final decisions.

A last ground for exclusion in criminal proceedings arises from a special German institution: the judge of inquiry (Untersuchungsrichter). While in general the public prosecutor handles the preparation of a case until it is either dropped or presented to the court for indictment, cases of a certain gravity are subject to an inquiry conducted by the Untersuchungsrichter. If the judge of inquiry has actually handled the inquiry at any substantial stage he is precluded from being a member of the court that rules on the indictment or of the court that hears the trial of the case. Presiding trial judges have followed a restrictive construction of this special provision. Thus, the presiding judge of a trial court has not been excluded even where, in his capacity as trial judge, he has made substantial pre-trial inquiries of whether the accused could

54 Schwarz & Kleinknecht, supra note 27, at § 370, annot. 1.
58ZPO §§ 578-91.
59 A. Baumbach & W. Lauterbach, supra note 22, at § 41, annot. 2 (F).
60StPO § 151.
61Id. §§ 178, 184.
62Id. § 23, para. 3.
be considered an habitual criminal, or whether it would be advisable to sentence him not only to incarceration, but also to security detention.  

Parallel to the question of exclusion of a judge from participation in resumption proceedings is the problem of whether a judge can sit again in a case that has been reversed and remanded by an appellate court or, as in the United States, the case has to be retried because of a hung jury.  

The personal involvement of a judge in these situations will, of course, be of varying degrees. In the American situation a judge's involvement and subconscious tendency to adhere to his former rulings will probably not be as strong in a case involving a hung jury as in the remand cases where the rulings or actions of the court have themselves been challenged. Within the remand cases a judge's involvement will be stronger where the reversal is based upon substantive grounds rather than upon a technicality. In any case, such involvement will tend to be stronger where the judge decides both issues of fact and law than where the questions of fact will again go to a jury. No American decision has been found which requires exclusion based on the mere fact of a judge's renewed participation under any of the circumstances mentioned. However, Connecticut and Indiana have enacted statutes which in such situations exclude the judge in both civil and criminal proceedings either automatically or upon application of either party.

Under German law the hung jury situation cannot occur. There is no jury in civil proceedings, and in criminal proceedings professional judges and sometimes lay judges together decide both questions of fact and law. The court is bound to reach a decision under the detailed rules which determine the necessary voting majority in civil and criminal proceedings. The decision rendered can be attacked only by appeal. The extent of any right to appeal and the various forms of appeal which are available are established by German procedural law. Therefore, in Germany the problem in the case of remand is confined to the question of whether a judge, either a professional or a lay judge, can sit again in a case that was reversed and remanded on appeal by a higher court.

Until recently the only statutory rule that dealt with this problem in

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64See also Ratner, Disqualification of Judges for Prior Judicial Actions, 2 How. L. J. 228, 229-38 (1957).
65See U.S. v. Bryan, 393 F.2d 91 (2d Cir. 1968) which only suggests a self-disqualification of the District Court judge for bias or prejudice in a re-trial after the first trial before him of almost two months' duration had ended in a hung jury.
66CONN. GEN. STAT. § 51-41 (1958); IND. STAT. ANN. § 2-1404.
67GVG § 196.
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criminal proceedings was a provision in the *Strafprozessordnung* permitting the court of appeals to remand a case to a neighboring court of the same state and of the same rank as the lower court whose decision was reversed. It seems likely, however, that this provision was designed more to take the case out of surroundings susceptible to public prejudices that could influence the judges in the new trial than to avoid the renewed participation of individual judges. Somewhat closer to the problem here considered is a provision in section 565 of the *Zivilprozessordnung* which provides that the Federal Supreme Court may remand a case to a different division of the Circuit Court of Appeals (Oberlandesgericht) than the one from which the decision was appealed. In an early interpretation the Federal Supreme Court admitted that this provision had been adopted in 1898 as an amendment to the *Zivilprozessordnung* in order to obviate the occasional inclination of members of the Circuit Court of Appeals to sustain in some manner their own legal view even though it had been overturned by the higher court. Yet, in the same judgment the court expressly denied the exclusion of a circuit court judge upon remand merely on the grounds of his participation in the former proceeding.

The 1964 amendment to the *Strafprozessordnung* has changed the situation as to remand. Where, upon any appeal to any court higher than the Superior Court (Landgericht), the appellate court reverses and does not itself render a final judgment, which it is allowed to do only within certain narrow limits, it is now required to remand the case to another division of the court whose judgment was reversed or to another court of equal rank within the same state. The public prosecutor has the right to appeal the decision of a court which refuses to indict or which in the indictment refers the case to a court of lower rank contrary to his request. If this appeal is successful, a 1950 amendment to the *Strafprozessordnung* allows the appellate court to order that the trial be held before a division of the lower court other than the one

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68STPO § 354, para. 2 in its pre-1964 version.
71The basic structure of the courts of general jurisdiction, which is almost completely uniform throughout the territory of the Federal Republic of Germany is: Amtsgerichte (Local Courts), Landgerichte (Superior Courts), Oberlandesgerichte (Circuit Courts of Appeal), Bundesgerichtshof (Federal Supreme Court). GVG § 12. The first three types are courts of the states (Länder) which form the Federal Republic.
72STPO § 354, para. 2.
73Id. § 210, para. 2.
whose decision was overturned, or before a neighboring court of equal rank of the same state.\textsuperscript{75} Both the 1950 and 1964 amendments show a clear trend aimed at bringing cases before judges that have not participated in the matter at an earlier stage. This trend is asserted more strongly in the 1964 amendment because it compels the remand to a different division or a different court, whereas the 1950 amendment left such action to the appellate court's discretion.\textsuperscript{76}

However, remand to a different division of the lower court, or even to another court, does not guarantee that a judge who participated in the overturned judgment will not hear the case again. Due to changes in the distribution of cases and organizational changes within the court, a different division of the same court or another court may not always be comprised of judges who have not previously tried the case. It appears that the spirit of the 1964 amendment requires the exclusion of a judge who tried the same case upon a remand to a different division of the lower court or a different court. Nevertheless, the legislative history of the amendment shows that the German Federal Bar proposed to add a specific requirement of exclusion for such a judge to the other exclusions of section 23 of the Strafprozessordnung, but that both the Judiciary Committee of the Bundestag and the Bundestag itself refused to do so after extensive deliberation. From this the Federal Supreme Court concluded, first by way of dictum\textsuperscript{77} and later when dealing directly with the issue,\textsuperscript{78} that a judge who participated in a reversed decision is not by law excluded from participation after remand if he happens to be a member of a different court or court division which deals with the case.

The Strafprozessordnung does not provide for exclusion or disqualification of the public prosecutor.\textsuperscript{79} However, the Federal Act on Public Officials (Bundesbeamtengesetz) establishes a rule which requires federal officials to abstain from taking actions against their own interests or against the interests of their relatives.\textsuperscript{80} The Federal Supreme Court,

\textsuperscript{75}STPO § 210, para. 3.

\textsuperscript{76}In Italy, after a remand, the judge who has participated in the overturned decision has to disqualify himself in civil proceedings, C. PRO. Civ. § 51, No. 4 (Hoepli 1967), and is excluded in criminal proceedings. C. PRO. PEN § 61, para. 1 (Hoepli 1967). See also M. Cappelletti & J. Perillo, Civil Procedure in Italy, § 308, at 77 (1965).

\textsuperscript{77}Judgment of Feb. 2, 1966, [1966] NJW 1718 (BGHSt.).

\textsuperscript{78}Judgment of Sept. 9, 1966, 21 BGHSt. 142; See Judgment of Nov. 15, 1965 (OLG, Celle), [1966] NJW 168 (W. Ger. 1966); Judgment of Apr. 21, 1966 (OLG, Hamm), [1966] NJW 2073 (W. Ger. 1966); Judgment of May 9, 1966 (OLG, Celle), [1966] NJW 1723 (W. Ger. 1966); Dahs, Disqualification of Trial Judges after Remand by Court of Appeals, [1966] NJW 1691; but cf. Löwe & Rosenberg, supra note 27, at § 354, annot. 2; see also part IV infra.

\textsuperscript{79}See note 16 supra.

however, has brought public prosecutors within the statutory provision for the exclusion of judges who have previously testified in the proceedings if the prosecutor participates in the trial after giving testimony. However, a judgment rendered in violation of this rule must be reversed only if there exists a possibility that the decision was based on the testimony of the prosecutor in violation of the exclusion. Consequently, no reversal is necessary where another official of the prosecutor's office summarizes the testimony of his fellow prosecutor which concerns only a technical point in connection with the activity of the testifying prosecutor in the preliminary stages of the proceedings. This situation illustrates the need for a more extensive statutory treatment of the question of exclusion or disqualification of prosecutors.

IV

Both the German Zivilprozessordnung and Strafprozessordnung apply a somewhat strange organizational technique in dealing with the problem of disqualification for bias or prejudice. The Codes contain identical provisions: "A judge can be recused both in those cases where he is excluded from exercising his judicial office by law and also on the ground of fear of bias or prejudice. The recusation on the ground of fear of bias or prejudice takes place when there is an adequate ground to justify distrust in the impartiality of the judge." Because the exclusion of a judge is effectuated by operation of law, a plea of recusation to exclude a judge is only a procedural step that enables a party to bring about this result. The plea does not have to be invoked for the exclusion to apply. Since the exclusion is dictated by law, this type of recusation is not subject to any limitations regarding the stage of the proceedings or the point in time at which the recusing party acquired knowledge of the ground for exclusion. On the other hand, recusation on the ground of fear of bias or prejudice (hereinafter called "disqualification"), is subject to such limitations. This situation results from the fact that the participation of a judge subject to disqualification is not unlawful where the right to have him disqualified has not been claimed by any of the parties entitled to do so.

The Freiwillige Gerichtsbarkeit Gesetz, after providing that a judge may disqualify himself for bias or prejudice, in section six, paragraph

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81 Judgment of May 3, 1960, 14 BGHSt. 265.
82 Löwe & Rosenberg, supra note 27, remarks preliminary to § 22, annot. 7, at 43.
83 ZPO § 42, paras. 1, 2; StPO § 24, paras. 1, 2.
84 ZPO § 43, StPO § 24.
two, clause two, excludes such disqualification by others. In this connection the question has been raised whether or not a party has a constitutionally guaranteed right to an impartial judge, such as that found in the law of the United States under the due process clause of the Fourteenth Amendment to the federal constitution and under constitutional provisions of the various states. The Federal Supreme Court approached the problem in a limited way when it considered a disbarment proceeding against an attorney under the Federal Bar Regulations (Bundesrechtsanwaltsordnung). The court decided that in a proceeding of this character the provisions of the Zivilprozessordnung on disqualification of a judge for fear of bias or prejudice must be applied in a supplementary manner, which, of course, opened the way for disqualification by the parties.

Soon after this case the Federal Constitutional Court (Bundesverfassungsgericht) met the question directly and declared that section six, paragraph two, clause two of the Freiwillige Gerichtsbarkeit Gesetz was incompatible with article 191, paragraph one, clause two of the Basic Law (Grundgesetz) which reads: "No one may be denied the jurisdiction of his lawful judge." The court gave this clause multiple meanings: First, in a formal sense, in each individual case no judge other than the one to whom the case was allotted by the general procedural norms and the organizational plans of the court can act upon or decide the case.

Second, in a broader sense, the judicial task must be fulfilled not only by a judge who is free from influence by a judicial administrator and is secure in his independence, but also by a judge who is a "non-involved third person," neutral and detached from the parties. Accordingly, there must be provisions by which a judge who does not offer this guaranty of impartiality may be excluded or disqualified. Thus, the court concluded that section six, paragraph two, clause two of the Freiwillige Gerichtsbarkeit Gesetz was incompatible with this requirement.

Regarding the substantive prerequisites of disqualification, it is interesting that both the subjective element of "fear of bias or prejudice" and
the objective limitation which requires "a ground adequate to justify distrust in the impartiality" are spelled out in the German law. The leading commentaries to both Codes emphasize that there must be, from the view point of the party concerned, sufficient objective grounds to arouse in the eyes of a reasonable person distrust of the impartiality of the judge. This view corresponds to the standard expressed in Mr. Justice Frankfurter's statement.

The factual situations where questions of the impartiality of the judiciary may arise are of course as abundant and varied under German law as under any legal system that provides for an impartial judiciary. A few recent situations will illustrate the point.

The presence of the subjective element of fear, bias or prejudice was denied where a party had been faced with the same facts and the same judges in a prior proceeding but had not sought disqualification. In a decision involving the remand of a case, a judge who had participated in the former decision of the lower court declared himself "prejudiced by law." Rightly, the appellate court corrected him by saying that there is no such thing as "prejudice by law." Anticipating a later decision by the Federal Supreme Court, the court denied the exclusion of the judge. The higher court on appeal came to the same conclusion. It emphasized that the new text of section 354, paragraph two of the Strafprozessordnung was clearly not based upon a legislative belief that a judge should be considered prejudiced on the mere ground that he had taken part in a decision which later was reversed and remanded. Therefore, the court concluded, the innovation in section 354, paragraph two was no reason to abandon the doctrine that participation in a prior decision, without more, offers no ground for the disqualification of the judge. This same position was taken where a judge participated in a decision against the wishes of the prosecutor.

The principle has also been applied where the only ground for disqualifying a judge would be the fact that he has taken a certain position in other proceedings or that he has defended a certain viewpoint in a

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9ZPO § 42, para. 2; StPO § 24, para. 2.
90Stein-Jonas, supra note 22, at § 42, annot. II, para. 1; Löwe & Rosenberg, supra note 27, at § 24, annot. 2.
91See note 1 supra and text. As to case law and statutory development of disqualification in American law see Disqualification of Judges 327-48, 350-51.
94Judgment of Sept. 9, 1966, 21 BGHSt. 142. See note 78 supra.
95Judgment of Sept. 9, 1966, 21 BGHSt. 142.
The question was solved somewhat differently where, after a judge had been disqualified successfully in three other pending proceedings, the court, in a fourth proceeding, ruled that the party could reasonably fear that the judge would not be impartial. In the area of public statements of a judge, a member of the Federal Constitutional Court who was also a university professor of constitutional law was disqualified after he publicly expressed his opinion concerning a problem then before the court. The court emphasized that the issue here was not whether the judge was actually prejudiced but rather whether a party evaluating all the surrounding circumstances might reasonably doubt the impartiality of the judge. The court conceded that the judge in his role as a university professor enjoyed the academic right of freedom in his expressions, but felt that for the duration of his term as a member of the court, his duties as a judge must prevail. Therefore, utterances made by the judge as a university professor had to be weighed according to the principles applicable to judges, at least insofar as such utterances referred to a proceeding pending before his court. The court gave weight to the fact that the judge had not only publicized his conclusions on the issue but had also bolstered his statements with the contention that liberal forces and forces hostile to democracy had apparently joined hands to form an unholy alliance opposing his viewpoint. On the basis of this derogatory statement, the court concluded, a party to the proceeding could reasonably doubt the impartiality of the judge.

A judge has been disqualified after making pretrial statements to the press commenting on allegations made against a defendant as if the allegations were ascertained facts. To prevent future disqualification, the court recommended that trial judges should exercise special restraint when confronted by members of the press.

Members of the Federal Constitutional Court are not precluded from the exercise of their judicial functions solely on the ground of prior scholarly publication. The court mentioned the fact, totally unique in the German court system, that at the Federal Constitutional Court no substitute judge takes the place of a judge who has been disqualified; therefore, this fact creates a duty of additional diligence in a member of this Court to give the appearance of impartiality.

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88 Judgment of Mar. 7, 1963 (OLG, Nurnberg), [1964] Fundhefte für Zivilrecht No. 8599 (W. Ger. 1964). See also A. Baumbach & W. Lauterbach, supra note 22, at § 42, annot. 2 (B) (b); Stein-Jonas, supra note 22, at § 42, annot. 11, para. 2; Löwe & Rosenberg, supra note 27, at § 24, annot. 3(a). Each of these works cites older cases.


90 Judgment of Mar. 3, 1966 (BVerfG), [1966] NJW 922 (W. Ger. 1966). The court mentioned the fact, totally unique in the German court system, that at the Federal Constitutional Court no substitute judge takes the place of a judge who has been disqualified; therefore, this fact creates a duty of additional diligence in a member of this Court to give the appearance of impartiality. Id. at 924.

100 Judgment of July 9, 1953, 4 BGHSt. 264.
participation in the legislative process.\textsuperscript{102} Relying on legislative history, the Codes have been interpreted to prevent exclusion by operation of law and disqualification for fear of bias or prejudice based solely upon such participation.\textsuperscript{103}

The membership of a judge in certain organizations is, on principle, not considered enough to warrant his disqualification. A motion to disqualify all members of the Federal Constitutional Court who were "members of a Marxist organization of any type, be it Communists, Titoists or other species, including the Social Democratic Party" was rejected because it was not directed against specific judges indicated by name. The court declared in dictum that a judge's membership in a political party without other acts is not a sufficient reason to justify his disqualification.\textsuperscript{104} Membership in a trade union by a lay judge of a labor court was considered to be inadequate grounds for disqualification even where rival union interests were cited as forming the basis for the claims made in the suit.\textsuperscript{105} In a proceeding against a judge for drunken driving, the court rejected the self-disqualification of some of his colleagues since it was based solely upon the fact that they and the defendant had long been members of the same court.\textsuperscript{106} The same result was reached where the divorce suit of a judge of a court of appeals was pending before his own court and his fellow judges attempted to disqualify themselves. The court ruled that the fear of lack of impartiality would justify disqualification only where the judge who was party to the action had a relationship with his fellow judges beyond that which normally characterizes such professional association.\textsuperscript{107}

Exactly what pretrial or trial behavior on the part of a judge is necessary to justify his disqualification is such a broad issue that little is to be gained by selecting one example over another. Suffice it to say that if a judge uses the contentions made in an application for his disqualification to accuse the applicant of punishable slander, disqualification would be justified.\textsuperscript{108} It is also clear that tensions between the judge and a lawyer who represents a party in a case before the judge can lead to disqualification.\textsuperscript{109}

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\textsuperscript{103}Judgment of July 9, 1953, 4 BGHSt. 264.
\textsuperscript{106}Judgment of Apr. 11, 1968 (OLG, Zweibrücken) [1968] NJW 1439.
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With regard to arbitration proceedings, the Federal Supreme Court has made far-reaching conclusions where the fear of a lack of impartiality by the arbiters is present. In one case an arbitration agreement provided for a court of arbitration, composed only of members of a commercial association, which would adjudicate disputes between members and nonmembers of this association. The court reasoned that since the nonmember was a foreign exporter, a conflict of interests between the nonmembers and importer-members appeared natural. Therefore, the court ruled that it was reasonable to fear that all of the possible arbiters under the agreement would not be impartial. Going beyond the issue of the arbiters' disqualification, the court concluded that because the law requires every judicial function to be impartial, the arbitration agreement was illegal and void so as to prohibit ordinary courts from executing the judgment of the arbitration court.

Procedurally, recusation, whether by exclusion or by disqualification for fear of bias or prejudice, involves a number of varied aspects. The special proceeding established for this objection is put in motion by a recusation petition which is presented to the court of which the challenged judge is a member. The right to petition is given in civil cases to both parties and in criminal cases to the prosecutor, the private complainant and the defendant. A party complainant can personally initiate the recusation proceeding under both Codes which provide that the petition may be submitted as a deposition before the clerk of the court. This procedure offers some assurance that the petition will appear in an acceptable and understandable form and will contain at least some degree of substantive relevance. This procedure also is an exception to the rule that in courts above the local court level all civil proceedings must be handled by an attorney who has been admitted to the court.

\^a See note 13 supra.
\^c A special ground for disqualification also exists when an arbiter other than the one appointed in the arbitration agreement "unduly delays the fulfillment of his duties."
\^d ZPO § 1032, para. 2.
\^e ZPO § 44 para. 1; StrPO § 26, para. 1.
\^f ZPO § 42, para. 2.
\^g Private complainants are admitted with regard to a limited selection of crimes. StrPO § 374.
\^h StrPO § 24, para. 3.
\^i See note 112 supra.
\^j ZPO § 78.
As discussed above, in cases of judicial exclusion the special proceeding is only a vehicle by which the parties may initiate a judicial examination of the obstacle. Therefore, the petition setting forth the grounds for the exclusion is not subject to the time limitations that exist in cases dealing with petitions for disqualification for fear of bias or prejudice.

Disqualification petitions are subject to different time limitations in civil and criminal proceedings. In civil proceedings a party cannot disqualify a judge because of a feared lack of impartiality if that party has entered before such judge any oral argument concerning the case, or if that party has made any motions during the civil proceedings without availing himself of the ground for disqualification which the party then knew to exist.

A disqualification petition in criminal proceedings may be presented before the trial or during the trial until the time when the defendant is questioned. This takes place almost at the very beginning of the trial. Thereafter, the disqualification is allowed only for grounds which either arise or become known to the petitioning party after the defendant's presentation. In either of these instances, the petition must be presented without undue delay. Furthermore, it can never be presented after the "last word" of the defendant, a term which refers to the defendant's opportunity to make a last statement to the judges immediately before they retire for deliberation. This proscription against a petition for disqualification after the "last word" of the defendant has been rightly criticized. There appears to be little justification for not recognizing a prejudicial remark made by a judge after the "last word" but before the court retires for deliberation as a possible ground for disqualification. In criminal proceedings on appeal to a court higher than the Superior Court the disqualification petition against an appellate judge based upon grounds then known, may be presented up to the time of the oral pleadings. As to grounds which appear later the rules described above are applicable.

Time restrictions are imposed in both civil and criminal proceedings so that the court can avoid the repetition that can result in advanced

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118 See note 83 supra and text.
119 If the judge, while hearing testimony after the questioning of the defendant, discovers that his father-in-law is among the persons injured, he is excluded, and the entire proceeding becomes void. Judgment of July 6, 1954 (BGHSt.) [1954] MDR 656 (W. Ger. 1954).
119ZPO § 43.
119StPO§ 25.
119LÖWE & ROSENBERG, supra note 27, at § 25, annot. 7, para. 4.
119StPO § 25.
civil cases from a rehearing of the oral arguments or in advanced criminal cases from a trial *de novo* of the issues where a ground of fear of bias or prejudice was known to the parties at an early stage of the proceedings. On the other hand, such grounds should still be available if they arose or became known only upon reaching a later stage of the proceedings as, for example, a prejudicial attitude of a judge during the oral argument in a civil proceeding or during the trial in a criminal proceeding. This is especially important because in German procedure, especially criminal procedure, the judge plays a much stronger role than in American procedure. In Germany the presiding judge not only directs the proceedings in general but also questions the parties and other participants, a characteristic which gives the proceedings an inquisitorial appearance as compared with the adversary system which is the backbone of Anglo-American procedure.

Recusation petitions in both civil and criminal proceedings must indicate the grounds for the petition and, in cases where the normal time limit has expired, must allege that the grounds for the petition either arose or became known to the petitioner only after the normal deadline. It also must be alleged that the petition in criminal proceedings is being presented without undue delay. Finally, all of the factual elements used to support the grounds and timeliness of the petition must be "authenticated" by any means of proof except that of a sworn affidavit of the petitioner. The German phrase, here translated as "authenticated," is "glaubhaft gemacht" which, though not requiring actual proof, means "made highly probable." As to civil proceedings, the *Zivilprozessordnung* provides generally that all means of proof can be used for "authentication." Thus, documents, unsworn or sworn written attestations of witnesses and experts, and written declarations of counsel made with reference to his position as attorney at law are admissible to "authenticate" the petition. The same has been held true in criminal proceedings even though the *Strafprozessordnung* does not have a general rule comparable to that of the *Zivilprozessordnung*. Both Codes secure for the petitioner a right of access to the most important proof in recusation proceedings, the testimony of the recused judge, by providing: "For the authentication, reference may be made to the

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124ZPO §§ 136, 139, 140; StrPO § 238.  
125ZPO § 44, para. 2, 4; StrPO § 26, para. 2.  
126ZPO § 44, para. 2; StrPO § 26, para. 2.  
127ZPO § 294.  
128LÖWE & ROSENBERG, supra note 27, at § 26, annot. 5; SCHWARZ & KLEINKNECHT, supra note 27, at § 26, annot. 4.
testimony of the recused judge." The challenged judge is required to make an official statement as to the ground of the recusation. Given the strict disciplinary supervision of German judges with respect to all nonjudicial official acts, it is perhaps justifiable that the courts afford this statement considerable weight in deciding the recusation issue. On the other hand, a court must take great care not to weigh the official statement of the challenged judge or any facts presented to it by any third source without also affording the petitioner an opportunity to respond. Otherwise, the decision will be in violation of article 103, paragraph one of the Grundgesetz.

The Codes also contain a procedure for self-recusation of a judge where no party demands his recusation in the following provision: "The court that has jurisdiction over petitions of recusation must also decide the issue raised when no petition is presented but a judge discloses circumstances that could justify his recusation, or for other reasons there arises some doubt as to whether a judge is excluded by law." This opens two avenues: First, self-recusation by a judge, and second, though applicable only to exclusions by law, recusation by use of information coming from any source as, for example, from a fellow judge, a juror or a discussion in the press.

A judge has a civil service duty to disclose to the court any circumstances of the type described either with reference to himself or, at least in regard to possible exclusion by law, with reference to other court personnel. However, this does not give rise to a duty toward the parties in the main proceeding. Thus, such a party could not claim to have been deprived of his right to a judge who is free from any recusatory taints on the mere ground that a judge failed to make such a disclosure.

The provision governing a judge's self-disclosure refers, with the restriction mentioned above, both to exclusion by law and disqualification for fear of bias or prejudice. Its application is not subject to time

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129ZPO § 44, para. 2, cl. 2; Id. para. 3; StPO § 26, para. 2, cl. 3; Id. para. 3.
131ZPO § 48, para. 1; StPO § 30.
132Stein-Jonas, supra note 22, at § 48, annot. 1 (L); A. Baumbach & W. Lauterbach, supra note 22, at § 48, annot. 1 (b); Löwe & Rosenberg, supra note 27, at § 30, annot. 4.
134See note 131 supra.
135A. Baumbach & W. Lauterbach, supra note 27, at § 48, annot. 1; Stein-Jonas § 48, annot. I (2); Löwe & Rosenberg § 30, annot. 1.
limitations. Rather, it sets in motion the court's consideration of a purely internal matter in which the parties do not participate. The decision denying recusation in this internal process is not even communicated to the parties. Neither the parties nor the judge who made the disclosure can appeal from any decision reached in this internal matter. On the other hand, such a decision does not prevent the parties from later using the facts disclosed in this context in a recusation petition in the main proceedings, or in an appeal from the judgment in the main case on the ground that, for example, the court had wrongly denied the exclusion by law of one of its members.

VI

The problem of which court should decide the issues presented by a recusation petition is somewhat complicated. The basic principle is that the decision should be made by the same bench or division of which the recused judge is a member, but without the personal participation of the judge whose recusation is being sought. Another judge must take the place of the challenged judge on the latter's bench or division. In European continental procedure each bench or division must always sit with the full number of judges who are assigned to it. Should all of the benches or divisions of a court become incapacitated to act on the recusation decision, such as through the preliminary elimination of all of its judges where multiple recusation petitions are directed against

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\textsuperscript{136}The limitations of the Zivilprozessordnung (see note 120 supra) do not lend themselves to the special proceedings here under consideration. As to criminal procedure, see SCHWARZ & KLEINKNECHT, supra note 27, at § 30, annot. 1; LÖWE & ROSENBERG, supra note 27, at § 30, annot. 1. \textsuperscript{137}ZPO § 48, para. 2. As to criminal proceedings, see SCHWARZ & KLEINKNECHT § 30, annot. 2; LÖWE & ROSENBERG § 30, annots. 6, 8; but cf. note 130 supra and text. \textsuperscript{138}A. BAUMBACH & W. LAUTERBACH § 48, annot. 2; STEIN-JONAS § 48, annot. II; LÖWE & ROSENBERG § 30, annots. 6, 7. \textsuperscript{139}See note 158 infra and text. \textsuperscript{140}ZPO §§ 45 (para. 1), 47; StPO § 27, para. 1. \textsuperscript{141}On the level above local courts a bench or division consists of three judges. A bench or division of the Superior Court for commercial matters consists of one professional and two lay judges. An appeal from the judgment of a single judge of the local court who tried a criminal case without participation of laymen is heard by a bench or division of the Superior Court composed of one judge and two laymen. GVG §§ 75, 76, 105. Where the single judge was assisted by laymen the appeal division of the Superior Court consists of three judges and two laymen. GVG § 76, para. 2. Only above the level of the Superior Court may the benches or divisions consist of five or more judges. E.g., GVG §§ 122, 132, 139. In criminal cases, laymen jurors or jurymen never participate in recusation proceedings whether directed against a professional or lay judge. StPO §§ 27, 31. However, in civil proceedings the lay judges of the divisions for commercial matters have the same position and functions as the professional judges. GVG § 112. \textsuperscript{142}See note 100 supra concerning the one exception to this principle in German law.
each judge on the court, then the next higher court must make the
decision. In civil proceedings when the recusation petition is directed against a
judge of a local court of the lowest level, where the judicial functions
are not performed by a bench or division but by a single judge, the
recusation petition is acted upon by the Superior Court through one of
its three-man benches or divisions. In criminal proceedings, where
matters may be more pressing, another judge of the local court decides
whether his colleague must be recused. If the local judge sought to be
recused considers the recusation justified, no further decision is needed
in either a civil or a criminal proceeding.

Recusation petitions may, of course, be easy vehicles to bring about
delays in proceedings. In Germany, courts have consistently held that a
judge whose recusation is sought may participate in a decision which
rejects the petition if the ground for such rejection is that the petition
was obviously an abuse of the right to recuse. These holdings have
been promulgated in spite of the continued existence of contrary Code
provisions providing that a judge can never deny a recusation petition
directed against himself. Examples of petitions that are obviously abu-
sive of this right include those which do not indicate an individual judge,
and which seek to recuse judges in general solely because they may be
members of a political party. Other obviously abusive cases are those
which merely seek to renew those formerly rejected petitions without
alleging any new grounds. This exceptional method of summarily
rejecting abusive recusation petitions with the participation of the judge
against whom recusation is sought has been codified for criminal pro-
ceedings through insertion of section 26 (a) into the Strafprozessordnung. This section reads:

1. The court will reject the recusation of a judge as inadmissable if
   (1) the recusation was not made in time, (2) no ground for the recusa-

\[\text{\textsuperscript{143}ZPO § 45, para. 1; StPO § 27, para. 4.}\]
\[\text{\textsuperscript{144}ZPO § 45, para. 2, cl. 1.}\]
\[\text{\textsuperscript{145}StPO § 27, para. 3, cl. 2. Occasionally, when the local court trying criminal cases consists of
   the single judge and two laymen, a second judge is added if the case is of major proportions. GVG
   § 29.}\]
\[\text{\textsuperscript{146}ZPO § 45, para. 2; StPO § 27, para. 3, cl. 3. The last provision is equally applicable to the
   judge of inquiry. See notes 61 and 62 supra and text.}\]
\[\text{\textsuperscript{147}See cases cited in A. BAUMBACH & W. LAUTERBACH § 42, annot. 1 (B); STEIN-Jonas § 45,
\[\text{\textsuperscript{149}A. BAUMBACH & W. LAUTERBACH § 42, annot. 1 (B).}\]
tion or no means of probable proof was given or (3) obviously only a
delay or only ends foreign to the proceedings were to be pursued by
means of the recusation.
2. The court will reach a decision concerning the rejection according
to paragraph 1 without the removal of the challenged judge. Paragraph
1(3) requires a unanimous decision and the articulation of the specific
circumstances which result in the rejection.

The remainder of paragraph two provides that, in any of the situa-
tions where a single judge sitting alone in a criminal proceeding is
challenged, he then has jurisdiction over the question of whether the
recusation petition should be rejected.

The new section appears to be self-explanatory. Whether the provi-
sion in section 26 (a), paragraph 1 (3) is adequate or whether it is of
practical importance is doubtful, since it will be difficult to show that
the exclusive aim of the petition is to delay the proceedings or that its
ends are "foreign to the proceedings," except, perhaps, where the peti-
tion is clearly repetitious.

VII

Although the decision granting or denying a recusation petition is
normally issued by the court against whose member recusation is
sought, with or without that member's participation, there is another
procedure by which an aggrieved party may claim recusation. In all
appeal proceedings which review issues of both fact and law and in those
which review only issues of law, one may claim that a judge who was
excluded by law has participated in a decision below. This is true in civil
and criminal cases and corresponds to the principle that recusation
petitions based upon exclusion of a judge by law are not subject to time
limitations. In civil proceedings if the question of exclusion by law
was raised in the court below by an unsuccessful recusation petition the
question cannot be raised a second time on appeal. This restriction is
a consequence of the rules which govern independent appeals from an
interlocutory decision rejecting the recusation petition.

As previously discussed, disqualifications based upon fear of bias or
prejudice are subject to time limitations. Thus, in appeal proceedings,

\[^{101}\] LÖWE & ROSENBERG § 26(a), annot. II (5), (6).
\[^{102}\] ZPO § 551, No. 2; StPO § 338, No. 2.
\[^{103}\] See note 84 supra and text.
\[^{104}\] ZPO § 551, No. 2.
\[^{105}\] See note 169 infra and text.
\[^{106}\] See notes 120 and 121 supra and text.
such disqualifications may be invoked only in the following circumstances: In civil proceedings, only in the rare case in which a judge participates in the decision of the lower court despite the fact that a disqualification petition has been granted;\(^5\) in criminal proceedings, disqualification may also be invoked where a disqualification petition directed against a judge of the lower court is unjustifiably rejected by the lower court and the judge in fact participates in the judgment below.\(^6\) Again, the difference between the civil and criminal proceeding results from the rules on special appeals from the interlocutory rejection of recusation petitions by the lower court.

A further question which arises is whether a recusation petition will be allowed by way of the extraordinary resumption proceedings after the judgment in the original proceeding has become final.\(^8\) In civil cases, to a limited extent, the Zivilprozessordnung allows recusation on the grounds of exclusion by law even at this late stage. This type of recusation proceeding closely follows the rules established for recusation in ordinary appeal proceedings.\(^9\) Any former rejection of the recusation, whether in the original recusation proceedings or in a special or general appeal, bars a renewal of the recusation in the resumption proceedings.\(^10\) As for disqualification for fear of bias or prejudice, the only case admitted is the rare situation in which a judge has participated in the decision despite the fact that his disqualification had been previously granted\(^11\) and there was no way to use this ground for disqualification in an appeal.\(^12\)

The Strafprozessordnung omits recusation matters as a sufficient ground for a resumption proceeding in criminal cases whether such a proceeding would be in favor of or against the person sentenced.\(^13\) This omission effectively excludes claims for recusation as grounds for resumption proceeding.\(^14\) It only admits, with slight variations, a much narrower ground for resumption connected with judicial behavior, found also in the Zivilprozessordnung.\(^15\) Resumption is appropriate where "a judge, juror or juryman who has participated in the judgment has been

\(^5\)ZPO § 551, No. 3.
\(^6\)STPO § 338, No. 3.
\(^8\)See notes 50-59 supra and text.
\(^9\)See note 152 supra and text.
\(^10\)ZPO § 579, para. 1, No. 2.
\(^11\)See note 157 supra and text.
\(^12\)ZPO § 579, paras. 1 (No. 3), 2.
\(^13\)STPO §§ 359, 362.
\(^14\)LÖWE & ROSENBERG, § 359, annot. 12.
\(^15\)ZPO § 580, No. 5.
guilty of a violation of his official duties with regard to the case, where such violation is also subject to public punishment in a judicial criminal proceeding" and where such professional or lay judge has actually been sentenced for this violation or where the criminal proceeding against him could not be carried out for reasons other than lack of proof.167 Even if all these conditions exist, however, a resumption is not available in favor of the person sentenced in the original proceeding if the defendant himself somehow brought about the violation of the official duty by the professional or lay judge.168 There appears to be no justifiable reason why, in criminal proceedings, recusation based on the judge's participation in the former judgment, at least as to a judge who is subject to the exclusion by law, should not be open to the same, albeit limited, resumption as in civil proceedings.

VIII

Within certain limits there exists not only an appeal from a judgment on the merits based on the faulty participation of a judge in the decision, but also a special appeal from an interlocutory decision of the lower court dealing with a recusation petition.169 At the outset it should be noted that an appeal is never allowed in either civil or criminal proceedings from a decision which grants the recusation.170 On the other hand, an interlocutory recusation decision by a court below the rank of a Circuit Court of Appeal171 which rejects the recusation petition is subject to an interlocutory appeal (Beschwerde) in both civil and criminal proceedings.172 However, in criminal proceedings a denial of a recusation request which seeks to recuse a judge who has "judged the case," i.e., a judge who has participated in the case from the indictment up to the final judgment,173 can be appealed only "together with the judgment," i.e., through the ordinary appeal from the judgment on the merits.174 This requirement is applicable whether the recusation petition was actually denied on its merits or whether it was merely deemed inadmissible according to section 26 (a) of the Strafprozessordnung.175 The wording

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167StPO §§ 359 (No. 3), 362 (No. 3), 364.
168StPO § 359, No. 3.
169See note 115 supra and text.
170ZPO § 46, para. 2; StPO § 28, para. 1.
171ZPO § 567, para. 3; StPO § 304, para. 4. See Judgment of Dec. 8, 1966 (BGHZ), [1966] NJW 2062 (W. Ger. 1966).
172ZPO § 46, para. 2; StPO § 28, para. 2, cl. 1.
174StPO § 28, para. 2, cl. 2; see note 158 supra and text.
of section 28, paragraph two, clause two, of this Code makes it clear that it is the time of the denial of the recusation petition, and not the time at which the recusation petition is presented which is determinative of whether the decision refers to a judge "judging the case" or one who is only active at an earlier stage.

Where a special appeal lies it must be submitted within one week from the communication to the petitioner of the decision denying the recusation. However, in criminal cases where the party concerned is present at the time the decision is pronounced, the special appeal must be submitted within one week from the date of this pronouncement.

If the special appeal is dismissed no further regular or special appeal is allowed. Only in criminal proceedings can a lower court, whose decision rejecting the recusation is being appealed, change its own decision. Even then such a decision may be changed only if the lower court failed to give an adequate opportunity for the appealing party to present his argument. In an appellate court the same is true in regard to the appellate court's decision on the special appeal. The system of special appeals has limited a reexamination of denied recusations by means of regular appeals from the judgment on the merits of the case.

Due to the relative finality of the special interlocutory proceedings in matters of recusation, the Federal Constitutional Court has allowed constitutional appeal prior to the judgment on the merits when it is claimed that the interlocutory decision has been reached in an unconstitutional manner. An example of such a constitutional violation would be a recusation decision which was made without affording the recusing party an opportunity to examine and respond to the official statement of the challenged judge.

IX

The Zivilprozessordnung and the Strafprozessordnung deal identically with the question of the effect of a recusation petition upon the
further participation of a challenged judge between the time of the presentation of the petition and the decision thereon. Both state: "A judge whose recusation is sought is to carry out, before the disposing of the recusation petition, only such acts as cannot be delayed." The meaning of this provision is somewhat more complicated than its text initially indicates. This complexity becomes clear if one remembers that the recusation petition plays a different role if it is based upon an exclusion of the judge by law than if it is based on a fear of bias or prejudice. In the exclusion-by-law role the petition merely sets in motion a declaratory pronouncement of an existing legal prohibition, whereas in its disqualification role no provision of law is violated if a biased or prejudiced judge participates in the proceedings so long as no party seeks to recuse him on the ground of fear of bias or prejudice. Although the general purpose of the quoted provision is to prevent a challenged judge from carrying out any acts that can be delayed and, conversely, to permit him to do those acts which cannot be delayed, even the concession allowing a challenged judge to carry out acts that cannot be delayed is inapplicable to a judge who is excluded by law from any participation. Thus, if, by the petition or otherwise, the judge is made aware of any ground for exclusion by law, he can no longer participate in any act. Beyond this the exclusion by law is effective even if the excluded judge does not know anything about the grounds for his exclusion.

Whether the above provision refers to the initial or final decision concerning the recusation petition remains doubtful. Where the first decision is not subject to a special interlocutory appeal but only to an appeal from the decision of the court to the merits, the Federal Supreme Court has decided (1) that the denial of the recusation petition by the first court is to be considered final until the judgment on the merits is entered, and (2) that with this denial any incapacitation of the judge ceases, subject, of course, to an appeal from the judgment on the merits. At the same time the court stated that concerning cases in which there is a special interlocutory appeal of the first denial of the recusation petition, its predecessor, the Reichsgericht, had dealt with the

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185 ZPO § 47; StPO § 29.
186 See note 84 supra.
187 A. Baumbach & W. Lauterbach § 47, annot. 1(A); Stein-Jonas § 47, annot. III; Löwe & Rosenberg § 29, annot. 2.
188 Löwe & Rosenberg § 29, annot. 2.
189 See note 174 supra and text.
question of whether the judge is incapacitated for acts that can be delayed only until the first decision is made or until the decision is made on the special appeal. The Federal Supreme Court did not reach a decision on the question and found that the decisions of the Reichsgericht had not been uniform in their treatment of it. Neither are the leading commentators uniform in their opinions. An opinion of the Oberlandesgericht Hamburg extended the incapacity of a judge in a civil case, as to matters that are not urgent, until a decision is reached on the special interlocutory appeal, or if no such appeal is sought, then until the end of the period within which such an appeal could have been sought.

CONCLUSION

The law of the Federal Republic of Germany in the field of the recusation of judicial personnel appears to be thorough and exhaustive. It gives the parties concerned an ample choice of remedies to correct the dangers which might result from the participation of persons either excluded by law or those whose involvement could give rise to fears of bias or prejudice by a party. Though the procedural provisions regulating the subject are sometimes involved, they are not unduly demanding and pursue the aim of insuring both justice and the appearance of justice without jeopardizing the effective completion of the argument in civil proceedings or the trial in criminal proceedings. The treatment of recusation within the framework of the German codes of procedure is not perfect and not without gaps as is the case with every codification. But, as with every well-drafted codification, a considerable degree of certainty about the law is created without preventing flexibility through judicial interpretation and development.

\[\text{Footnotes:}\]

101 Id.
102 In civil cases, the incapacity is said to extend up to the final decision. A. BAUMBACH & W. LAUTERBACH § 47, annot. 1; STEIN-JONAS § 47, annot. 1. As to criminal cases, compare SCHWARZ & KLEINKNECHT § 29, annot. 1 (B), with LÖWE & ROSENBERG § 29, annot. 3.