

The unknown guys in the red robes – Analyzing the careers of judges at the German Federal Constitutional Court

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VERY FIRST DRAFT

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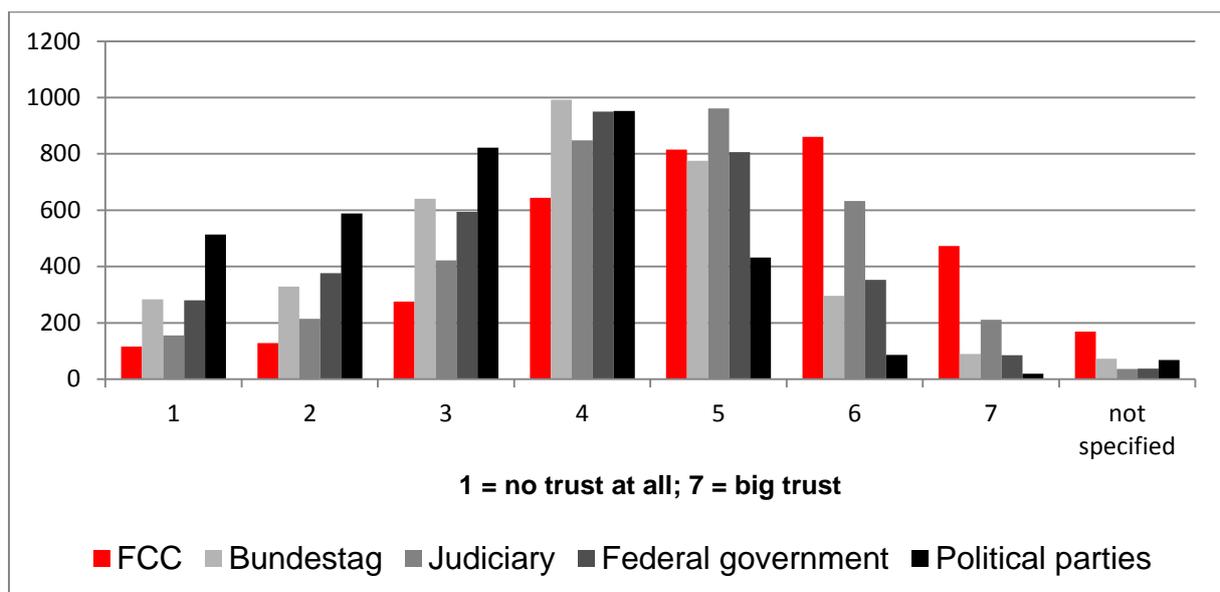
1. Introduction

This article tries to shed some light on a surprisingly rather under-researched topic: the judges at the German Federal Constitutional Court (FCC) and their careers. The paper starts with two short paragraphs depicting the popularity and power of the FCC (1.1) and an overview over the research on the Court (1.2), highlighting that it is at the moment a relatively one-dimensional research agenda that focuses on the thesis of a judicialization of politics. Yet, for a proper analysis of this assumption, but also for other research questions it is necessary to take a closer look at the composition of the FCC and thus at the individual judges. Especially with regard to the popularity of the FCC and its influential position within the German political system, it is relevant not only to focus on institutional characteristics of the Court – like most existing studies do – but to center more on the actors within the FCC. Subsection 1.3 picks up these arguments and makes a case for the study of complete careers of FCC judges. The second section contains prerequisites for the main analysis: subsection 2.1 visualizes basic organizational principles of the FCC that determine to some degree the composition of the Court as well as certain characteristics of the judges; in subsection 2.2 we present our newly compiled data set which consists of all judges that had been working at the FCC between its establishment in 1951 and 2013. We use sequence analyses techniques to exploit the data, as these methods give a more holistic picture of a judge's career. Subsection 2.3 gives a short introduction to sequence analysis. The main analysis is presented in the third section. There we first, take a look at the very last positions before being elected to the FCC (3.1), secondly, we use clustering algorithms to test whether there are distinct paths leading into the office of a FCC judge regarding the types of jurisdiction and the different levels of the German federal system the judges had previously worked in (3.2). The paper concludes with an overview of the results and an appraisal to what extent classic elite studies, works on the FCC and the method of sequence analysis can be fruitfully combined.

1.1. Popularity and power of the German Federal Constitutional Court

Again and again surveys show that the German Federal Constitutional Court (FCC) is among the most popular institutions with the Germans (Patzelt, 2005; Vorländer & Brodocz, 2006). Figure 1 presents data from the 2013 German General Social Survey (ALLBUS). Again the FCC outperforms the other institutions in terms of trust. Only towards universities and the police people express an even higher confidence (not shown in the graph). Yet, compared to the other high-level political institutions like the Federal Government or the German Bundestag and especially compared to political parties, the FCC has a much higher credit with the citizens. This probably has to do with the fact that people see the Court and thereby its judges as hovering somewhere above the turbulences of party politics. Nevertheless, this popular view has been contested since the establishment of the FCC: catchwords in this regard are the *judicialization of politics* and the *politicization of justice* (Bornemann, 2007).

Figure 1: Trust in German Institutions (source: ALLBUS 2012; n = 3480)



The public evaluation of the FCC comes along with an empirically extraordinary strong position when compared with other constitutional courts. The FCC is often regarded as a very influential institution which has not only judicial but also a lot of political power. It stands out among the other constitutional courts not only because of its institutional arrangements and formal powers¹, but especially because of its high legitimacy (Kneip, 2013: 88-89).

¹ During the last decades a number of countries (e.g. Spain, Portugal or the Czech Republic) has established constitutional courts quite similar to the German FCC in terms of formal competences (Kneip, 2013: 78). For some of them the FCC can be regarded as a kind of blueprint. Kneip also shows that the constitutional courts in Portugal, Slovakia, Hungary Slovenia and Cyprus even outperform the German FCC when focusing only on the

1.2. *The state of the art: Studies on judicialization dominating the field*

Contrary to its popularity and its wide range of power – both completely uncontested facts within the political science community – research on the FCC, like on most other constitutional courts, has until recently been quite one-dimensional. While there is a plentitude of very different analyses on the US Supreme Court mostly trying to explain the courts decisions applying “attitudinalist[...], strategic [...] and interpretative approaches” (Hönnige, 2011a: 349)², the situation is completely different for the European constitutional courts. Following Alec Stone Sweets landmark book “governing with judges” (Stone Sweet, 2000) most works on constitutional courts in Europe focus on the judicialization of politics.³ This divide between US and European research for sure has been fostered by the much better data availability for the Supreme Court and its decisions. Particularly, the individual votes that are publicly available in the US case, but not for European constitutional courts make it much easier to test theories of judicial decision making for the Supreme Court (Hönnige, 2011a: 351). In Europe and especially in Germany studies about a potential dangerous judicialization of politics dominate the field at least since the 1990s (Hönnige, 2011a; Kneip, 2011a; Landfried, 1994).⁴ The key argument of these works is that the judicial review especially in its abstract form undermines to some degree the legislative authority of the parliament and has evolved into a further instrument of the opposition parties. Some authors see the FCC in this regard as a “major restraint to policy-makers” (Schmidt, 1996: 87), an “alternative legislator” (Karpen, 2002;

institutional powers. Regarding institutional independence it’s the constitutional courts in Belgium, Latvia and Lithuania that, after all, measure up with its German counterpart (Kneip, 2008: 648).

² Moreover, Hammond and his colleagues observe “seven distinctions in the literature” (Hammond et al., 2005: 8) on Supreme Court decision making. For example the question whether just the final vote or all five stages of the decision making process shall be explained (Hammond et al., 2005: 17-18).

³ To a lesser extent the other side of the coin, the politicization of justice, is criticized as well. Two arguments are mentioned in this regard most often (Bornemann, 2007: 77): First, the opposition parties and/or Länder governments (Voigt, 2000: 198-200) instrumentalize the FCC, trying to reverse all laws that had been adopted in parliament without their consent: the FCC as an “extended arm of the opposition” (Stüwe, 2001: 34; author's translation). In contrast, the former FCC judge Jutta Limbach speaks of only few single cases where the Court was used as an arena to perpetuate political fights. These decisions do in her view not qualify to make the generalization that politics abuses the FCC (Limbach, 1999: 17). Second, the government parties themselves try to abdicate from their responsibility to take painful or unpopular decisions that could undermine their chances of reelection. This legislative fainceance pushes the FCC automatically into a more active political role: the Court has to decide because politics ducks out of unpleasant decisions. Nevertheless, the two concepts of politicization of justice and judicialization of politics are deeply intertwined and in many instances they cannot be clearly separated: From a sociological system perspective Bora puts it in a nutshell when he argues that constitutional courts in general are “organizations which provide for a structural interconnection between the judicial and the political system” (Bora, 2003: 209; author's translation).

⁴ This is not only true for studies coming from political science, but also a huge number of law-scholars has published on the relationship between the FCC and the other constitutional bodies, especially the legislature (see for example: Badura, 1998; Gusy, 1985; Limbach, 2010: 59-62; Piazzolo, 1995; Rupp-von Brüneck, 1977; Siedler, 1999). Moreover, the general concept of juridification can be analyzed from a number of different discipline specific angles. Voigt (2000: 142-146) mentions an empirical legal, a system-theoretic, a legal-policy, a social-psychological and a political science point of view.

author's translation), a “third legislative chamber” (Shapiro & Stone, 1994: 404) or warn of the possibility that the FCC could emerge some kind of “super-legislation” (Hesse, 1995: 267) out of its factual position as a court of final appeal for sub-constitutional, regular laws (Scholz, 2002: 19). Studies on the quality of the FCC as a veto player (Alivizatos, 1995; Wagschal, 2006a, 2006b) point into the same direction.⁵ Therefore, a number of studies focus on the dysfunctional effects of the FCC for the political system trying to find “a proper balance of power between Parliament and the Constitutional Court” (Landfried, 1997: 307). Others, like Sascha Kneip or Christian Rath, are less critical with the work of the FCC. Kneip argues that the Court has only in “very rare instances overexpanded its functional role within the system of separated powers to decide on issues which from the point of democratic theory it should not have been allowed to decide on” (Kneip, 2011a: 241; author's translation). Christian Rath makes a good point when he draws our attention to the fact that the FCC is not able to pass laws. The Court nevertheless can complain about existing legislation and it can decree transitional rules for the time until parliament has revised the original law. These transitional rules are in most cases relatively vague, giving the parliament some leeway how to shape the new law. Nevertheless in some instances the FCC has also used a very clear wording which makes it very comfortable for the legislator just to transcribe the transitional rule from the FCC one to one into the new law (Rath, 2013: 53-54). Thus, Rath argues that it is “rather accommodativeness and risk-aversion of the legislative bodies, if the transitional rules from Karlsruhe become permanent laws in the end” (Rath, 2013: 54; author's translation) than an active, FCC-controlled judicialization of politics.

Apart from studies about judicialization and its veto player qualities there are a number of articles and book chapters that compare the FCC with other constitutional courts. These comparisons nevertheless mostly remain at a rather institutionalist level. They deal with formal powers, institutional independence, regulations regarding the appointment of judges and the different ways in which the courts can take political action (Hönnige, 2008; Kneip, 2008, 2013). Furthermore, during the last years, a couple of studies focusing on the effects of FCC decisions on changes or new interpretations of the German constitution – the *Grundgesetz* –

⁵ Tsebelis himself sees constitutional courts as no veto players (Tsebelis, 2002: 228). He argues that the judges of the FCC are elected by the parliament and thus by other partisan veto players. As a result, the FCC is being located within the unanimity core of the other veto players, without any influence on policy stability (Tsebelis, 2002: 28). According to this view constitutional courts do not have own preferences different from the other veto players. That is why it makes sense to see them as being absorbed. Yet, they should be counted as distinct veto players if their preferences are not covered by the other veto players (Wagschal, 2006b). Furthermore, if at all, the FCC should be characterized as a “conditional veto player” (Kneip, 2009: 21; author's translation) or a “triggered veto player[.]” (Lhotta, 2003), because they can only come into play *a posteriori* when a third party within the policy-process chooses to call them in (Kneip, 2011a: 225).

have been published (Hönnige, 2011b; Kneip, 2011b). What is lacking, however, are studies focusing on the personal characteristics of the FCC judges. At the utmost one can find listings of the party affiliation of the judges, or at least of the parties which had nominated the judges (Hönnige, 2009: 971; Vanberg, 2005: 84 and 86; Wagschal, 2001: 881).

1.3. Why we should study careers

For sure, the new wave of institutionalism associated with scholars like Arend Lijphart, Guy Peters or George Tsebelis is a relevant part of nowadays political science – especially comparative politics. These works explain why we focus on institutions like the FCC. Yet, to paint a complete picture of the Court, its decisions and its influence in politics, it is necessary to open this black box and to take a look at its actors – the FCC judges. Knowing their preferences, for example, is a prerequisite for testing rational choice theories of judicial decision making. Unfortunately, these preferences can only be approximated.⁶ Hönnige, for example, who uses such an approach, harks back to the party affiliation of the judges (Hönnige, 2009) which makes much sense when the research interest is to test whether the decision making of the FCC is more in favor of the government or in favor of the opposition. However, in a more y-centered research design, when the variation among the Court's decision making shall be explained, party affiliation is of course a rather crude approximation for other potentially explanatory variables like the position of the judge on specific ideological scales. Additional information about the judges is therefore a necessary precondition for more profound analyses of FCC decision making. For example, it could be relevant, at which universities the judges studied and thus to see whether a certain academic and jurisprudential socialization shows influences on their decisions. More generally speaking, the complete career of a FCC judge is important. Of course, this is not only true for the advancement of research regarding decision- and lawmaking of the FCC, but also more directly important to shed a light on the staffing of the Court. Interesting questions in this regard are: What did the FCC judges do before they put on the red robes? Are there any shifts observable regarding the Court's composition in terms of gender, party affiliation, age and previous jobs or the like?⁷

⁶ Of course, this problem does not only apply to FCC judges, but is apparent for nearly all empirical tests of rational choice assumptions.

⁷ Although, the latter questions will not be answered in this paper, our data set gives us the possibility to check them.

2. Prerequisites for the empirical analysis

Before we start with our analysis it makes sense to clarify a number of things: 1) The basic organizational principles of the FCC, 2) the data set we use and 3) the technique of sequence analysis which we apply.

2.1. *Basic organizational principles of the FCC*

There are some basic organizational principles that make provisions about the general composition of the FCC and the question “who is eligible as a judge?” These constitutional and legal rules must be kept in mind when we examine the careers of FCC judges.⁸

The FCC is made up of two senates, each consisting of eight judges (BVerfGG: §2(1-2)).⁹ Half of the judges of each senate are elected by a committee of the Bundestag consisting of twelve deputies¹⁰, half by the Bundesrat (the second chamber made up of the Länder governments) (BVerfGG: §5). A candidate needs a 2/3-majority in the respective committee to be elected.¹¹ Three judges of each senate have to be former judges at highest federal courts¹². Only fully qualified lawyers that are at least 40 years old can be elected. FCC judges have a term of 12 years without the possibility of being reelected.¹³ At the age of 68 judges have to retire (BVerfGG: §4). Judges at the FCC may not be members of the Bundestag, the Bundesrat, the federal government or the corresponding Länder institutions (BVerfGG: §3).

These provisions are thought to beware the FCC of a couple of potential problems:

- (1) The requirements regarding education and professional experience shall make sure that only technically qualified persons can become a judge.
- (2) The political election procedure shall undermine the danger of a judicial self-selection (Rudzio, 2011: 297-298) and thus can be seen as one of the components of checks and balances within the German political system.

⁸ For a detailed description of the legal framework for the election of FCC judges see Tschentscher (2005).

⁹ The number of judges at the FCC has been gradually decreased from 24 in 1951 to 16 in 1970. Since then it has been stable (Kneip, 2009: 194).

¹⁰ The deputies of this committee are appointed by the Bundestag through proportional representation (BVerfGG: §6).

¹¹ Since 1956 there was even a ¾-majority necessary (Rudzio, 2011: 298).

¹² These are the Federal Court of Justice (Bundesgerichtshof BGH) which is the supreme court for all matters of private and criminal law, the Federal Administrative Court (Bundesverwaltungsgericht BVerwG) being the court of the last resort for disputes between citizens and the state, the Federal Labour Court (Bundesarbeitsgericht BAG) which is responsible for all final decisions on labor law (e.g. disputes between employees and employers or cases of strikes), the Federal Fiscal Court (Bundesfinanzhof BFH) being the final court of appeal for customs and tax matters and the Federal Social Court (Bundessozialgericht BSG) which is the supreme court for cases of social security deciding on such matters as public health insurance or pension insurance.

¹³ In the early days of the Court there was no such provision.

- (3) The necessity of a qualified majority as well as the dual responsibility of the Bundestag and the Bundesrat should prevent the FCC from becoming dominated by the current governing coalition parties at the federal level.
- (4) The prohibition of a reelection shall strengthen the independence of the judges from politics.

Yet, all these provisions were not able to prevent the election procedure to develop into a party dominated, informal consociational system, where the real selection is made long before the official election during informal meetings of the parliamentary groups. In the end the choice is made by only two or three persons from each of the large parties, coming to a preliminary arrangement. Hence, the official election by the Bundesrat or Bundestag-committee becomes a mere formal act, where the already decided package deals are in most cases confirmed without a dissentient vote (Tschentscher, 2005: 111-113).¹⁴

2.2. *Data*

Since this study ventures into uncharted terrain, there is no readily usable data set available. We therefore compiled the data on our own. It consists of all 102 judges that had been working at the FCC between its establishment in 1951 and 2013.¹⁵ The most important information for our analysis are yearly data on the stages of their careers.¹⁶ We developed a detailed codebook for the stages, leaving us in the end with 59 different kinds of career stages. Table A1 in the appendix shows all stages – we call this the complete alphabet – together with their percentages. We already see that some types of stages are more frequent than others – e.g. being a judge at the Federal Court of Justice is coded in about 4 percent of all coded years (FCC judges excluded) while only about 0.4 percent of all coded years are coded as “judge at the Federal Fiscal Court”. Nevertheless, without taking into account any form of sequentiality these data are hard to interpret. For example, we do not know whether a certain type has to be passed through by all FCC judges and is very frequent because of that, or if we can find certain types only with some judges, but for a long spell, explaining the high percentage in another way. Yet, as figure A1 in the appendix shows, taking the complete alphabet for the sequence analysis becomes a mess. No meaningful interpretation would be possible, neither

¹⁴ It is doubtful whether the currently debated reform considerations which demand an election of the FCC judges by the plenum of the Bundestag would actually change a lot with regard to this informal preliminary decision making process (Wittreck, 2014).

¹⁵ Many thanks go to Matthias Böhme, Johanna Budke, Julian Erhardt, Alena Hahn, Cornelia Klatt, Patrick Schweiß and Charlotte Wittnebel who helped to compile the dataset.

¹⁶ Furthermore, the data set contains information on socio-demographic characteristics of the judges (age, gender, their party-affiliation, about whether they were elected by the Bundestag or the Bundesrat, their position within the FCC) which nevertheless will not be used in the following analysis.

from the mere graphical analysis nor if cluster procedures were applied on these data (in the next section we explain in more detail how to conduct and to interpret a sequence analysis). Therefore, it makes much sense to structure the stages according to relevant characteristics. We opt for a three-step structuring.

- 1) As a first step we distinguish between positions within the judicial system (J), in politics (P), at universities (U), in the administration (A) and other positions (O). The first letter of the code marks this differentiation.
- 2) For all career stages, where such a distinction makes sense, F, L and S indicates positions on the federal, the Länder or a sub-Länder level respectively.
- 3) The third step is only relevant for the large group of positions within the judicial system. Here we furthermore distinguish between the six types of jurisdiction: ordinary courts (Ord), labour courts (Lab), finance courts (Fis), administrative courts (Adm), social courts (Soc), and constitutional courts (CC).

The data set is organized in state-sequence (STS) format: each line represents a judge and “the successive states (statuses) of an individual are given in consecutive columns” (Gabadinho, Ritschard, Studer, et al., 2011: 28). We centered the biographies at the first appointment to the FCC, making it easier to compare the biographies (see the snapshot of the data set in table 1). Hans, Hugo Klein for example was a member of the Bundestag, then for one year parliamentary state secretary¹⁷ at the ministry of justice before he was elected as a FCC judge. After 12 years at the Court he went back to Göttingen, where he held the chair for public law already since 1969. Otto Seidl instead has been judging at the Federal Court of Justice during the last four years before he got elected as a judge at the FCC. A quite similar sequence of career stages shows our last example, Karin Graßhof: four years before becoming a judge at the highest court in Germany she was still working at the Higher Regional Court (Oberlandesgericht) in Cologne. Then she was – like Otto Seidl – at the Federal Court of Justice. After she dropped out of the FCC Karin Graßhof became an honorary professor at the University of Bonn.

Table 1: Snapshot from the data – STS-format centered at the first appointment

name	id	birthyear	...	a04	a03	a02	a01	p01	p02	...	p13	p14	...
Klein, Hans Hugo	59	1936	...	P_F_MP	P_F_MP	P_F_MP	P_F_Min	J_F_CC	J_F_CC	...	J_F_CC	U_P	...
Seidl, Otto	60	1931	...	J_F_Ord	J_F_Ord	J_F_Ord	J_F_Ord	J_F_CC	J_F_CC	...	U_P	U_P	...
Graßhof, Karin	61	1937	...	J_L_Ord	J_F_Ord	J_F_Ord	J_F_Ord	J_F_CC	J_F_CC

¹⁷ Due to their de facto political position we coded parliamentary state secretaries in the same way as ministers.

2.3. *Sequence analysis – a valuable method for elite studies*

Most – if not all – methods applied in political science have been developed within completely different science fields and later been adapted for the use in our discipline. Just to mention one as *pars pro toto*: Survival or Event History Analysis has been invented more or less simultaneously within medicine and reliability engineering and is now being applied to diverse political science questions about government survival (Jäckle, 2011; Saalfeld, 2008; Warwick, 1994), political elites (Dowding & Dumont, 2009; Jäckle, 2012, 2013) or the duration of conflicts (Box-Steffensmeier et al., 2003).

Sequence analysis is a recent candidate for becoming another example of a fruitful transfer of methods into political science. It has originally been developed for the analysis of DNA sequences, but already in the 1990s sociologists saw its potential for the study of biographies (Abbott, 1995; Abbott & Tsay, 2000). Particularly the ability to analyze a biography with respect to its different partitions – while still keeping the holistic view of the complete sequence – is a great asset: sequence analysis takes simultaneously into account states, their order and their durations. This feature makes it a much more appropriate method to examine complete biographies than those techniques focusing solely on certain, single states such as the last position before the assumption of office, or approaches that look at the whole experience of a person, cumulating all career-stages without taking into account the ordering or the duration of them (e.g. Borchert & Stolz, 2011). The second benefit of sequence analysis is the possibility to compare complete sequences in a systematic way using clustering algorithms. This enables us to find out in an inductive manner general patterns within the set of observed careers.¹⁸ Although, this method obviously fits very well also to the analysis of political elites and their careers, there are – at least to our knowledge – up to now only very few applications within the field of political elite studies. All of them not yet published (Kerby, 2013; Real-Dato & Alarcón-González, 2012; Tepe & Marcinkiewicz, 2013).

Before we start with the empirical analysis we give a short introduction to sequence analysis. Mills defines the following five steps as possible elements of a typical sequence analysis:

- 1) “describing key sequences via aggregated measures;
- 2) visualizing key sequences via sequence index plots;

¹⁸ We agree with Real-Dato and Alarcón-González (2012: 3-5) that the inductive sequence analysis approach complements the conventional deductive approach, being used for the study of political elites and their careers for example in the works by Borchert and Stolz (2011; 2011) or Scarrow (1997).

- 3) comparing sequences via optimal matching (OM) or alternative techniques (i.e. obtain a matrix of proximities between spaces)
- 4) grouping sequences into clusters via cluster or multidimensional scaling methods; and
- 5) associating patterns with other variables within regression models.“ (Mills, 2011: 214)

Our analysis in the next section focuses predominantly on the steps 1-4. For the calculation of the similarities between the sequences we desist from the widely-used optimal matching procedure.¹⁹ Instead we apply the Longest Common Subsequence (LCS) metric proposed by (Elzinga, 2007).²⁰ To illustrate the concept let us assume the following three example sequences²¹:

X:	Uni	Adm	Uni	Pol	Uni	Adm		
Y:	Adm	Uni	Jud	Oth				
Z:	Uni	Adm	Pol	Uni	Jud	Law	Oth	

Position at/in: Uni = University; Adm = Administration; Pol = Politics; Jud = Judicial System; Law = Law firm; Oth = other position.

Comparing sequence X and Y we find the common subsequence “Adm Uni” as it occurs both in X and Y. No other subsequence is common among these two sequences. The length of this common subsequence is thus 2. When we compare X and Z we find one of length 4: “Uni Adm Pol Uni” appears in X as $x_1x_2x_4x_5$ and in Z as $z_1z_2z_3z_4$. The last comparison is between Y and Z. Here the longest common subsequence is again 4 stages long: The complete sequence of Y can be found in Z at the positions $z_2z_4z_5z_7$. This example has shown how to determine the longest common subsequence and its length. One of the advantages of the LCS-metric is the fact that it is able to handle data with internal gaps within the sequences (e.g.

¹⁹ Optimal Matching has been the most common technique for the analysis of sequence data. It was developed in the context of genome analysis but has been applied widely in the social sciences (Abbott & Tsay, 2000). Its basic idea is to compare pairs of sequences and to measure their distances. The OM similarity measure “expresses distances between sequences in terms of the minimal amount of energy, measured in terms of edit operations, that is required to change two sequences such that they become identical.” (Elzinga, 2007: 3). Yet, although this logic may make sense for the analysis of DNA-sequences, Dijkstra and Taris (1995) show that for applications within the social sciences we often have a different understanding of *similarity*. Their example shall be stated here, as it illustrates very well the problems of the OM-metric. Let us assume that there are three sequence objects X, Y, and Z, each having six states. X: aaabcd; Y: bcdeee; Z: ffffff. Applying the OM-metric leads to the result, that the distance between sequence X and Y is six (every state in Y has to be replaced to get a sequence identical to X). Accordingly the distance between X and Z is also six. In the context of career-studies this does not make any sense, as obviously sequence X and Y are much more similar: they share three states and they are even in the same order, whereas there are really no similarities between X and Z and between Y and Z (Dijkstra & Taris, 1995: 216).

²⁰ Another alternative to the OM-metric proposed by Elzinga (2007: 9-14) is the Longest Common Prefix. Two sequences are here considered to be similar, if the very first common subsequence is long compared to other pairs of sequences (Gabadinho, Ritschard, Müller, et al., 2011: 25). This metric is of course not very well suited for our purpose, as the similarity measure would be based on the first years, primarily the time as the FCC judges studied law and worked as trainee lawyers.

²¹ This example is adapted from Elzinga (2007: 14).

when for some years there are no information available which position the later FCC judge did hold). These missing values are considered by the program “as an additional valid state” (Gabadinho, Ritschard, Studer, et al., 2011: 94). From the information about the LCS and its length distance and similarity measures can be calculated.²² We normalize these distances to account for the different length of the sequences. The idea behind this normalization is “to relativize distances such that a dissimilarity of say 10 between sequences of length 100 becomes less important than a dissimilarity of 10 between sequences of length 5” (Gabadinho, Ritschard, Müller, et al., 2011: 28)

The next step is then to cluster the matrix of these distances. Cluster analysis is sensitive with respect the clustering-algorithm (Wagschal, 1999: 261-277). We opted for the Ward-Method as it tends to produce relatively homogeneous clusters (Wagschal, 1999: 276).²³

3. Empirical analysis²⁴

3.1. *Last position before coming to the FCC*

Before going into the details of the career sequences, we take a short look at the last position the judges held just before being elected to the FCC (see table 1). The majority of the judges was university professor, had a position within the federal or Länder administration or worked at one of the highest courts (particularly at the Federal Court of Justice and the Federal Administrative Court). Only 17 out of the 102 left a position within politics to become a judge at the FCC. When we look at the chief judges of both senates (the president and the vice president of the FCC) this ratio turns around: 8 out of the 11 chief judges worked as a politician just before being elected to the FCC. And even more interesting there is not even one president or vice president coming directly from administration or one of the major courts.²⁵

²² For the exact formula see (Elzinga, 2007: 15; Gabadinho, Ritschard, Studer, et al., 2011: 93).

²³ First cursory crosschecks with single linkage, complete linkage and weighted average linkage produce no significantly different pictures.

²⁴ We use the TraMineR package for R. Mills (2011: 215-226) gives a short introduction to this package. For all further technical questions one should consult the handbook (Gabadinho, Ritschard, Studer, et al., 2011) or the developers’ own articles (Gabadinho, Ritschard, Müller, et al., 2011; Ritschard et al., 2008) .

²⁵ The only chief judge who held a position within the judicial system directly before coming to Karlsruhe in 1953 was Josef Wintrich, who worked at the higher regional court in Munich and was vice president of the Bavarian Constitutional Court.

Table 1: Last positions before being elected to the FCC

Last position	N	President/ Vice President
University professor	24	2
Judge at the Federal Court of Justice (BGH)	17	
Judge at the Federal Administrative Court (BVerwG)	9	
Administration Länder level	8	
Administration Federal level	7	
Minister Länder level	6	3
Member of the Bundestag	4	3
Lawyer	3	
Member of a Länder Parliament	3	
Judge at the Federal Fiscal Court (BFH)	2	
Judge at the Federal Labour Court (BAG)	2	
Judge at the Federal Social Court (BSG)	2	
Prime minister of a Land	2	1
Position in church administration	1	
Administration sub-Länder level	1	
Judge at a Superior Administrative Court (OVG)	1	
Judge at a constitutional court of the Länder	1	1
Judge at a fiscal Court (FG)	1	
Judge at other court	1	
Judge at an administrative Court (VwG)	1	
Judge at a Landgericht	1	
Employed at an International Organization	1	
Member of the European Parliament	1	1
Minister at the Länder level	1	
University professor in church law	1	
Academic staff at law faculty	1	
Sum	102	11

3.2. Sequence Analysis

Having in mind the extremely fuzzy picture from figure A1 it is inevitable to reduce the number of states. We will do this in two different ways:

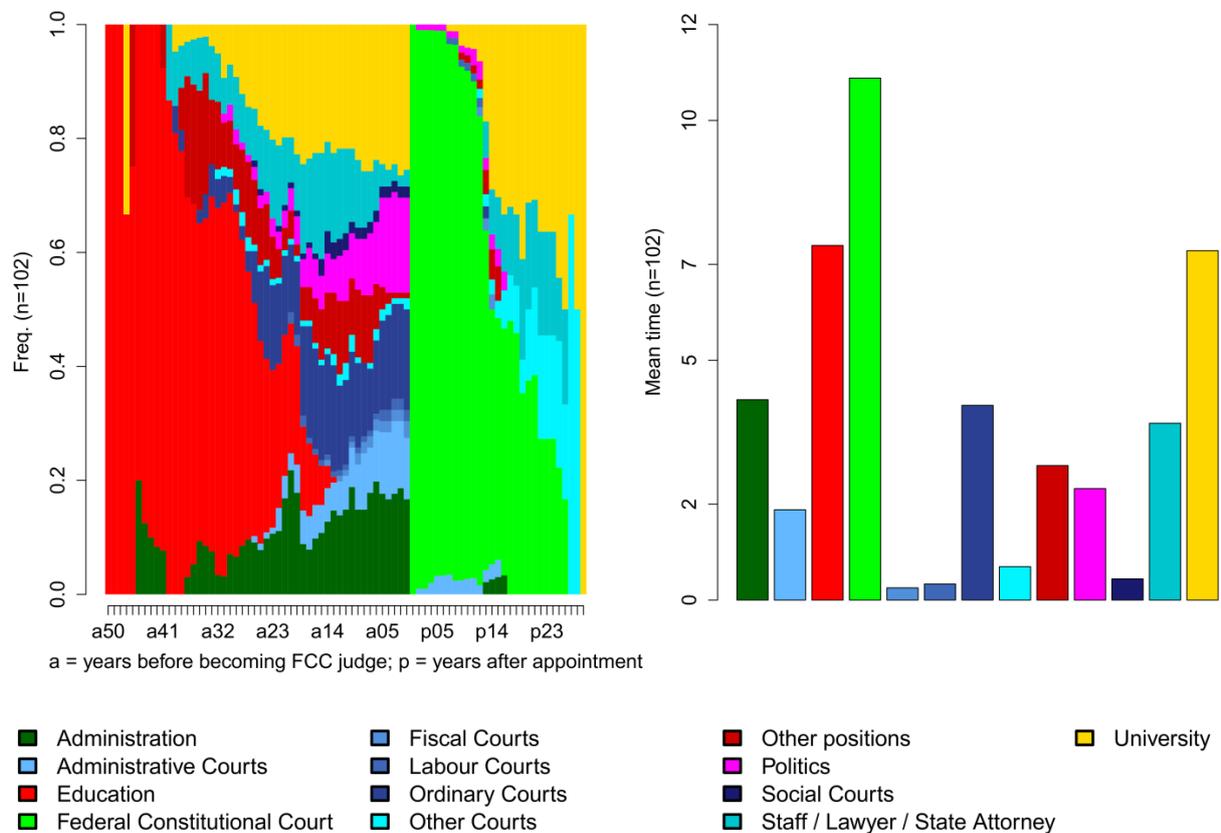
- 1) To test the influence of the *different types of jurisdiction* we distinguish between administrative, fiscal, social, labour and ordinary courts. Furthermore we distinguish for this analysis also between administration, times in education (student, trainee lawyer), FCC, other courts, other positions, staff at courts (+ lawyer and state attorney) and university positions. The reduced jurisdiction alphabet can be found in the annex (Table A2).
- 2) To test the influence of the *different levels of the federal system* we distinguish for the administrative, the judicial and the political sphere between positions on the federal, the Länder and the sub-Länder level. As some positions are clearly out of this trichotomy we furthermore have a couple of other categories like positions at university or positions at IOs. The state of interest – a position at the FCC – is also treated as a distinct category. All categories of this reduced federal system alphabet can be found in the annex (Table A3).

The following sections show the results of our sequence analysis first for the different types of jurisdiction differentiation and then for the differentiation by the three levels of the German federal system.

3.2.1. Aggregate characteristics for the differentiation by type of jurisdiction

To get a first impression of the overall pattern within the sequence data, it is helpful to inspect the transversal frequencies. They are depicted in the left graph of figure 2. Each column (=year) gives the frequencies of the statuses. Thus, in the year exactly before becoming a judge at the FCC about 25 percent worked at universities (the yellow stack just before the bright green one). Some conclusions can already be made from this picture: First, 10 to 20 years before becoming a FCC judge, quite a lot of judges had been lawyers (ca. 15%) while immediately before being elected to the FCC this quantity drops to only 2 %. Second, the opposite is true for those coming from politics and the administrative courts. Here we see a steady increase up to the point of election to the FCC. And third, with respect to the types of jurisdiction we can conclude that only judges socialized within the ordinary jurisdiction or the administrative jurisdiction play a major role in filling the FCC.

Figure 2: Transversal frequencies and mean time (differentiation by types of jurisdiction)

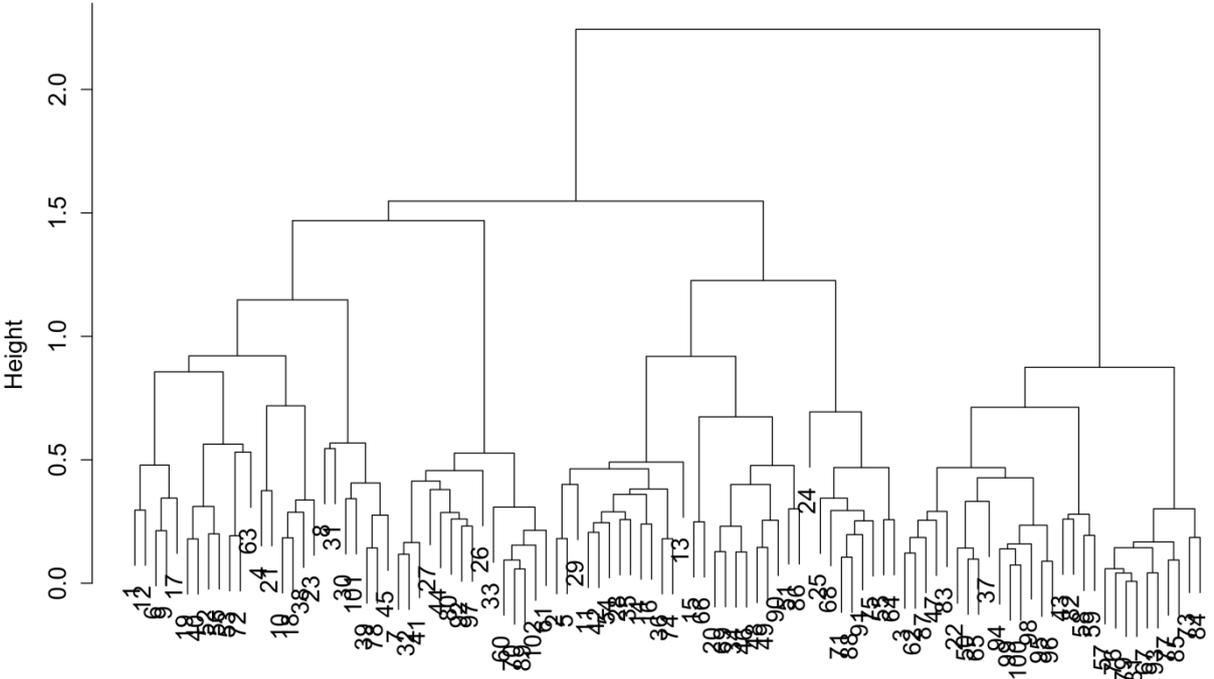


The second plot in figure 2 gives the mean time the judges were in each state. Again it is obvious that from the five types of jurisdiction only the ordinary and the administrative jurisdiction matter.

3.2.2. Cluster Analysis for different types of jurisdiction

After calculating the matrix of distances based on the LCS-metric we cluster them using the Ward-method. Figure 3 is the dendrogram we get. From the mere inspection of the dendrogram it is not completely self-evident what the optimal number of clusters would be. The inverse scree test (see figure A2) favors either a 2, a 4, or a 6 cluster solution.²⁶

Figure 3: Dendrogram (differentiation by types of jurisdiction; Ward-method)



Another possibility to check the fit of a cluster solution are the so called silhouettes, a graphical method developed by Peter Rousseeuw (1987). Its basic idea is simple: We start with a given clustering solution with k clusters. Furthermore we need the dissimilarity-matrix between all objects. We then compare for each case i in the dataset the average distance to the other cases within its own cluster (let us call this a_i) with the minimum of the average dissimilarities of i to all the other clusters (i.e. the average distance to its neighboring cluster which

²⁶ For a description of the inverse scree test see Wagschal (1999: 270-272).

we will call b_i). The silhouette-measure for each case s_i is then calculated as follows (Rousseeuw, 1987: 55-56):

$$s_i = \frac{b_i - a_i}{\max\{a_i, b_i\}}$$

When s_i is close to 1 the average distance to the nearest other cluster (b_i) is much bigger than the average distance of i within its own cluster (a_i). In such a case we would say that the clustering algorithm has definitely put object i into the right cluster. If s_i is close to zero the object can be regarded as a kind of intermediate case which could have also been assigned to the neighboring cluster as the distances a_i and b_i are almost equal. The worst case for the quality of a clustering solution is when s_i is negative. Then i lies on average closer to the neighboring cluster than to the other objects within its own cluster. Summing up, s_i “measures how well object i matches the clustering at hand (that is, how well it has been classified)” (Rousseeuw, 1987: 56). Plotting the silhouette measures by cluster enables us to compare different clustering solutions, or as Rousseeuw writes to “distinguish ‘clear-cut’ clusters from ‘weak’ ones” (Rousseeuw, 1987: 57). If the right-hand side clearly dominates and the average s_i -value is relatively high the cluster can be regarded as homogenous. If on the other hand the left hand side makes up a significant proportion of all cases within a cluster and the average s_i -value is low or even negative, the clustering solution for this cluster is not good.

According to the silhouettes the 2 cluster solution leads to the most homogenous clusters, for the other solutions there is always one cluster which is very fuzzy, while the others are at least reasonably homogenous. Yet, we should also check whether the mathematically best fitting clustering solution also produces a meaningful result from the point of our research interest. In our case we would end up with one cluster consisting only of persons who had been university professors before being elected to the FCC and another cluster containing all the other persons (see figure A3 in the annex for the sequence plots of these clusters). In our view, it makes more sense to accept a clustering solution that is less perfect, if the produced clusters can be reasonably interpreted. We therefore opt here for the 6 cluster solution, although cluster 1 contains in that solution FCC judges with very diverse careers.

Figure 4: Transversal frequencies for the 6 cluster solution (diff. by type of jurisdiction)

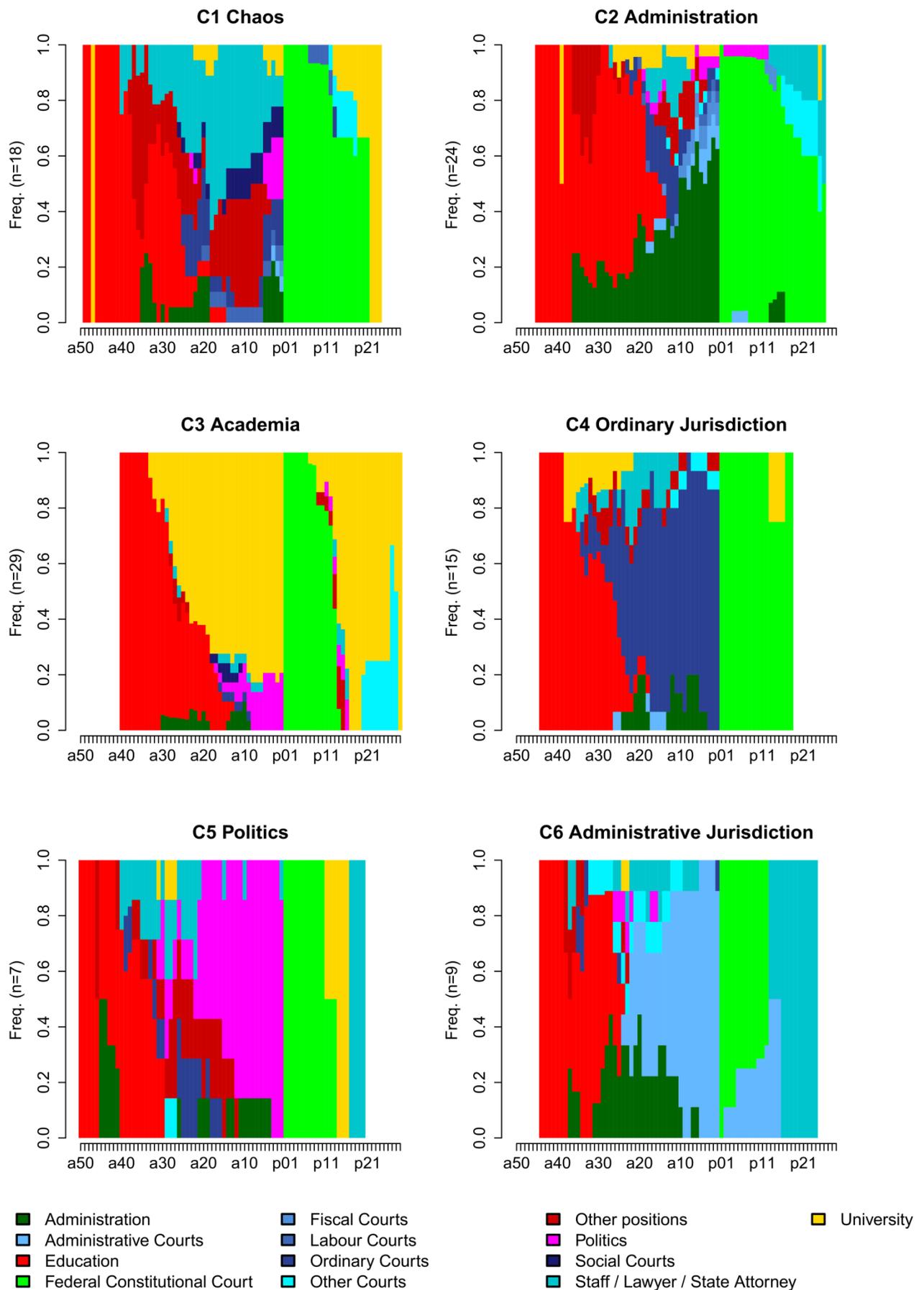
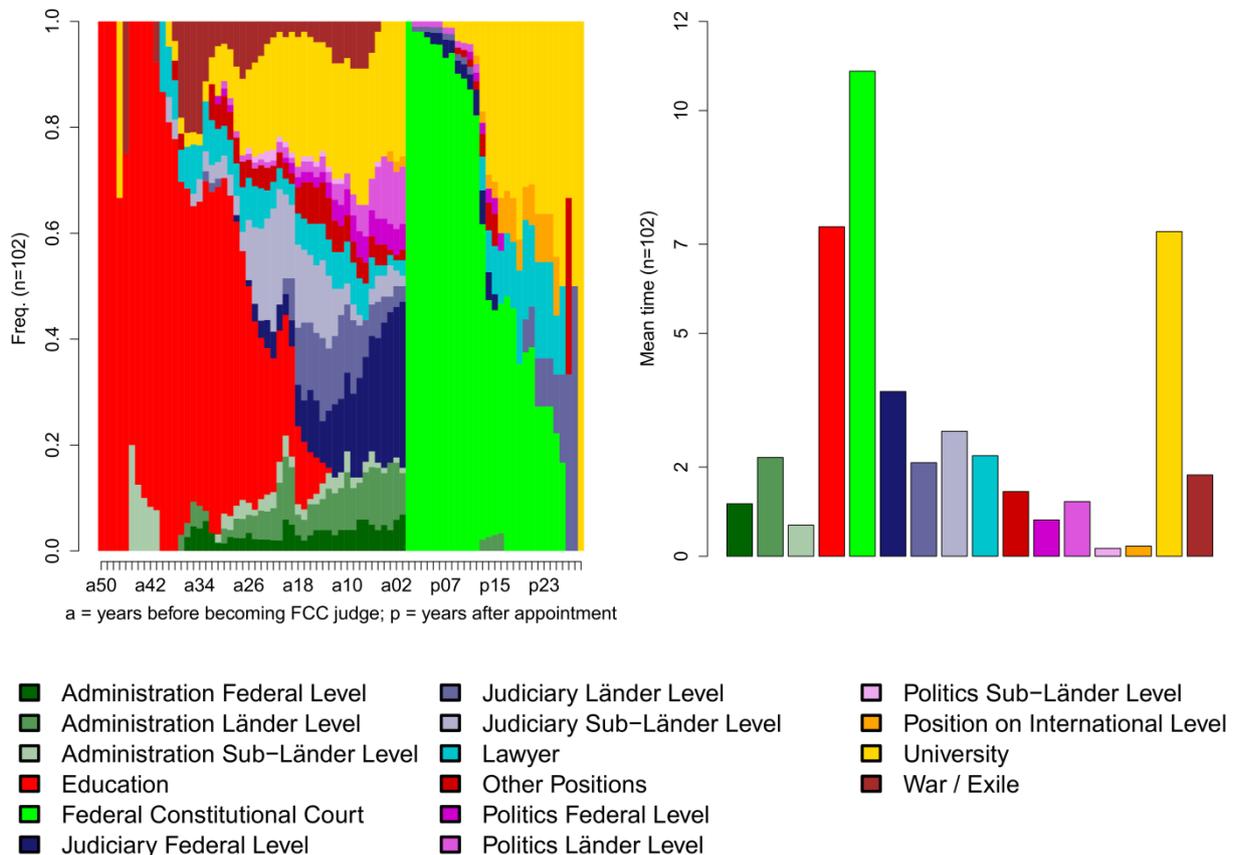


Figure 4 shows the transversal frequencies for these six clusters. Cluster 1 is, as already the silhouettes have shown, the “chaos” cluster. If we can at all observe any structure in it, we could say that this cluster is dominated by the positions “lawyer” and “others”. Apart from the chaos cluster all five “good” clusters show one dominant color that steadily increases up to the point of being elected to the FCC. These five clusters are thus much clearer and can be labeled accordingly as the *administration*, the *academia*, the *ordinary jurisdiction*, the *administrative jurisdiction* and the *politics* cluster. What is quite interesting is the fact that especially for those in the academia cluster the FCC must not be the last positions – which is in general nevertheless the case. The regular sequence plots depicted in figure A4 in the annex make this point even clearer.

3.2.3. Aggregate characteristics for the differentiation by level of the federal system

For the second differentiation we reduce the complete alphabet by the three levels of the German federal system: the federal, the Länder and the sub-Länder level. Figure 5 shows the transversal frequency plot for the complete sample and the mean time in each state.

Figure 5: Transversal frequencies and mean time (differentiation by level of the federal system)



For the positions in the judiciary we find a smooth change from positions on the sub-Länder level to the Länder level and finally to the federal level from where those judges enter the FCC. Only very few make it directly from the lower levels. The dark blue area more than 20 years before becoming a FCC judge can be attributed to people working as staff at one of the federal courts (often just after finishing their studies). For positions within the administration and within politics no such clear pattern can be observed. In both cases the Länder and the federal level make up the majority of stages, particularly those a few years before the election to the FCC. In contrast, the sub-Länder level contributes only marginally to the overall frequencies for both groups. The differentiation used here also shows that there are at least some judges who start a career at the supra-national level after their time at the FCC. But again, the transversal frequencies are not the best possibility to test such questions, as they do not account for the number of cases available at each point in time (particularly the edges of the plot are thus based on much fewer cases than the middle part!).

The right plot in figure 5 shows the mean time in each state. Focusing on the levels of the federal system we see again a similar pattern for positions in politics and administration. For both the Länder level has the longest mean duration. For the judiciary it is the other way round: here the judges work for the longest time at the federal level, followed by the sub-Länder level. Nevertheless, compared to positions at universities all three types of preceding positions are rather short-lived.²⁷

3.2.4. Cluster Analysis for different levels of the federal system

Like before, we calculate the matrix of LCS-distances and cluster them with the Ward-method. Figure 6 depicts the dendrogram we get. Both the inverse scree test as well as the silhouettes point towards either a 2 or a 4 cluster solution (see Figure A5 in the annex). Since the 2 cluster solution would again lead to no meaningful conclusions, with one cluster for FCC judges coming from universities and the other with the rest, we utilize the 4 cluster solution.

²⁷ This is of course to some extent also an artifact of combining university professors and university staff into the single category *university*.

Figure 6: Dendrogram (differentiation by level of the federal system; Ward-method)

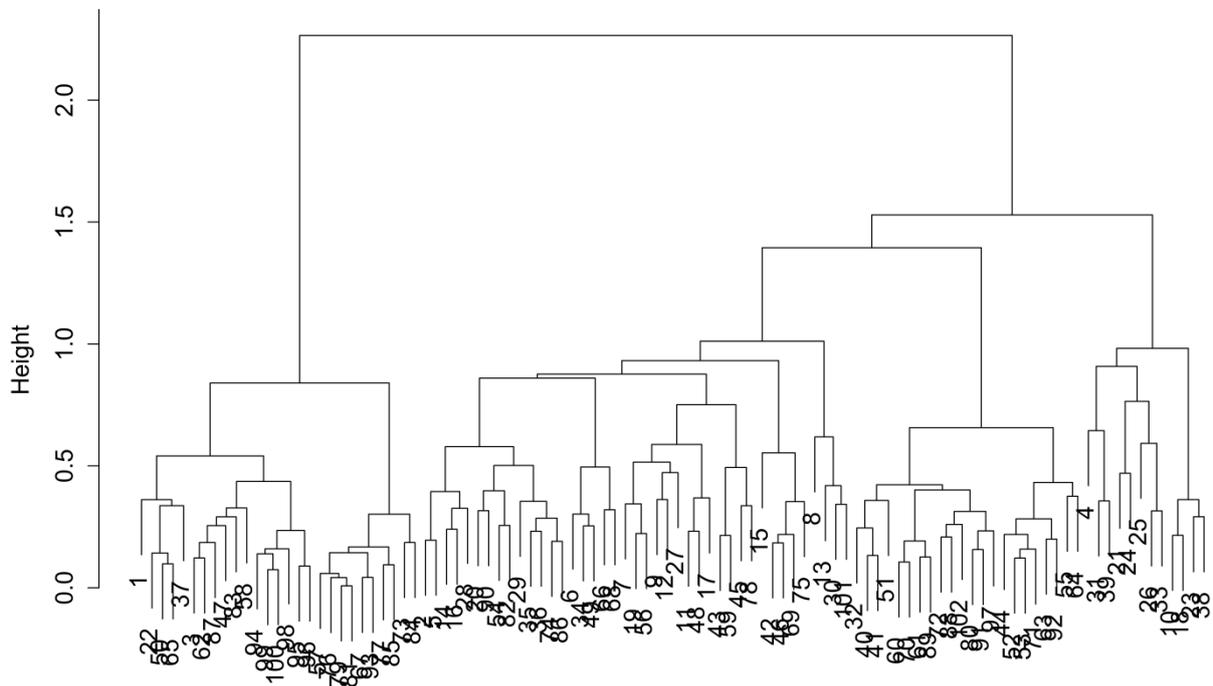
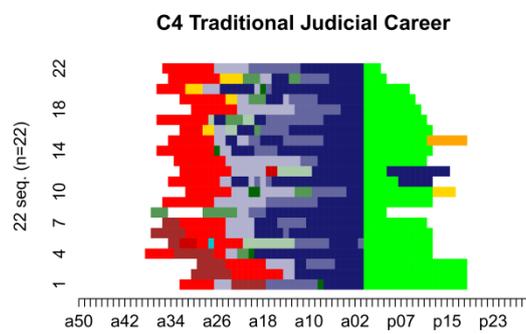
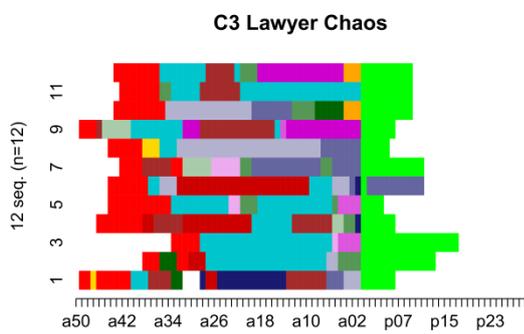
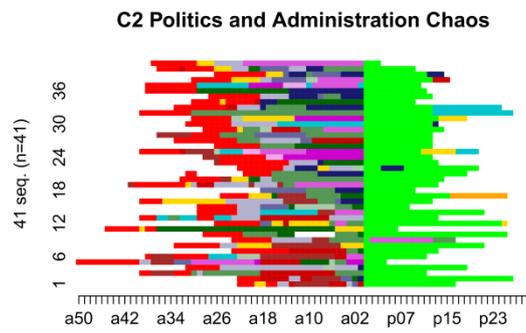
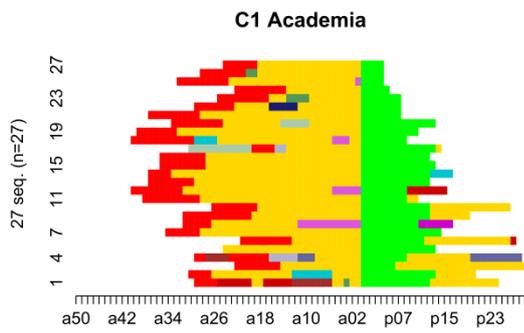
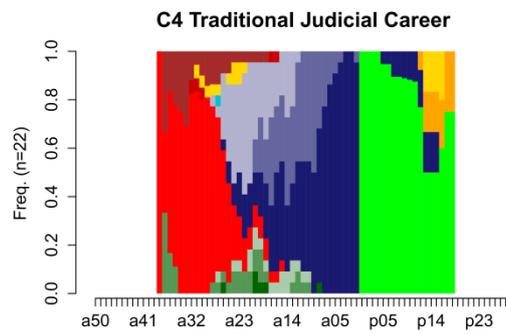
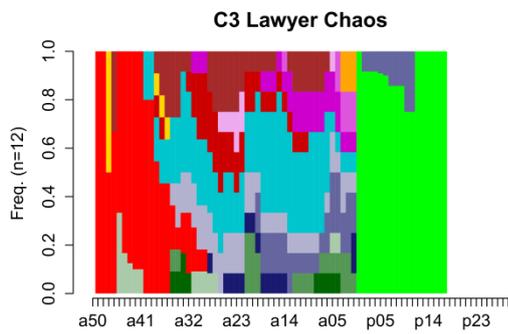
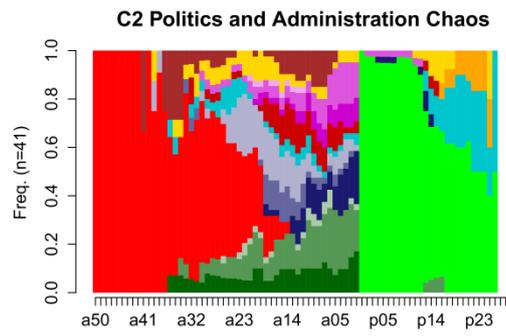
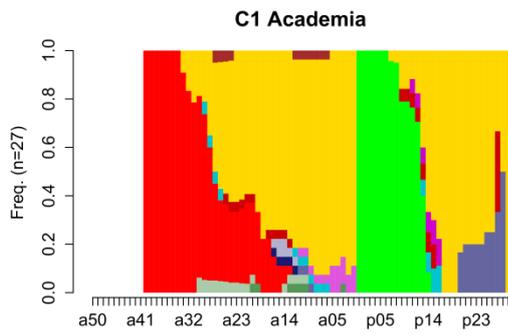


Figure 7 shows the transversal frequencies as well as sequence plots for the 4 cluster solution. A number of observations can be made:

- 1) The academia cluster is again the most homogenous cluster and the only cluster where at least for some the FCC is not an dead end for their career.
- 2) The fourth cluster contains primarily those FCC judges who ran through a traditional career stepping from the sub-Länder level, to the Länder level and finally to the federal level before they became FCC judges.
- 3) Such a stepwise career pattern cannot be observed in a similarly clear way for those FCC judges having an administrative or political background. Here we see the later FCC judges staying at just one level – either the Länder or the federal one – much more often than switching between the levels.
- 4) The second and the third clusters show that especially those FCC judges who came into office either directly from politics or from administration often do not exhibit such a clear structured career pattern as those from academics or the major federal courts.

Figure 7: Plots for the 6 cluster solution (differentiation by level of federal system)



- | | | |
|-----------------------------------|------------------------------|-----------------------------------|
| ■ Administration Federal Level | ■ Judiciary Länder Level | ■ Politics Sub-Länder Level |
| ■ Administration Länder Level | ■ Judiciary Sub-Länder Level | ■ Position on International Level |
| ■ Administration Sub-Länder Level | ■ Lawyer | ■ University |
| ■ Education | ■ Other Positions | ■ War / Exile |
| ■ Federal Constitutional Court | ■ Politics Federal Level | |
| ■ Judiciary Federal Level | ■ Politics Länder Level | |

4. Conclusion

In contrast to their factual and perceived relevance there is only little research on the judges of the German Federal Constitutional Court (FCC). In this paper we argue that much more research on these relevant judicial as well as political actors is needed to test further hypotheses. Knowing more about them will enable us not only to promote those works on the judicialization of politics that have been dominating the field especially in Germany since a couple of years, but also to answer questions about judicial decision making (Why does the Court decide in this or that way?). Sequence analysis is a technique that is very well suited in this regard as it helps to identify systematic patterns within the careers while at the same time giving a holistic picture of them.

Our analysis of all 102 FCC judges that had been working in Karlsruhe between 1951 and 2013 shows, that there are indeed different paths leading to the FCC. We therefore differentiated at the one hand between the five types of jurisdiction and on the other hand between the levels of the federal system in Germany. Regarding the types of jurisdiction we see two major paths to the FCC: from administrative and especially from ordinary courts. Those FCC judges coming from the judicial sphere most often climb the ladder in a very consistent way, stepping from the sub-Länder level to the Länder level and finally to the federal level before they get elected to the FCC. Such a clear pattern of running through the different levels of the German federal system cannot be found for those FCC judges with a background in politics or the administration. Their career paths are much more heterogeneous than from those coming from the judicial sphere. When talking about the FCC judges coming from politics it should also be noted that these judges possess much higher odds to become one of the chief judges of the Court, whereas coming from a judicial position is more or less tantamount to the impossibility of becoming the president or vice-president of the FCC. The fourth large cluster consists of former university professors. They exhibit the most homogenous cluster. Furthermore, it is interesting that FCC judges who worked in the academia before coming to Karlsruhe are more prone to perpetuate their professional career even after they left the FCC. For all others – except some very few – the Court is instead really the final step of their careers.

This paper has already shed some light on the career patterns of FCC judges. Nevertheless, further analyses are needed. One possible way to develop this sequence analysis would be to include additional variables. This can be done in two different ways: Either one could use the variables as factors explaining the clustering within a regression framework, or variables could be used to group sequence plots in order to find additional patterns. And of course the

results of this analysis could also be taken as a starting point for any research on judicial decision making that go beyond the classic judicialization thesis.

Appendix:

Figure A1: Sequence of complete careers using the complete alphabet

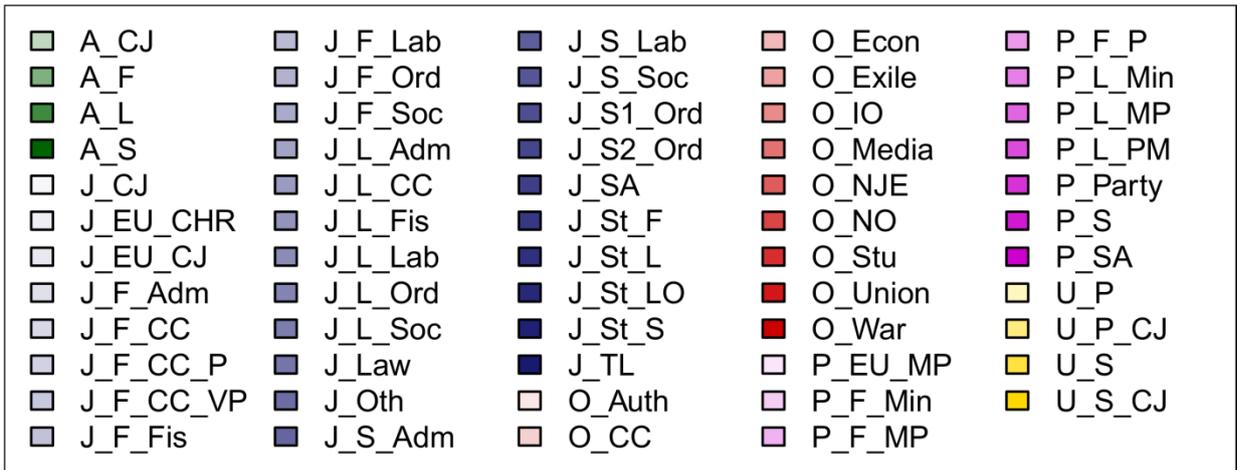
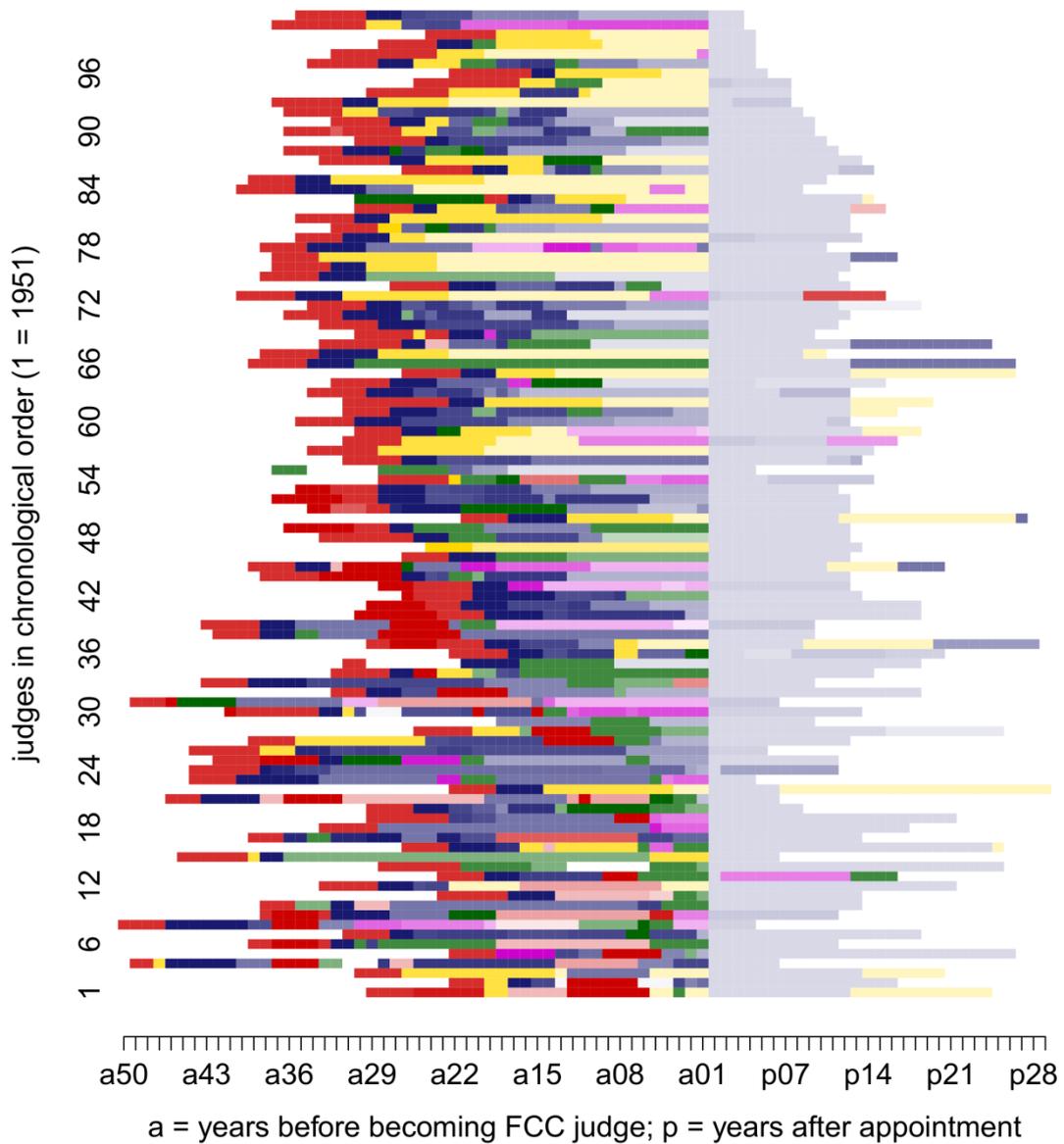


Figure A2: Scree Test and Silhouettes (differentiation by types of jurisdiction)

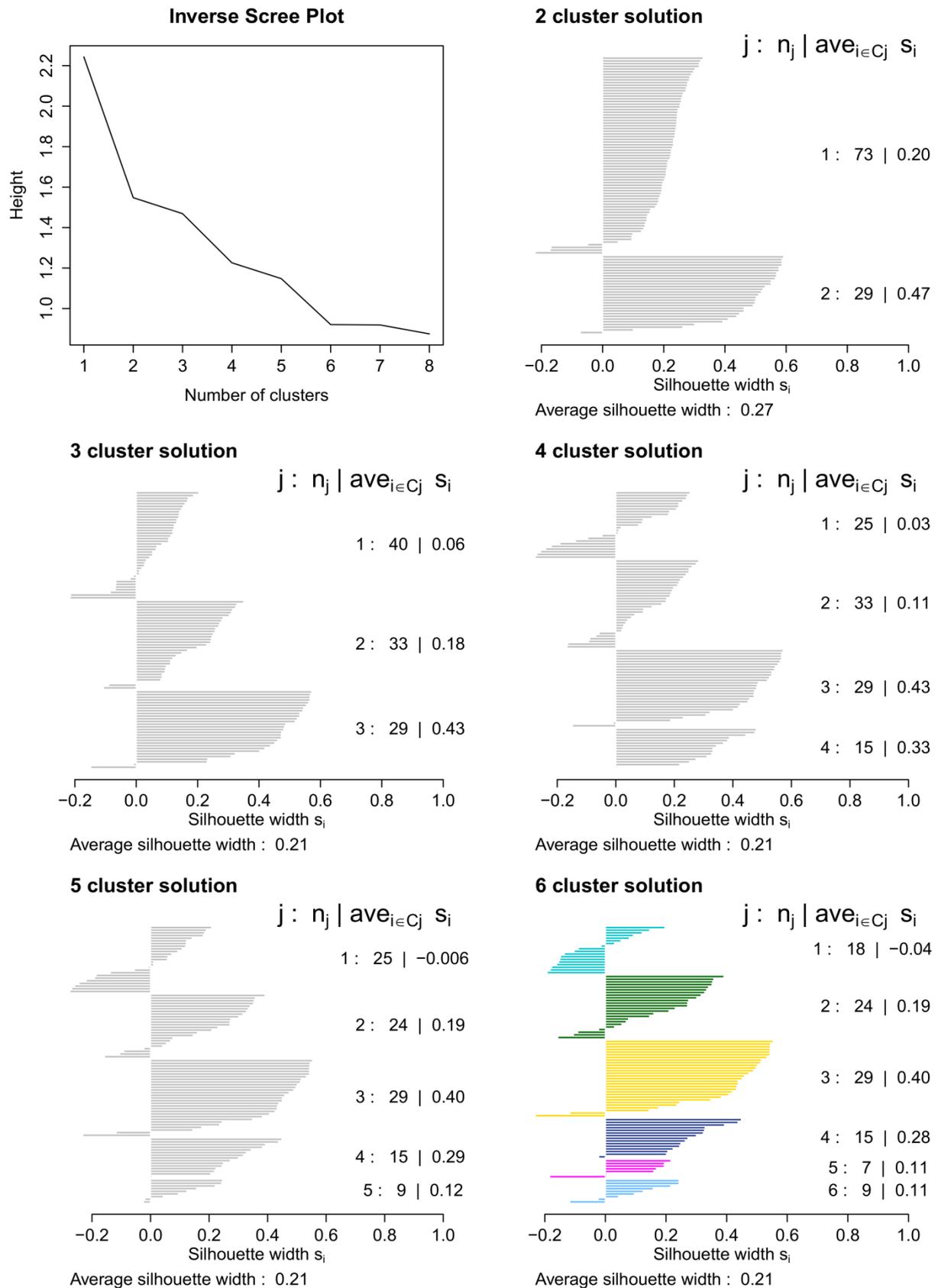


Figure A3: Sequence plots for the 2 cluster solution (differentiation by types of jurisdiction)

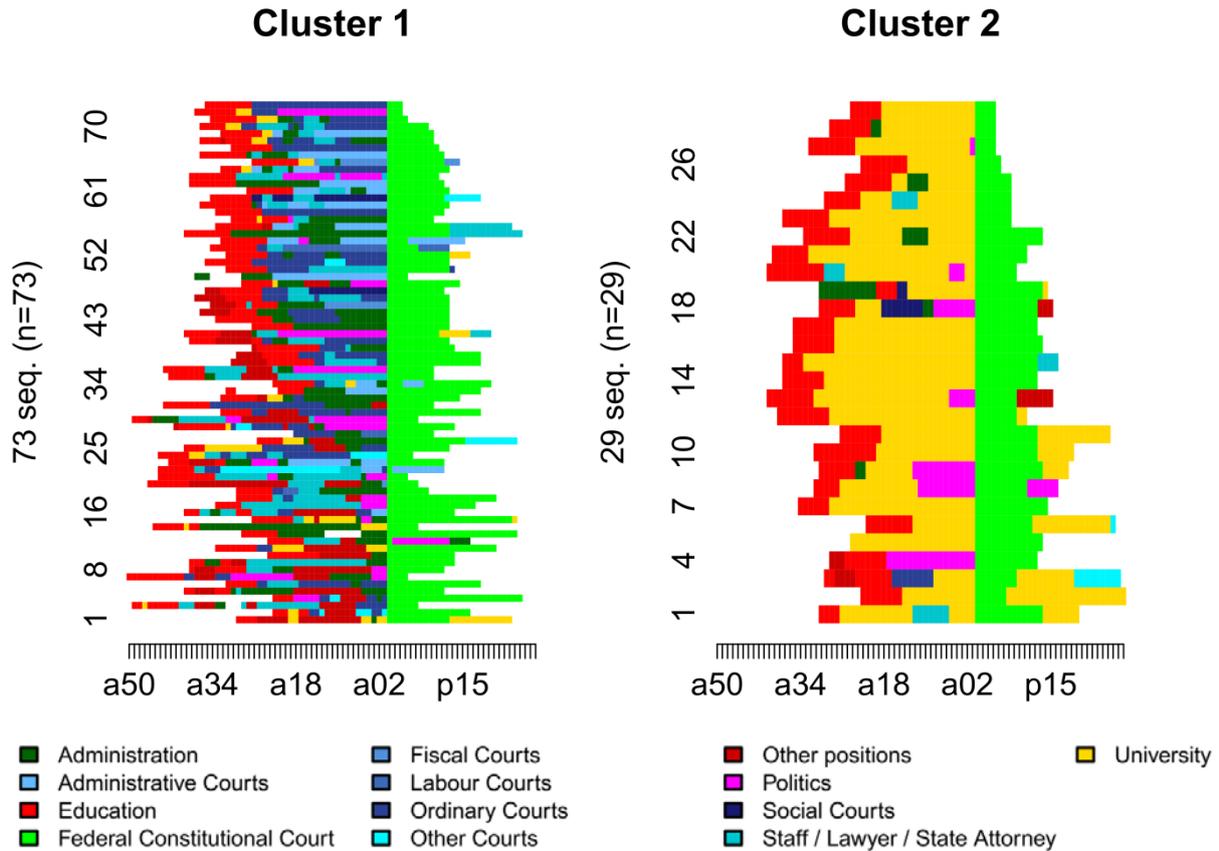
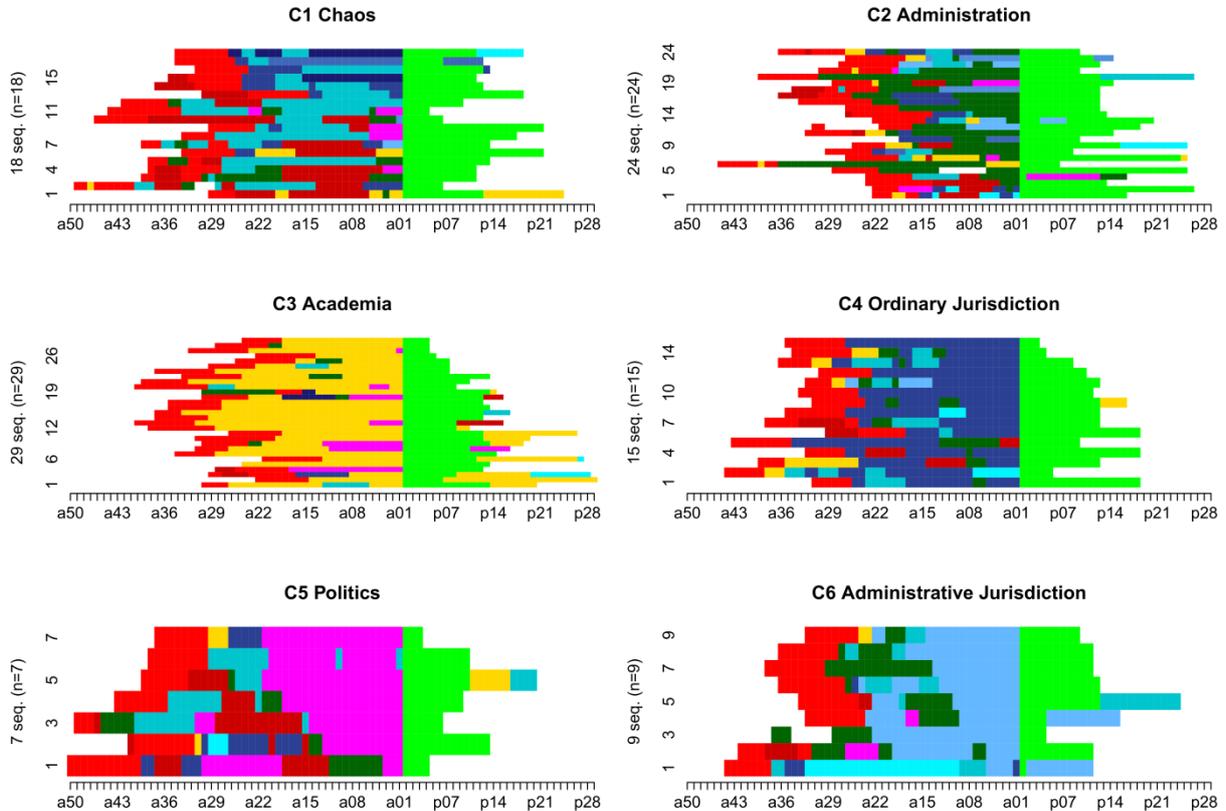


Figure A4: Sequence plots for the 6 cluster solution (differentiation by types of jurisdiction)



For the legend see Figure A3 above.

Figure A5: Scree Test and Silhouettes (differentiation by level of the federal system)

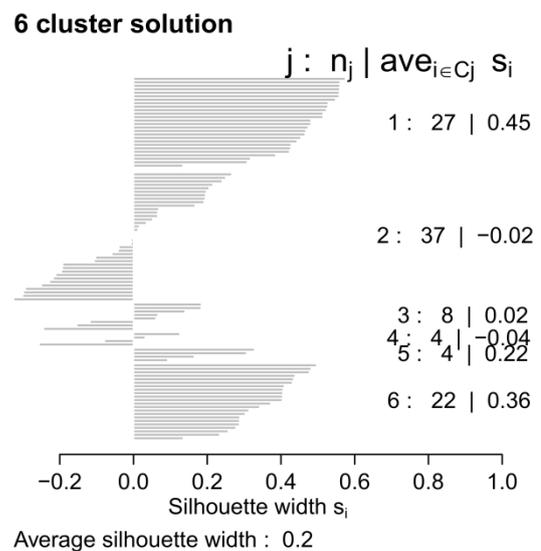
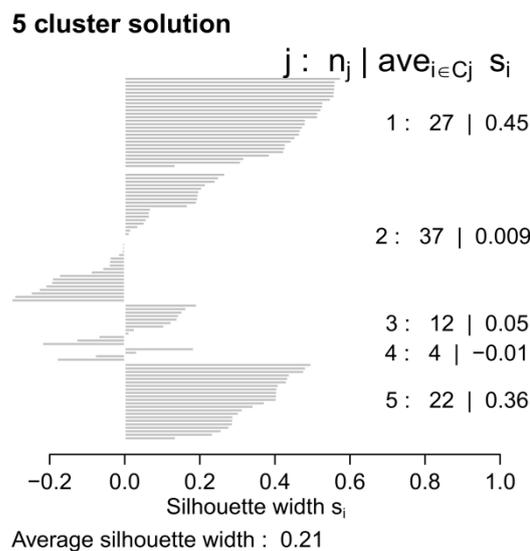
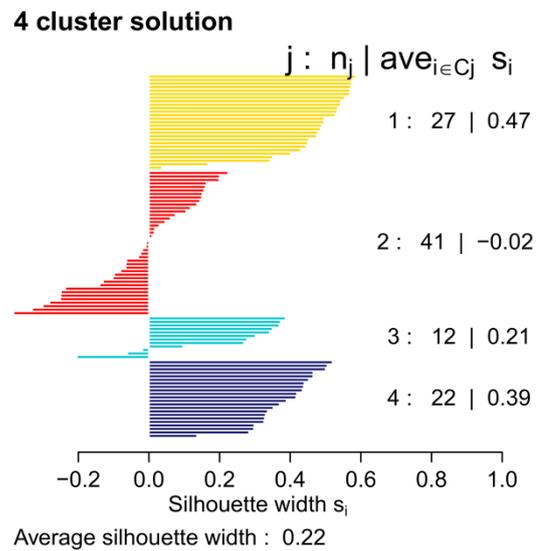
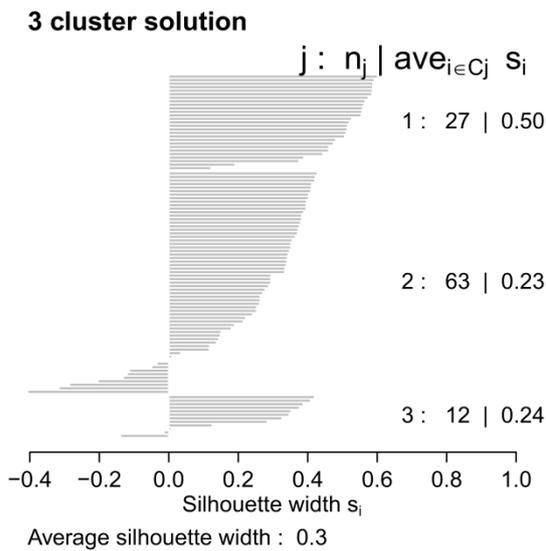
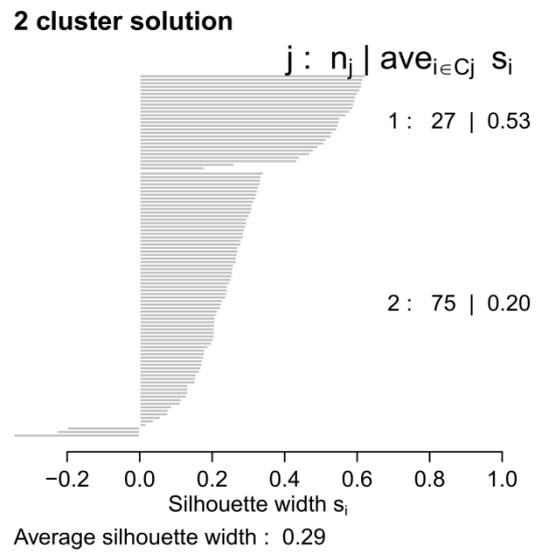
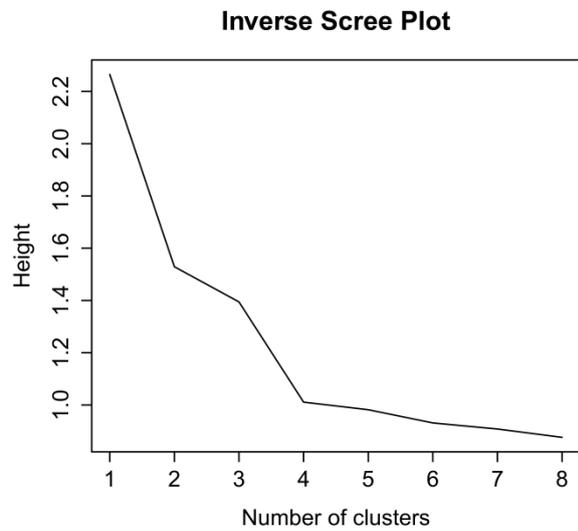


Table A1: Complete alphabet + percentages

Code	Position	% of total incl. FCC	% of total excl. FCC
Administration			
A_CJ	position in church administration	0,19	0,25
A_F	administration federal level	2,55	3,33
A_L	administration Länder level	4,79	6,27
A_S	administration sub-Länder level	1,51	1,97
Judicial System			
J_CJ	employed in church jurisprudence	0,15	0,19
J_EU_CHR	judge at the European Court of Human Rights ECHR	0,15	0,19
J_EU_CJ	judge at the European Court of Justice ECJ	0,21	0,28
J_F_Adm	judge at the Federal Administrative Court (Bundesverwaltungsgericht BVerwG)	2,18	2,86
J_F_CC	judge at the Federal Constitutional Court	20,81	-
J_F_CC_P	president of the Federal Constitutional Court	1,40	-
J_F_CC_VP	vice-president of the federal Constitutional Court	1,34	-
J_F_Fis	judge at the Federal Fiscal Court (Bundesfinanzhof BFH)	0,28	0,36
J_F_Lab	judge at the Federal Labour Court (Bundesarbeitsgericht BAG)	0,57	0,75
J_F_Ord	judge at the Federal Court of Justice (Bundesgerichtshof BGH) or federal public prosecutor (Bundesanwaltschaft)	2,27	2,97
J_F_Soc	judge at the Federal Social Court (Bundessozialgericht BSG)	0,36	0,47
J_L_Adm	judge at a Superior Administrative Court (Oberverwaltungsgericht OVG)	1,19	1,55
J_L_CC	judge at a constitutional court of the Länder	0,42	0,55
J_L_Fis	judge at a Fiscal Court (Finanzgericht FG)	0,28	0,36
J_L_Lab	judge at a Superior State Labour Courts (Landesarbeitsgericht LAG)	0,06	0,08
J_L_Ord	judge at the Higher Regional Court (Oberlandesgericht OLG)	2,02	2,64
J_L_Soc	judge at a Superior State Social Courts (Landessozialgericht LSG)	0,42	0,55
J_Law	Lawyer	4,65	6,08
J_Oth	judge at other courts	0,57	0,75
J_S_Adm	judge at an Administrative Court (Verwaltungsgericht VwG)	0,70	0,92
J_S_Lab	judge at a Labour Court (Arbeitsgericht ArG)	0,08	0,11
J_S_Soc	judge at a Social Court (Sozialgericht SG)	0,17	0,22
J_S1_Ord	judge at a Amtsgericht (AG)	1,53	2,00
J_S2_Ord	judge at a Landgericht (LG)	2,97	3,88
J_SA	State Attorney	0,57	0,75
J_St_F	Staff at a Federal Court	2,33	3,05
J_St_L	Staff at a Länder Court	0,15	0,19
J_St_LO	Staff at a law office	0,23	0,31
J_St_S	Staff at a sub-Länder level court	0,04	0,06
J_TL	Trainee Lawyer (up to the second state examination)	5,73	7,49
Other Positions			
O_Auth	free author	0,15	0,19
O_CC	staff at chamber of commerce	0,04	0,06
O_Econ	position in the private economy	1,10	1,44
O_Exile	Exile during Nazi regime	1,08	1,42
O_IO	employed at an International Organization	0,06	0,08
O_Media	Position in the Media (e.g. public broadcasting)	0,11	0,14
O_NJE	Non judicial employment (especially during Nazi-regime when the judge was not allowed to work in jurisprudence)	0,34	0,44
O_NO	national organization (e.g. Jutta Limbach as president of the Goethe Institute)	0,15	0,19
O_Stu	Student (up to the first state examination)	10,27	13,43
O_Union	staff of Unions and employee organizations	0,17	0,22
O_War	participation in war as soldier, prisoner of war, military administration ...	2,86	3,75
Politics			
P_EU_MP	member of the European parliament	0,06	0,08
P_F_Min	federal minister (or parliamentary state secretary)	0,06	0,08
P_F_MP	member of the Bundestag (or parliamentary council = Parlamentarischer Rat)	1,57	2,05
P_F_P	Federal President	0,13	0,17
P_L_Min	Länder minister (or State Secretary Staatssekretär)	1,32	1,72
P_L_MP	member of a Landtag	0,87	1,14
P_L_PM	Prime minister (Ministerpräsident)	0,47	0,61
P_Party	Working for party (e.g. as an consultant for the parliamentary group in the Bundestag)	0,06	0,08
P_S	political position on sub-Länder level (e.g. mayor, member of municipal council, district administrator = Landrat)	0,38	0,50
P_SA	Working for the NSDAP, SS or SA (Sturmabteilung)	0,11	0,14
Academia			
U_P	professor at law faculty /or Max Planck	9,50	12,43
U_P_CJ	professor in church law	0,42	0,55
U_S	academic staff at law faculty / or Max Planck	5,69	7,44
U_S_CJ	academic staff in church law	0,15	0,19

Table A2: Reduced alphabet (differentiation by types of jurisdiction) + percentages

Position	% of total incl. FCC	% of total excl. FCC
Judge at a court		
Administrative Courts	4,07	5,33
Federal Constitutional Court	23,55	
Fiscal Courts	0,55	0,72
Labour Courts	0,72	0,94
Ordinary Courts	8,78	11,49
Other Courts	1,51	1,97
Social Courts	0,95	1,25
Positions not at a court		
Administration	9,04	11,82
Education (Student, Trainee Lawyer)	15,99	20,92
Other Positions	6,07	7,94
Politics	5,03	6,58
Staff / Lawyer / State Attorney	7,98	10,43
University	15,76	20,62

Table A3: Reduced alphabet (differentiation by level of the federal system) + percentages

Position	% of total incl. FCC	% of total excl. FCC
Federal Level		
Administration Federal Level	2,55	3,33
Federal Constitutional Court	23,55	
Judiciary Federal Level	8,00	10,46
Politics Federal Level	1,76	2,30
Länder Level		
Administration Länder Level	4,79	3,33
Judiciary Länder Level	4,54	5,94
Politics Länder Level	2,65	3,47
Sub-Länder Level		
Administration Sub-Länder Level	1,51	1,97
Judiciary Sub-Länder Level	6,07	7,94
Politics Sub-Länder Level	0,38	0,50
Further Positions		
Education	15,99	20,92
Lawyer	4,88	6,38
Other Positions	3,14	4,11
Position on International Level	0,49	0,64
University	15,76	20,62
War / Exile	3,95	5,16

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