

CONSTITUTIONAL LAW AROUND THE GLOBE: Selection of Justices to the German Federal Constitutional Court

DIREITO CONSTITUCIONAL AO REDOR DO GLOBO: A SELEÇÃO DE JUÍZES PARA A CORTE CONSTITUCIONAL FEDERAL ALEMÃ

Luiz Araujo¹
UNIFBV

ABSTRACT

This paper exploring the Selection of Justices for the German Federal Constitutional Court is part of the series "Constitutional Law Around the Globe". This topic of the series focuses on the "selection of justices to Supreme and Constitutional Courts" in contemporary democracies. Second in the row, this paper analyzes the selection of Justices in German Constitutional Law and how transparent and accountable the process is. A final paper will approach the legal systems composing the series in a comparative perspective.

Keywords: German Constitutional Law; German Federal Constitutional Court; Selection of Justices; Accountability; Transparency.

RESUMO

Este artigo, analisando a seleção de juizes para a Corte Constitucional Federal Alemã, faz parte da série "Direito Constitucional ao Redor do Globo". Este tópico da série tem por foco "a seleção de juizes para Cortes Supremas e Tribunais Constitucionais" em democracias contemporâneas. Segundo sobre o tema, este artigo analisa a seleção de juizes para a Corte Constitucional Federal Alemã e o quão transparente e plural é o processo. Um artigo final abordará os sistemas jurídicos componentes da série em uma perspectiva comparada.

Palavras-chave: Direito Constitucional Alemão; Corte Constitucional Federal Alemã; Seleção de Juizes; Responsabilidade; Transparência.

1 L.L.M. and PhD on Constitucional and Procedure Law (Federal University in Pernambuco, Brazil). Visiting Student Researcher (University of California, Berkeley). Visiting Professor (University Paris I - France and University of British Columbia - Canada).



1. INITIAL CONSIDERATIONS

This paper exploring the selection of justices in a comparative perspective is part of a series named “Constitutional Law Around the Globe”. This chapter of the series focuses on Supreme and Constitutional Courts and how they are shaped in many contemporary democracies.

Second in the row, this paper focuses on the selection of justices to the German Federal Constitutional Court. In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the selection of justices to the Supreme Court of Brazil in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such as in Germany, Canada, South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.²

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Ecuador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in a rise.³

Certainly, the notion of a Constitution comprises the interpretation and enforcement of rights. Therefore, a Constitution is not only a solemn declaration of rights. In fact, the content of a Constitution derives also from the actual interpretation and enforcement by a specific institution. In modern democracies, this role of interpreting and enforcing constitutional provisions are in many cases attributed to courts that end up shaping constitutional norms.⁴ In parallel, the use of new interpretative constitutional methods has made possible the shape and meaning of constitutional provisions, with no need to rewrite

² KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts. Judicial Roles in Global Perspective**. New York. Cambridge University Press, 2013.

³ COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. New York. Cambridge University Press, 2010.

⁴ ROUSSEAU, Dominique. **Droit du contentieux constitutionnel**. Paris. Montchrestien, 2010.



the text by means of amendments⁵. This is a reality in many jurisdictions, including Germany and Brazil.

In this broad picture, Supreme and Constitutional Courts (and also the lower courts and judges) have been playing a very important role in the democratic process. In several jurisdictions, this has led to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, freedom of speech, equal clauses, among many others.

In spite of many reasons favouring its growing adoption in the world, judicial review has been suffering from a legitimacy crisis in many jurisdictions, including in Brazil. This phenomenon has been coined by BICKEL as the “countermajoritarian difficulty”⁶. It focuses on non-elected judges striking down legislation passed by parliament in an unconstrained or little constrained way. The most powerful of the problems concerning judicial review is to reach a balance between judicial independence and responsibility⁷.

The processes under which democratic jurisdictions can shape the plurality, transparency, partisanship and accountability of Supreme Courts is thus of highest importance. That’s why we will be analyzing processes that different jurisdictions use to select their justices.

The *problem* under scrutiny in the series is how Constitutional and Supreme Courts are shaped in a set of democratic jurisdictions in a comparative perspective. The selection of justices plays a key role on the subject in many democracies. However, there are many variations among different jurisdictions that should be specifically assessed.

The *aim* of the chapter Supreme and Constitutional Courts of the Series Constitutional Law Around the Globe is to analyze how these apex Courts are shaped in democracies in a comparative perspective. The selection process of Supreme and Constitutional Court Justices is an important feature of it.

The *hypothesis* of the series is that the selection of justices vary widely among democracies. Understanding those differences and nuances allows the comprehension of

⁵ BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo. Malheiros, 2007.

⁶ BICKEL, Alexander. **The least dangerous branch. The Supreme Court at the Bar of Politics**. New York. The Bobbs-Merrill Company, Inc., 1962.

⁷ SHAPIRO, Martin. Judicial Independence: New Challenges in Established Nations. **Indiana Journal of Global Legal Studies**, Bloomington, n. 20, pp. 253-277, 2013.



processes that can enhance transparency and accountability in democracies around the world.

The *methodology* used is consultation of references (primary and secondary sources – books, papers and judicial decisions).

2. THE GERMAN BASIC LAW AND THE GERMAN FEDERAL CONSTITUTIONAL COURT

In the Spring of 1948, roughly two years after Germany had surrendered in WWII, at the Six Powers Conference in London, the United States, Great Britain, France, Belgium, Luxemburg and the Netherlands agreed on a Western German constituent assembly that would draft a new constitution entrenching federalism, democracy, and protection of basic rights.⁸

However, the majority of the presidents of the Länder (German States/Provinces) feared that the creation of a German state excluding the Soviet zone of occupation would deepen the division of Germany. On this basis, they rejected the creation of a *constitution* and also its referendum by the Länder, wishing instead to create a mere *organisational statute*. The assembly that would be encharged of deliberating on the *organisational statute* was not to be a *constituent assembly* but merely a *Parliamentary Council*, that would conduct deliberations on the new the German Basic Law (Grundgesetz).⁹

Thus, the Presidents of the German Länder set up a Committee formed by one commissioner from each of the eleven Länder along with other experts. They met on an island in Lake Chiemsee, where they deliberated from 10 to 23 August 1948 and managed to stablish many of the fundamentals of the forthcoming constitution.¹⁰

The draft of the Herrenchiemsee Conference (HChE) comprised, in section viii, articles 97 to 100, a section respecting the Federal Constitutional Court, in order to safeguard democracy and fundamental rights. Thus, one of the most important creations of

⁸ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 157.

⁹ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 158.

¹⁰ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 159.



the Herrenchiemsee Conference is a complete constitutional review system, that was later incorporated into the Basic Law.¹¹

In 1949, the German Basic Law (in other words, the German Constitution) was passed by a two-thirds majority of the German Länder. Its text begins with the Basic Rights that impose negative and positive duties on the state, therefore commanded not to infringe basic rights by inaction as well as by means of affirmative duties destined to the guarantee of a fundamental right.¹²

Of course, constitutional review is very closely linked to constitution. It was intended in the deliberations following the end of WWII that the future German Basic Law should be interpreted and enforced by a federal constitutional court. Therefore, the origins of the German Basic Law and of the German Federal Constitutional Court were deeply connected from the beginning.¹³ The *Constituent Assembly* made fundamental decisions on the Federal Constitutional Court, but other major questions about it were left to further legislation, that came to be the Federal Constitutional Court Act of 1951 (FCCA).¹⁴

Regarding the Judicial Power, Germany Basic Law, in its article 92, states that "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the *Länder*".¹⁵

As it is widely known, Germany is a federal state. Then, judicial authority in Germany is shared between the Federation ("Bund") and the sixteen "Länder" (states, provinces). Federal courts are the Federal Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe and the five highest courts of the Federation, namely the Federal Court of Justice in Karlsruhe (*Bundesgerichtshof*, civil and criminal cases), the Federal Labour Court in Erfurt (*Bundesarbeitsgericht*, labour cases), the Federal Administrative Court in Leipzig (*Bundesverwaltungsgericht*, administrative law cases), the Federal Social Court in Kassel

¹¹ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 159/160.

¹² TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. **University of Baltimore Journal of Media Law and Ethics**, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 268/9

¹³ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 156.

¹⁴ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 157.

¹⁵ Germany. Basic Law. Available. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516. Access on April 8 2021.



(*Bundessozialgericht*, social security and social insurance cases) and the Federal Finance Court in Munich (*Bundesfinanzhof*, tax cases).¹⁶ These Federal Courts are mandated by article 95 of the Basic Law.¹⁷

These five highest courts of the Federation are courts of last instance, generally hearing appeals exclusively on issues of law, not of facts. On the other hand, the courts of first instance in all five branches are courts of the Länder. Thus, within the German judicial system the courts of first and second instance, in general, are the responsibility of the Länder whereas the final courts of appeal are the responsibility of the Federation.¹⁸

The Federal Constitutional Court (BVerfG) was established in 1951. Any citizen may, on exhaustion of his/her legal process through the ordinary courts of law, have recourse to the Federal Constitutional Court.¹⁹ Unlike in the US and in Brazil, for instance, where judges can exercise the judicial review of legislation, in Europe, this power normally is entitled to constitutional courts created by constitutional charters for that special purpose, such as the French Constitutional Council, the German Federal Constitutional Court, and the Spanish Constitutional Court. According to this framework, the most that an individual judge can do is interpret the law liberally.²⁰

The German Federal Constitutional Court holds a truly extraordinary power, established by article 93 of the Basic Law. Among them, the *Bundesverfassungsgericht* holds review powers vis-à-vis the organisation of the state, i.e., federal-state conflicts, conflicts between the federal government and the Länder, conflicts between Länder (*Bund-Länder-Streitigkeit*), and disputes between high federal organs (*Organstreit*).²¹

It also has the power of constitutional review in the narrow sense (*Normenkontrolle*), according to which the Court examines the constitutionality of the law by abstract review (*abstrakte Normenkontrolle*) or concrete review (*konkrete Normenkontrolle*). Concerning

¹⁶ RIEDEL, Johannes. Training and Recruitment Judges in Germany. *International Journal for Court Administration*, v. 5, no. 2, p. 42-54, October 2013.

¹⁷ Germany. Basic Law. Available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516. Access April 8th 2021.

¹⁸ RIEDEL, Johannes. Training and Recruitment Judges in Germany. *International Journal for Court Administration*, v. 5, no. 2, p. 42-54, October 2013, p. 42-3.

¹⁹ BOTTCHE, Hans-Ernst. The Role of the Judiciary in Germany. *German Law Journal*, v. 5, no. 10, p. 1317-1330, October 1, 2004, p. 1328.

²⁰ MUNIZ-ARGUELLES, Luis; FRATICELLI-TORRES, Migdalia. Selection and Training of Judges in Spain, France, West Germany, and England. *Boston College International and Comparative Law Review*, v. 8, no. 1, p. 1-38, Winter 1985, p. 6-7.

²¹ BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. *Ratio Juris*, 16, no. 2, P. 155-186, June 2003.



abstract review, the Federal Government, the Government of a Land and an aggregate of no fewer than one-third of the members of the Bundestag are all empowered to turn to the Federal Constitutional Court for a decision on the constitutionality of a law, quite apart from any concrete case. On the other hand, in concrete review, a court of ordinary jurisdiction (any court other than the Federal Constitutional Court), deciding a case, is convinced that the applicable federal law or Land law is unconstitutional, it must refer the constitutional question to the Federal Constitutional Court.²²

Regarding its structure, the Federal Constitutional Court actually works like two courts rather than one. When the German Constitutional Court was established in 1951, Parliament decided that the Court should be divided into two separate panels or *Senates*. In the beginning, each Senate was formed by twelve members, but since 1962 each panel has had eight justices.²³

Cases are assigned to each of the two Senates on a subject matter basis. It means that in general matters of individual rights come before the First Senate, and matters of governmental structure are destined to the Second Senate. Each justice is assigned to one of the two Senates and may not ordinarily participate in the other Senate. Eventually both Senates are authorized to sit together (in a body called the Plenum).²⁴

Another feature of the Federal Constitutional Court is that its judges are appointed for nonrenewable twelve-year terms. This prohibition of another term is seen as a means of enhancing judicial independence, because justices would not mold their decisions in order to achieve political favors towards a new term at the Constitutional Court.²⁵

3. THE SELECTION PROCESS OF JUSTICES TO THE FEDERAL CONSTITUTIONAL COURT

The process for appointment of Constitutional Court Justices in Germany is ruled by a complex normative system in which rules with the lowest degree often play the most

²² BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003, p. 155/6.

²³ QUINT, Peter E. Leading a Constitutional Court: Perspectives from the Federal Republic of Germany. **University of Pennsylvania Law Review**, v. 154, no. 6, p. 1853-1878, June 2006, p. 1855.

²⁴ QUINT, Peter E. Leading a Constitutional Court: Perspectives from the Federal Republic of Germany. **University of Pennsylvania Law Review**, v. 154, no. 6, p. 1853-1878, June 2006, p. 1855, p. 1855/6.

²⁵ MILLGRAMM, Karl-Heinz. Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States. **Yearbook: Supreme Court Historical Society**, p. 146-154, 1985, p. 148.



important practical role. The Basic Law has some rules, but statutory norms are closer to real life. However, these norms are overshadowed by a longstanding, informal agreement between the major political parties on a system of party affiliation.²⁶

This system has even been described as “less democratic than the papal election”. Although a caricature, the truth is that elections to the Federal Constitutional Court are an oddity in the German legal system, because there is not a set of legal norms determining its features. In fact, it is mostly determined by layers of rules of decreasing binding force, as well as informal usages that are determinant.²⁷

The first and second sources of norms regarding the selection of justices to the Federal Constitutional Court are the Basic Law and statutory provisions. Section 94(1) of the German Basic Law states that the Federal Constitutional Court is formed by federal judges and other members and that half of its members shall be elected by the *Bundestag* (lower chamber of Parliament) and the other half by the *Bundesrat* (upper chamber of Parliament). The section also provides that they may not be members neither of the *Bundestag*, the *Bundesrat*, the Federal Government or any of the corresponding bodies of a *Land* (state)²⁸.

Diverging from the Basic Law, on the other hand, the Act of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz – BVerfGG*), § 6 (2), provides that the *Bundestag*, in accordance with proportional representation, shall elect a committee for the selection of justices, which shall be composed by 12 members of the *Bundestag*. Section § 7 provides that “The Justices to be elected by the *Bundesrat* shall be elected by two thirds of the votes of the *Bundesrat*”.²⁹

The candidates must be at least forty years old, eligible for election to the *Bundestag* and qualified to hold judicial office under the German Judiciary Act. The judicial office is

²⁶ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 962.

²⁷ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 963.

²⁸ Germany. German Basic Law. Available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516. Access 15 April 2021.

²⁹ Germany. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546). http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. Access 15 April 2021.



incompatible with any other professional occupation, except for the post of professor of law at a German higher education institution (§ 3 of the Federal Constitutional Court Act).³⁰

The *Bundestag* and the *Bundesrat* are expected to elect half of the Justices of each Senate. From the seats to be filled by judges from the Supreme Federal Courts, one shall be elected to the Senate by one of the electoral organs and two by the other electoral organ. For the other five posts three justices must be from one of the electoral organ and two from the other electoral organ (§ 5 of the Federal Constitutional Court Act).³¹

The Constitutional Court itself also plays an important role on the nomination process. Although its propositions are rare and not binding, they can be very powerful, depending on the political temperature and the attitude of the other players.³²

The third layer of norms relating to the selection of justices to the German Constitutional Court derives from party affiliation. Indeed, party politics plays a practical decisive role on the selection of justices. The two-thirds majority required by the Act of the Constitutional Court has prohibited the simple majority – required to support the federal chancellor – to select its candidates. As a consequence, a compromise between the two major political parties (Social Democrats and Christian Democrats) is necessary.³³

Thus, in order to avoid political battles for the selection of each justice, both parties have agreed on a system that has been working for decades. In each of the two Senates of the *BVerfG*, the posts are equally split between the two parties, that have the right to propose their respective favorite candidates. Three of the four posts are filled with party members and the fourth with someone neutral. In addition to that, the two major parties have conceded one of the six posts reserved for party members to the two minor parties, the Liberals and the Greens. When a post becomes vacant, it must be replaced by a successor of the same

³⁰ Germany. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546). http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. Access 15 April 2021.

³¹ Germany. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546). http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. Access 15 April 2021.

³² KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 966/7.

³³ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 964.



“class” of the predecessor, for instance, a neutral Social Democrat will replace another neutral Social Democrat.³⁴

This third normative layer (party affiliation)³⁵ represents, surprising as it might be, a higher degree of formalization than the practical application of the statutory provisions of former federal judges. This is because the post filled by a former federal judge can be replaced by a non-judge, since the total number of former federal judges in each senate is a minimum of three, as provided by § 2(3) of the Federal Constitutional Court Act³⁶.

The system of party affiliation presents no practical difficulties, as long as one party's proposal is normally accepted with no further problems by the other. As for the “neutral” candidates, the practice has been to search a consent of the other party; for party members, there is a strong resistance to raising objections. There is one recent example of a failed compromise on the election of Horst Dreier, a highly respected professor of Constitutional Law and member of the Social Democrats, who was firmly rejected by the Christian Democrats because of his opinion on the protection of embryos in biological research and his acceptance of torture in cases of extreme hardship. The Dreier case is seen, however, as an oddity in the system. The functioning of these informal rules on party affiliation of Justices have worked mostly in a stable and effective fashion. This lead, in Dreier case, to the right of the Social Democrats to propose another candidate of its preference. On top of that, there was no case of the Social Democras adopting any kind of retaliation.³⁷

A fourth layer of practical rules determining the selection of Justices to the German Federal Constitutional Court: knowing the right people. Indeed, the determining decision on who will fill the vacant seat is not taken in Parliament, as the Basic Law Provides, nor by the parliamentary committee, as provided by the Federal Constitutional Court Act, neither in a more or less open debate within the political parties. In fact, even members of Parliament

³⁴ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 965.

³⁵ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 965.

³⁶ Germany. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546). http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. Access 15 April 2021.

³⁷ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 965.



usually do not know how the decision on the name came, because the real decision is taken within very small informal groups formed by high-ranking party officials, under the leadership of the parties' chairpersons, who are charged with finding the right candidate.³⁸

The relevant role attributed to the legislature on the selection process is justified at least on two grounds: first, it grants democratic legitimacy to the Constitutional Court; second, the process allows the selection of the best qualified jurists for constitutional adjudication. Professional competence in public law is required by means of scholarly publications, usually expected, even from candidates from the legislature. The mass media normally gives detailed cover to these appointments, guaranteeing transparency and accountability to the process.³⁹

Nevertheless, the process has not been immune to criticism on the grounds of lack of transparency and proposals for improvement have been made over time.

4. CRITICISM AND REFORM PROPOSALS

When one talks about the selection of Supreme and Constitutional Courts Justices one normally has in mind the extent to what the process of appointing justices guarantees the independence and the neutrality of the judiciary.

According to the Sustainable Governance Indicators of Berterlsmann Stiftung on independence and neutrality of the judiciary also as a consequence of the appointment process⁴⁰, Germany has been scored 8 (a high grade of independence where maximum is 10). This is due to the selection process to the Federal Constitutional Court too, stressing that not only but also Federal Constitutional Court Justices are elected by several independent bodies and the election procedure is representative, because the two bodies involved do not interfere in each other's decisions. Besides that, the report goes, the required majority in each chamber is a qualified two-thirds majority, warranting political opposition a voice in the selection of judges regardless of current majorities.

³⁸ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 968.

³⁹ CLARK, David S. The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat. *Southern California Law Review*, v. 61, no. 6, p. 1795-1848, September 1988, p. 1.810.

⁴⁰ Sustainable Governance Indicators. https://www.sgi-network.org/2020/Democracy/Quality_of_Democracy/Rule_of_Law/Appointment_of_Justices. Access April 6th, 2021.



Nevertheless, there has been a certain perception that there is a lack of public transparency in the process⁴¹. As a consequence, proposals have been presented for improving the procedure basically involving three innovations: a possible public hearing, a change in the bodies involved and innovations in the voting procedure.⁴²

The proposal for a public hearing is inspired in the US procedure for selection of Supreme Court Justices. Thus, candidacies would show up in a session before a public body and answer questions in public. According to this rationale, this would increment the process, making it more transparent. On top of that, the public hearing would highlight objective aspects of the candidacy, specially the candidate's legal qualifications, and, maybe, some personal aspects that could influence the individual's decisions. Actually, since 2010 there has been an informal hearing before the election committee, but it is completely secret, thus not able to fulfill the objection at stake.⁴³

Respecting the bodies encharged of selecting justices, some proposals have been made in order to institute a direct vote of the *Bundestag*, thus eliminating the election committee. Other proposals have gone in the direction of changing the roles of the *Bundestag* and the *Bundesrat* in the process, in order to encharge the *Bundestag* with the election and grant the *Bundesrat* consenting power. Other proposals have the goal of creating an official advisory committee encharged of finding suitable candidates.⁴⁴

The third group of proposals for improving the selection process relate to the voting procedure. In this respect, some proposals have been made in order to allow the choice of justices exclusively by drawing lots among all federal judges. Other proposals suggested transforming the election in a *yea* or *nay* on the one candidate previously selected by a special committee.⁴⁵

⁴¹ GESLEY, Jenny. How Judges Are Selected in Germany. Available at <https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/>. Access on April the 6th, 2021.

⁴² KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 968.

⁴³ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 968.

⁴⁴ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 968.

⁴⁵ KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. *International Journal of Constitutional Law*, v. 11, no. 4, p. 962-980, October 2013, p. 969.



5. FINAL CONSIDERATIONS

This paper exploring the selection of justices in a comparative perspective is part of a series named “Constitutional Law Around the Globe”. This chapter of the series focuses on Supreme and Constitutional Courts and how they are shaped in many contemporary democracies.

Second in the row, this paper focuses on the selection of justices to the German Federal Constitutional Court (*Bunderverfassungsgericht – BverfG*). In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the selection of justices to the Supreme Court of Brazil in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such as in Canada, South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.⁴⁶

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Ecuador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.⁴⁷

This normative challenge to judicial review has been strengthened by constitutional law scholars arguing that judicial review asserts itself contrasting the elected branches. As such, it would be under suspicion in a democracy.⁴⁸ The processes under which democratic jurisdictions can shape the plurality, transparency, partisanship and accountability of Supreme Courts need further research and debate. The selection of justices plays a key role

⁴⁶ KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts. Judicial Roles in Global Perspective**. New York. Cambridge University Press, 2013.

⁴⁷ COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. New York. Cambridge University Press, 2010.

⁴⁸ GINSBURG, Tom. **Judicial Review in New Democracies. Constitutional Courts in Asian Cases**. New York. Cambridge University Press, 2003.



on the subject in many democracies. However, there are many variations among jurisdictions.

The German odd and complex system for the selection of Justices to the Federal Constitutional Court has been subject to much criticism, as long as it is strongly influenced or even determined by political parties in a process mostly unknown to the public. As a means of improving the process, some proposals have been made in order to mirror the United States System of public and televised hearings by a representative political body. On top of that, there is a line criticism arguing that political balance between the two major parties is progressively becoming precarious and this can lead to a more politically-biased Constitutional Court.⁴⁹

Despite all criticism and improvement suggestions, the German Constitutional Court is still a model of technical judicial body and a world-recognized Constitutional Court, having developed a remarkable jurisprudence on constitutional and fundamental rights affairs over the decades.

REFERENCES

BICKEL, Alexander. **The least dangerous branch. The Supreme Court at the Bar of Politics**. New York. The Bobbs-Merrill Company, Inc., 1962.

BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo. Malheiros, 2007.

BOTTCHER, Hans-Ernst. The Role of the Judiciary in Germany. **German Law Journal**, v. 5, no. 10, p. 1317-1330, October 1, 2004.

BOROWSKI, Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. **Ratio Juris**, 16, no. 2, P. 155-186, June 2003.

CLARK, David S. The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat. **Southern California Law Review**, v. 61, no. 6, p. 1795-1848, September 1988.

COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. New York. Cambridge University Press, 2010.

GERMANY. Basic Law. Available. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516. Access on April 8 2021.

⁴⁹ STEINBEIS, Maximilian. No reason to be gentle. Available at <https://verfassungsblog.de/no-reason-to-be-gentle/>. Access on 20 April 2021.



GERMANY. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546).
http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. Access 15 April 2021.

GESLEY, Jenny. How Judges Are Selected in Germany. Available at <https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/>. Access on April the 6th, 2021.

GINSBURG, Tom. **Judicial Review in New Democracies. Constitutional Courts in Asian Cases**. New York. Cambridge University Press, 2003.
 KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts. Judicial Roles in Global Perspective**. New York. Cambridge University Press, 2013.

KISCHEL, Uwe. Party, Pope, and Politics - The Election of German Constitutional Court Justices in Comparative Perspective. **International Journal of Constitutional Law**, v. 11, no. 4, p. 962-980, October 2013.

MILLGRAMM, Karl-Heinz. Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States. **Yearbook: Supreme Court Historical Society**, p. 146-154, 1985.

MUNIZ-ARGUELLES, Luis; FRATICELLI-TORRES, Migdalia. Selection and Training of Judges in Spain, France, West Germany, and England. **Boston College International and Comparative Law Review**, v. 8, no. 1, p. 1-38, Winter 1985.

QUINT, Peter E. Leading a Constitutional Court: Perspectives from the Federal Republic of Germany. **University of Pennsylvania Law Review**, v. 154, no. 6, p. 1853-1878, June 2006.

RIEDEL, Johannes. Training and Recruitment Judges in Germany. **International Journal for Court Administration**, v. 5, no. 2, p. 42-54, October 2013.
 ROUSSEAU, Dominique. **Droit du contentieux constitutionnel**. Paris. Montchrestien, 2010.

SHAPIRO, Martin. Judicial Independence: New Challenges in Established Nations. **Indiana Journal of Global Legal Studies**, Bloomington, n. 20, pp. 253-277, 2013.

STEINBEIS, Maximilian. No reason to be gentle. Available at <https://verfassungsblog.de/no-reason-to-be-gentle/>. Access on 20 April 2021.

SUSTAINABLE GOVERNANCE INDICATORS. https://www.sgi-network.org/2020/Democracy/Quality_of_Democracy/Rule_of_Law/Appointment_of_Justices. Access April 6th, 2021.



TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. **University of Baltimore Journal of Media Law and Ethics**, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009.

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