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The Selection of Supreme Court Judges

What Can the World Learn from Canada, What Can Canada Learn from the World?**

The judges of the Supreme Court of Canada, the highest court of the country dealing also with constitutional matters, are appointed by the executive power. However, in October 2016, a new process was applied for the first time. It was not incorporated into the Supreme Court Act but remained rather a policy. It contained new elements including an independent and non-partisan advisory board preparing for the Prime Minister a shortlist of candidates, and two public hearings: one of the Minister of Justice and the Chair of the Advisory Board to explain the selection process for the MPs, and one of the candidates to answer questions of parliamentarians. The Government's communicated intent was to ensure a more transparent, inclusive, and accountable process. However, the new process was criticized by several authors because of its redundancies.

This paper aims to examine the Canadian selection process from multiple points of view. First, it gives a theoretical background of the constitutional principles that are relevant to the selection of supreme court judges and identifies the relevant international (soft law) requirements. Second, it analyses the current Canadian process and its realization taking also the historical aspects into account. Third, it gives a comparative constitutional law analysis: it compares the Canadian system with regulation and practice of the United States of America and several European countries. Finally, the paper seeks an answer to the question of what elements can optimise the process of selecting supreme court judges in a constitutional democracy.

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I Theoretical Background and International Requirements

As with all institutions that exercise public power, members of the constitutional courts should be democratically legitimized.[1] This is the basic constitutional principle that influences the selection systems of constitutional court justices. The countermajoritarian dilemma usually refers to the fact that courts are not directly legitimised. However, it is important to emphasize that also courts are democratically legitimized, but indirectly. Direct legitimation does not mean a higher quality.[2] The legitimacy of the constitutional review can be regarded as dependent on the selection process of the judges.[3]

Another basic constitutional principle that should be taken into consideration when deciding on a selection model is the separation of power. While the constitutional courts protect and enforce the constitution, they necessarily control (and conflict with) the other governmental branches. This control function makes it necessary to ensure the independence of constitutional review institutions. Even in states where the constitutional courts do not form part of the ordinary judicial system, their independence is a fundamental part of their constitutional role. The selection criteria and the process should ensure this independence.

However, as regards constitutional judges, it may be more accurate to talk about 'becoming independent' rather than 'being independent', since most of them are appointed thanks to the support of one or more political parties.[4] The principal aim in the appointment procedure is not that of appointing persons of unknown political beliefs but ensuring that, once a person is appointed, he or she can work without any pressure or influence from political or other external actors.[5]

There are no international legal obligations concerning the selection of constitutional court justices. The reason for that is that international organisations and agreements leave a wide margin of appreciation for the states to create their own constitutional system, including whether they institute a constitutional review organ or not and, if yes, with what characteristics.

However, indirectly, there are some international requirements that should be fulfilled here. If the constitutional review body deals with individual cases and not only abstract

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[1] This paper deals with institutions that carry out constitutional review independently of how they are called or the exact competences. As a result, when it uses the word 'constitutional courts' in general, it also includes constitutional review organs other than constitutional courts (supreme courts and constitutional councils). About the difficulties of defining constitutional courts see Katalin Kelemen, 'Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary' (2013) 54 (1) Acta Juridica Hungarica 6.

[2] Ernst Benda, Eckart Klein, Oliver Klein, *Verfassungsprozessrecht* (C.F. Müller 2012, Heidelberg) Rn. 15.

[3] Christine Landfried, 'The Selection Process of Constitutional Court Judges in Germany' in Kate Malleson, Peter H. Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006, Toronto) 197.

[4] However, some authors argue that judges will never become really independent; their judicial activity is bound to the ideology of the nominating parties. Zoltán Szente, 'The political orientation of the members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 (1) Constitutional Studies; Landfried (n 3).

[5] Kelemen (n 1) 6.

constitutional problems, it must follow the guarantees of a fair trial, including the right to an independent and impartial court.[6]

In the field of soft law, there are more guidelines concerning the selection of constitutional court judges. The UN Basic Principles on the Independence of the Judiciary rule only briefly on the selection of judges (not specifically constitutional or supreme court judges). According to the document, persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement for a candidate for judicial office to be a national of the country concerned shall not be considered discriminatory.[7]

The Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law (better known as the Venice Commission) issued several documents on this topic.[8] In its report of 1997 on the composition of constitutional courts, it examined the regulation and practice of 40 constitutional courts of its member states and observer states. According to the report, the direct appointment system is the most common among the supreme courts.[9] The appointment procedure of common law supreme courts, which does not distribute the power of appointment among the different public authorities, must be viewed in the context of the constitutional tradition and the personality of the constitutional judge in these systems. The elective system appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in the event of vacant positions.[10]

The Venice Commission identifies three main fields of concern; balance, independence, and effectiveness. Constitutional courts must, by their composition, guarantee independence from different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. A balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions. A minimum guarantee of independence is that a ruling party should not be in a position to have all judges

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[6] E.g. Article 10 of the Universal Declaration of Human Rights; Article 14 (1) of the International Covenant on Civil and Political Rights; Article 6 (1) of the European Convention on Human Rights; Article 8 (5) of the American Convention on Human Rights.

[7] Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[8] All of the examined countries below are members of the Venice Commission (France, Germany, Hungary, United States of America) or have an observer status (Canada). See more about the institution in Rudolf Dürr, 'The Venice Commission' in Tanja E.J. Kleinsorge (ed), *Council of Europe* (Wolters Kluwer 2013, The Netherlands).

[9] See a detailed description of the models below, in the comparative part.

[10] The composition of constitutional courts, CDL-STD(1997)020. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e> accessed 23 May 2018. 7.

appointed to its liking. Long terms of office and a ban on reappointment (or only one possible reappointment) may be a solution. Furthermore, special provisions might be necessary in order to maintain the effective functioning of the court when vacancies arise. Rules on appointment should foresee the possibility of inaction by the nomination authority and provide for an extension of the term of office of a judge until the appointment of his/her successor.[11]

The opinions that the Venice Commission has issued when examining the draft legislation of its member states also serve as guidelines. According to the Commission, the changing of the composition of a constitutional court and the procedure for appointing judges to the constitutional court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the constitutional court and the involvement of different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one political force or another.[12]

In the opinions, the Commission is very positive about the mixed system, in which the three main branches of power elect and appoint the members together, because it has more democratic legitimacy than a direct appointment system [13] and an elective system that involves the parliament, because it results in the society's trust in the court as a neutral arbiter.[14]

The qualified majority requirement is favoured by the Commission. It is designed to ensure that at least part of the opposition agrees on any candidate for the position of a judge at the Constitutional Court. It is advisable to provide for the inclusion of a broad political spectrum in the nominating procedure.[15]

The Commission also supports regulations that enhance a balanced composition, because such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people.[16] Diversity is also desirable concerning the legal background and age of the judges.[17]

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[11] The composition of constitutional courts, CDL-STD(1997)020. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e> accessed 23 May 2018, 21–22.

[12] CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court) para. 18.

[13] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para 19.

[14] CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para 13.

[15] CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), para 18, 19.

[16] CDL-AD(2005)039 Opinion on proposed voting rules for the constitutional court of Bosnia and Herzegovina, para 3.

[17] CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law NO. 47/1992 on the organisation and functioning of the constitutional court of Romania, para 17. CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para 18, 25.

The decision on a violation of the procedure for appointing a judge should be taken by the Court itself.[18] Finally, we should examine the aims of the selection procedure, which are, in general, to ensure that the members of the constitutional court are the best persons for the post. During the procedure, it should be examined whether the candidates fulfil the statutory requirements and are well-qualified. In addition, the selection procedure also aims to ensure the independence of the court from political influence. Besides, one aim may be to ensure a higher legitimacy, especially at those institutions that have a broad range of competences, and where the court has a strong control function above the legislative, executive, and sometimes also judicial branch.[19] Appointment mechanisms are also designed to insulate judges from short-term political pressures yet to ensure some accountability.[20] In addition, it can also be important to ensure the diversity of the members of the court. That requirement includes the balance of genders, members from different geographic regions, representation of various legal professions, jurisdictions, and fields of law. To sum up, the most important aim is to have independent, competent, and experienced judges, and a balanced and legitimate composition.[21]

II Selection of Supreme Court Justices in Canada

Canada follows the decentralised model of constitutional review, which means that it has no separate constitutional court and Canadian courts are generally capable of addressing judicial review and constitutional issues. The Canadian Supreme Court serves as the final court over constitutional matters.

The British North America Act of 1867, which serves as one of Canada's most important constitutional documents,[22] did not create a supreme court as this power fell within the competence of the British Judicial Committee of the Privy Council, which originally had ultimate judicial authority over all the off-island parts of the British Empire. This subordinated role also remained after the establishment of the Canadian Supreme Court in 1875, as far as until 1949.[23] The significance of the Court grew when the Canadian Charter of Rights was

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18 CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, para 20.

19 Epstein et al. set two goals: creating and sustaining an intellectually and legally distinguished and a politically independent bench. Lee Epstein, Jack Knight, Olga Shvetsova, 'Comparing Judicial Selection Systems' (2001) 10 (1) William & Mary Bill of Rights Journal 10.

20 Tom Ginsburg, *Judicial review in new democracies: constitutional courts in Asian cases* (Cambridge University Press 2003, Cambridge) 42.

21 The composition of constitutional courts, CDL-STD(1997)020. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e> accessed 23 May 2018, 6.

22 Now referred to as the Constitution Act, 1867. See especially Part VII 'Judicature', ss. 96–101.

23 Adam Dodek, Rosemary Cairns Way, 'The Supreme Court of Canada and Appointment of Judges in Canada' in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (ed), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, Oxford) 213.

adopted in 1982 and the Supreme Court became responsible for its enforcement. This development represented a shift from the traditional values of parliamentary supremacy to the new values of constitutional supremacy.[24]

Today, the Supreme Court of Canada, which decides 70-85 constitutional issues each year, is one of the most well-known constitutional bodies of the world.[25] Its decisions are regularly cited by other national constitutional courts and even by international human rights fora.[26]

According to the Supreme Court Act, the Court consists of a chief justice and eight puisne (ordinary) judges. The judges are appointed by the Governor in Council (representative of the monarch) by letters patent under the Great Seal.[27] In practice, the 'Governor in Council' does not actually mean the Governor-General, but rather the federal cabinet giving the Governor-General advice that to all intents and purposes cannot be refused. In practice, it is generally the prime minister who makes the proposal.[28] Different Prime Ministers may have relied on the advice of their Ministers of Justice to varying degrees, but the choice lay wholly within the Prime Minister's discretion.[29]

This system was inherited from England at the time of Confederation. However, in the meantime, England changed the same system by introducing institutional and political limits, which were not observed by Canada. The roots of the system can be found in the Middle Ages when all governmental powers came from the Crown, and concepts of accountability and participatory democracy were an oxymoron.[30]

The Supreme Court Act contains just a few provisions on eligibility: any person who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province may be appointed as a judge. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.[31] According to the Supreme Court, this requirement has a dual purpose. First, it aims to ensure that the Court has civil law expertise because while the other provinces of Canada have a common-law system, Quebec follows the civil law model. Second, according to the Court, this provision makes it possible for Quebec's legal traditions and social values to be represented on the

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[24] Peter McCormick, 'Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada' (2005) 7 (1) J. App. Prac. & Process 6–12.

[25] Statistics 2006–2017. <https://www.scc-csc.ca/case-dossier/stat/sum-som-eng.aspx> accessed 23 May 2018.

[26] Ran Hirschl, 'Going Global? Canada as Importer and Exporter of Constitutional Thought' in Richard Albert, David R. Cameron (ed), *Canada in the world. Comparative perspectives on the Canadian constitution* (Cambridge University Press 2017, Cambridge).

[27] Supreme Court Act, R.S.C., 1985, c. S-26, Section 4.

[28] McCormick (n 24) 13.

[29] Dodek and others (n 23) 217.

[30] Jacob S. Ziegel, 'Appointments to the Supreme Court of Canada: the time is right for change. The disarmingly simple Canadian procedure has come under increasing criticism… because it lacks accountability and transparency' (Spring 2000) Canadian Issues 22.

[31] Supreme Court Act, Section 5–6.

Court and for Quebec's confidence in the Court to be maintained.[32] This can enforce the legitimacy of the Court.

A connected issue is that, through several recent appointments, it was an intention to have bilingual candidates. The Supreme Court is exempt from the requirements of the Official Languages Act because of the above-mentioned Quebec-quota requirement. However, the judges of the Supreme Court are called on to interpret both civil and common law, as well as to make rulings on cases that were argued in the lower courts in French and English. That is why the Rules of the Supreme Court of Canada state that the parties may use either language in any oral or written communication with the Court, and that simultaneous interpretation services must be provided during the hearing of all proceedings. In the last decade, seven bills were submitted to make bilingualism of the judges obligatory but none of them was successful.[33] The requirement of bilingualism is followed by harsh criticism as, according to some opinions, it would not help in choosing the best-qualified candidates.[34]

In addition, according to a long-established, unwritten constitutional convention, a territorial division is also applied. Beside the Quebec judges, the remaining six seats are also held on a regional basis: three seats to Ontario, two to the west (one to the prairie provinces and one to British Columbia), and one to the maritime provinces.[35]

Over time, other characteristics besides regionalism have become notable: examples are the appointment of the first judge from neither of the two so-called 'founding peoples' of Canada, that is not English or French, notable immigrant communities, and the first female judge.[36]

The selection process of the supreme court judges was not an issue for a long time, thanks to the humble role of the court in the early days. The only recommendation raised was about the obligation to consult with the provincial ministers of justice but that would have put the right to select the judge in the executive branch.[37]

In 2004, the Minister of Justice talked publicly for the first time at a committee hearing about the process of selecting supreme court justices behind closed doors. He named it an 'unknown but not a secret process' and explained which public officials and other stakeholders they consult with and what kind of aspects they consider.[38] In the legal scholarship, several

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32 Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, para 18.

33 Marie-Ève Hudon, 'Bilingualism in the Federal Courts' (parliamentary report) <http://publications.gc.ca/collections/collection_2011/bdp-lop/bp/2011-40-eng.pdf> accessed 23 May 2018.

34 Richard Albert, 'Bilingualism on the Supreme Court of Canada' <www.iconnectblog.com/2010/04/bilingualism-on-the-supreme-court-of-canada/> accessed 23 May 2018.

35 'Two new Supreme Court of Canada Justices nominated' <www.iconnectblog.com/2011/10/two-new-supreme-court-of-canada-justices-nominated/> accessed 23 May 2018.

36 Dodek and others (n 23) 212.

37 Erin Crandall, 'Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada' (2014) 41 (1) Queen's Law Journal 81–85.

38 Irwin Cotler, 'An unknown but not a secret process: Appointment of Supreme Court Justice' (Summer 2004) 27 (2) Canadian Parliamentary Review 13–15.

criticisms appeared, which urged the participation of parliament in the process, the establishment of an independent advisory body, and the ensuring of transparency but some time had to pass until the political decision on the changes was taken.[39]

In 2003, the newly elected prime minister raised for the first time that the selection process suffers from a 'democratic deficit' and a more transparent and more accountable process should be introduced.[40] The new process, which required the parliamentary hearing of the candidates, was introduced in 2006. However, this new procedure was not followed in all of the cases when filling a vacancy, and in 2014, it was announced that it would no longer be observed at all.[41]

In August 2016, the Government of Canada announced that the vacant mandate in the Supreme Court will be filled according to a new process that is 'transparent, inclusive, and accountable to Canadians'.[42]

The procedure started with a public call for application, where everyone who fulfilled the requirements could apply. To apply, one had to fill in a 22-page questionnaire that asked about the professional career, personal qualities (including also the state of health) and the candidate's opinion on the constitutional role of the judicial branch and the judges.[43] In addition, the candidate also had to submit five decisions, legal documents or publications of her,[44] and to give consent to a background check.[45]

The content of the questionnaire was in harmony with the requirements that were set by the Government for the candidates, beside the statutory requirements. These were personal skills and experience (demonstrated superior knowledge of the law; superior analytical skills; ability to resolve complex legal problems; awareness of and ability to synthesise information about the social context in which legal disputes arise; clarity of thought, particularly as demonstrated through written expression; ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law; commitment to public service), personal qualities (irreproachable personal and professional integrity; respect and consideration for others; ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society; moral courage; discretion; open-mindedness), and the institutional needs of the Court

[39] Ziegel (n 30) 22. Adam M. Dodek, 'Reforming the Supreme Court Appointment Process, 2004–2014: A 10-Year Democratic Audit' (2014) 67 Supreme Court Law Review (2nd Series) 111.

[40] McCormick (n 24) 1.

[41] See a detailed report of the history of the appointments in Erin Crandall, Andrea Lawlor, 'Courting Controversy: The House of Commons' Ad Hoc Process to Review Supreme Court Candidates' (2015, Winter) Canadian Parliamentary Review 35–43.

[42] New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada.

[43] Questionnaire <http://www.fja-cmf.gc.ca/scc-csc/Questionnaire-SCC-Judicial-Appointment-Process.pdf> accessed 23 May 2018.

[44] How to Apply and Instructions <www.fja-cmf.gc.ca/scc-csc/form-formulaire-eng.html> accessed 23 May 2018.

[45] Background check form <www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/bc-va/bc-va.pdf> accessed 23 May 2018.

(ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals; expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court; ensuring that members of the Supreme Court are reasonably reflective of the diversity of Canadian society).[46] In the case of the candidate appointed by the Prime Minister, the substantive parts of the questionnaire would be disclosed to the public after their appointment.[47]

The Office of the Commissioner for Federal Judicial Affairs checked whether the applications had fulfilled the formal criteria then forwarded them to the independent Advisory Body. The members of the Advisory Body received their mandate in different forms. Three members, at least two of whom were not advocates or barristers in a province or territory, were nominated by the Minister of Justice. A practicing member of the bar of a province or territory was nominated by the Canadian Bar Association. A practicing member of the bar of a province or territory was nominated by the Federation of Law Societies of Canada. A retired superior court judge was nominated by the Canadian Judicial Council, and a legal scholar was nominated by the Council of Canadian Law Deans. The Advisory Board had to submit to the Prime Minister the names of at least three but up to five candidates, assessing how the candidates met the statutory requirements and the criteria established by the Prime Minister.[48] The Advisory Board consulted also with the Chief Justice of the Supreme Court and had also the obligation to seek out qualified candidates and actively encourage them to apply for the post.

The Minister of Justice consulted on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers and opposition Justice Critics, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs. Following the consultations, the Minister of Justice presented recommendations to the Prime Minister who chose the nominee.[49]

Hereupon, two hearings took place. During the first hearing, the Minister of Justice and the Chair of the Advisory Board had to appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the chosen nominee met the statutory requirements and the criteria set by the Government and any additional reasons in support of the candidacy. In the second hearing, the nominee had to meet the members of

46 Qualifications and Assessment Criteria <www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html> accessed 23 May 2018.

47 How to Apply and Instructions <www.fja-cmf.gc.ca/scc-csc/form-formulaire-eng.html> accessed 23 May 2018.

48 Terms of Reference of the Advisory Board <www.fja-cmf.gc.ca/scc-csc/mandate-mandat-eng.html> accessed 23 May 2018.

49 New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. <pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> accessed 23 May 2018.

the same committee, as well as the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from the two opposition parties that had no parliamentary group. This second meeting did not take place in the Parliament but at the University of Ottawa.[50] The question and answer session were moderated by McGill University law professor Daniel Jutras.[51] The session was public; one could also follow it via the Internet. The MPs asked the nominee mainly about his French, his opinion on the role of judges, and his attitude towards diversity.[52] After this, he was formally appointed and sworn in.

The Advisory Board had to submit a report within a month of the judge being appointed, which outlined how it fulfilled its mandate, including costs related to its activities and statistics related to the applications received. In the public report, the Advisory Board could also make recommendations for improving the process.[53] In its recommendations on improvements to the appointment process and work of the Advisory Board, the Board made recommendations primarily concerning the timing of the process (not in the summer months), the strict timeframe and the format of the application materials and forms.[54]

The same process was applied for a second time in December 2017.[55] One difference was that it was directly indicated in the call that only candidates from Western Canada or Northern Canada could apply to ensure a geographic balance.

The public hearing of the nominee was moderated by François Larocque, interim dean for the University of Ottawa Faculty of Law's common law section, where the nominated Sheilah Martin 'voiced support for better sexual assault education for judges, acknowledged the taut balancing act of competing Charter rights, and touted existing supports for jury members (...), but steered away from any queries that could touch upon future cases or controversial issues.'[56]

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50 Maxime St-Hilaire, 'The New Selection Process for the Supreme Court of Canada: A Global Constitutionalism Perspective' (2016) Int'l J. Const. L. Blog, Oct. 20, <www.iconnectblog.com/2016/10/canada-new-selection-process> accessed 23 May 2018.

51 Prime Minister of Canada announces appointment of Mr. Justice Malcolm Rowe to Supreme Court of Canada. <pm.gc.ca/eng/news/2016/10/28/prime-minister-canada-announces-appointment-mr-justice-malcolm-rowe-supreme-court> accessed 23 May 2018.

52 John Paul Tasker, 'Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights' October 25, 2016. <www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318> accessed 23 May 2018.

53 New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. <pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> accessed 23 May 2018. The report is available here: <www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf> accessed 23 May 2018.

54 Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August–September 2016) <www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf> accessed 23 May 2018.

55 Supreme Court of Canada Appointment Process – 2017 (Appointment of the Honourable Sheilah Martin) <http://www.fja-cmf.gc.ca/scc-csc/index-eng.html> accessed 23 May 2018.

56 Marco Viglotti, 'Supreme Court nominee Sheilah Martin veers from the controversial during questioning from MPs', The Hill Times, December 5, 2017. <http://www.hilltimes.com/2017/12/05/supreme-court-nominee-sheilah-martin-veers-controversial-questioning-parliamentarians/127931> accessed 23 May 2018.

After the end of the appointment process, the Advisory Board again submitted a report. The recommendations dealt with the timeframe for applications (to give more time for the applications and for the board to decide), the advisory board deliberations (to have an early consultation with the Chief Justice), and format of the application materials.[57]

Even if the Canadian selection process has various strengths, it was criticised on several points. The first is that the process can be unilaterally amended or the development can be reversed at any time because it forms only a policy and not a legal requirement. The reason for that is that although the Supreme Court is not formally included in the constitution, according to the decision of the Supreme Court, Sections 5 and 6 of the Supreme Court Act, dealing with the composition of the Court, are constitutionalised (i.e. they form part of the constitution so can be amended only by a very strict amendment procedure).[58] So the Government did not attempt to change the formal rules of the Act but adopted rather a policy that complements the statutory requirements.

Critics also queried the 2016 nomination because a white male again became a member of the Court, which worsened the gender balance. The representation of the First Nations was not an aim of the appointing authority, because this is just a criterion to consider but not an obligatory requirement.[59] The bilingual criteria set by the Government also posed a barrier to indigenous judges.[60] The 2017 appointment took the gender balance into consideration but failed again to appoint the first Indigenous judge of the court.[61]

Some points of the process were not so clear. For example, the role of the Chief Justice is quite unclear: she is consulted twice during the process, and for the second time about a shortlist that may not contain the person who she recommended. The parliament also has the opportunity to participate in the process on two occasions; however, the second time it gets only an explanation but not information about the decision. One does not know anything about any possible difference of opinion between the Minister of Justice and the Prime Minister.[62]

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57 Independent Advisory Board for Supreme Court of Canada Judicial Appointments – Report on 2017 Process <http://www.fja-cmf.gc.ca/scc-csc/smartin-report-rapport-eng.html#bm08> accessed 23 May 2018.

58 Robert Leckey, 'Constitutionalizing Canada's Supreme Court', (2014) Int'l J. Const. L. Blog, Mar. 25, <www.iconnectblog.com/2014/03/constitutionalizing-canadas-supreme-court> accessed 23 May 2018. Crandall (n 37) 91.

59 John Paul Tasker, 'Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights' October 25, 2016, <www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318> accessed 23 May 2018.

60 Kristy Kirkup, 'Top court's bilingual rule a barrier to indigenous judges: Sinclair, Bellegarde' The Globe and Mail, 22 September 2016. <www.theglobeandmail.com/news/national/supreme-courts-bilingual-requirement-unfair-sinclair-bellegarde/article32011596/> accessed 23 May 2018.

61 Kathleen Harris, ''Extraordinary jurist': Sheilah Martin named new justice to the Supreme Court of Canada' CBC News, November 29, 2017. <http://www.cbc.ca/news/politics/supreme-court-justice-sheilah-martin-1.4424318> accessed 23 May 2018. Sean Fine, 'Trudeau's Supreme Court pick tangled in race, gender politics, Globe and Mail' November 16, 2017. <https://www.theglobeandmail.com/news/national/trudeaus-decision-on-supreme-court-appointment-tangled-in-race-gender-politics/article36999295/?click=sf_globefb> accessed 23 May 2018.

62 St-Hilaire (n 50).

In its report on the new process for judicial appointments to the Supreme Court of Canada, the Standing Committee on Justice and Human Rights proposed that the advisory board should be permanent and more diversified.[63]

It also complained that the hearing was not an official parliamentary hearing, so parliamentary privilege did not apply to protect both the members posing questions and the nominee answering them.[64]

Finally, the Advisory Board, in the report on the 2017 nomination, expressed its concerns about making a part of the application form public. It received feedback from candidates that, in order to respect the integrity of the process, they fully and candidly answered all the questions on the application form, including being forthcoming with respect to details about their personal lives. Concern was expressed about the necessity of making all these details public, should they be chosen as the Prime Minister's nominee. In the view of the Advisory Board, attention should be paid to this requirement, in case it discourages potential candidates from applying.[65]

III Comparative Overview

The selection of constitutional court justices and supreme court justices (if they have the power of judicial review) may be grouped into three main models.[66] The first is the direct appointment system, which does not involve any voting procedure. In this group are the countries that follow a decentralised model (mainly common law systems), where the supreme court has the power of constitutional review, but also some countries with a separate constitutional court. The appointment can be uni-channel, meaning that all of the appointments come from the same branch of government (e.g. in Canada, Supreme Court judges are appointed by the Government) or multi-channel, where the appointments come from different state organs or different branches (e.g. at the Constitutional Council of France, the appointments are divided among the presidents of the two chambers of the parliament and

63 The new process for judicial appointments to the Supreme Court of Canada. Report of the Standing Committee on Justice and Human Rights, February 2017. <http://publications.gc.ca/collections/collection_2017/parl/xc66-1/XC66-1-1-421-9-eng.pdf> accessed 23 May 2018, 6.

64 Ibid 8.

65 Independent Advisory Board for Supreme Court of Canada Judicial Appointments – Report on 2017 Process <http://www.fja-cmf.gc.ca/scc-csc/smartin-report-rapport-eng.html#bm08> accessed 23 May 2018.

66 Ginsburg identifies four methods of judicial appointment: (i) single-body appointment mechanisms; (ii) professional appointments; (iii) co-operative appointment mechanisms; and (iv) representative appointment mechanisms. Ginsburg (n 20) 43. Katalin Kelemen, following Wojciech Sadurski, uses another classification: the Split model is where several bodies share the power of appointment; the collaborative model means cooperation between the executive and the legislative branches: the different bodies involved in the appointment procedure do not act independently, but they have to collaborate; and in the parliamentary model the members are elected by the Parliament. Kelemen (n 1) 12–17.

the President of the Republic). The second form is the elective system, which tends towards greater democratic legitimacy. Here the electing authority can be the sole chamber of the parliament (e.g. Hungary, Portugal), the lower house of parliament (e.g. Croatia, Poland), both houses of parliament (e.g. Germany), or a joint sitting of the two (Switzerland). There are also differences concerning the nominations. The nominations may come from the President of the Republic, from a committee of the parliament, from the Government or from the judiciary. The hybrid or mixed system contains elements of the appointment and elective systems and has many variations. Usually, the elective element dominates (e.g. Belgium, Spain) but, in some countries, the elective and appointing elements have the same weight.[67]

In the following section, the paper will present the solution of four countries and focus on the transparency of the selection of constitutional court or supreme court judges in them. Among them, France has an appointing system, Germany and Hungary an elective system, and the United States of America a hybrid system. A comparison can, therefore, be made between the different models.

1 Selection of the Members of the Constitutional Council of France

France uses the appointment system but, unlike Canada, a multi-channel appointment system.

The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One-third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.[68]

To become a member of the Constitutional Council, one should fulfil only one requirement: enjoying full civil and political rights – there are no professional qualifications for membership and a degree in Law is not a requirement. However, according to the empirical data, in the practice since 1959, more than 90% of the members had a legal or public administration degree.[69]

Originally, the appointment was totally discretionary, which was harshly criticised by the scholarship because of politicisation and the nomination of personal or political friends. It is important to add that, in these decades, the activity of the Council was rather not judicial.[70]

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67 The composition of constitutional courts, CDL-STD(1997)020. <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e> accessed 23 May 2018. 4–5.

68 Constitution Article 56. In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. This paper does not deal with this question as it is irrelevant to our topic, although a very problematic one. See for example Pierre Pactet, Ferdinand Mélin-Soucramanien, *Droit constitutionnel* (Dalloz 2012, Paris) 499. Dominique Rousseau, *Droit du contentieux constitutionnel* (LGDJ 2013, Paris) Rn 60.

69 Thierry S. Renoux, Michel de Villiers, *Code Constitutionnel* (LexisNexis 2013, Paris) 695.

70 Rousseau (n 68) Rn 56–58.

This unrestricted nomination resulted in a situation that experienced politicians became members of the Council, which might account for a fine-tuned political sensitivity.[71]

The constitutional amendment of 2008, which made the Council a real judicial body by introducing the priority preliminary ruling on the issue of *constitutionality (question prioritaire de constitutionnalité, QPC),* also changed the appointment procedure. Since then, appointments coming from all appointing authorities are subjected to the opinion of the Constitutional Law Committee of each House. The appointment of a candidate presented by the appointing authority may be blocked by a three-fifths majority vote.[72] The appointment decision cannot be contested before the Council of the State.[73]

The parliamentary opinion also serves as a guarantee, because the appointing authorities are more pressed to nominate persons who are respected because of their legal qualifications and moral qualities. The parliamentary hearing is public and open to the press, so it is a guarantee of a more transparent process.[74] Candidates should answer questions and the process is usually televised so this can deter nominations only purely political grounds. As in the United States, a parliamentary opinion can stop the President's candidate. However, there is also a voice that considers this step only symbolic as, because of the bipolar logic and the voting rigor of parties, it is quite impossible to reach the blocking three-fifth of the votes.[75]

The multi-channel system is also criticized. The selection of members of the Council is a matter of high politics.[76] It cannot be excluded that all the three presidents appoint someone who is close to their own political orientation. If the President of the Republic and the parliamentary majority (therefore, as a consequence, the President of the National Assembly) have the same political orientation, then two of the three newly appointed members will enforce the majority in the Council, even when they must decide on the constitutionality of a bill adopted by this political majority. If their orientation is different, the Council will change but only with a delay and partially. There will be a phase shift and division based on politics when it should be decided only on legal grounds.[77] This was the case in 2010, when all three nominees were selected on political grounds and, from the eleven members, seven had a political background and only four a legal one. In addition, it happened at the same time as the Council first started to deal with QPCs.[78]

Other opinions hold that the fear of pure political decisions has no basis, as the nomination process is always more complex. First, the fact that there are nominations every

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71 Marie-Claire Ponthoreau, Fabrice Hourquebie, 'The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice' (2008) 2 The Journal of Comparative Law 273.

72 Renoux, de Villiers (n 69) 694.

73 Jean Gicquel, Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques* (Montchrestien 2010, Paris) 733.

74 Pierre Avril, Jean Gicquel, *Le Conseil constitutionnel* (Montchrestien 2011, Paris) 63.

75 Rousseau (n 68) Rn 59.

76 Doris Marie Provine, Antoine Garapon, 'The Selection of Judges in France: Searching for a New Legitimacy' in Kate Malleson, Peter H. Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006, Toronto) 181.

77 Pactet, Mélin-Soucramanien (n 68) 498.

78 Avril, Gicquel (n 74) 66.

three years can ensure some political balance on its own.[79] Second, the practice tends to combine the competence and the experience of political persons. This complexity is undoubtedly rewarding, regarding the necessary conciliation between legal conformity and political opportunity.[80]

In most cases, the Council does not hesitate to control the political power, even if the majority of members received their mandates from this power. The key to their independence is this 'duty of ingratitude'. The authority of the members is due to their independence, preparedness, and their resolute mission.[81]

2 Selection of the Members of the Constitutional Court of Hungary

The Hungarian Constitutional Court was established during the democratic transition in 1989 and started its operation in 1990. The Constitutional Court is the principal organ for the protection of the Fundamental Law.[82] The Constitutional Court is a body of fifteen members, each elected for twelve years by a two-thirds majority of the Members of Parliament.[83] Members of the Constitutional Court may not be re-elected.[84]

Any Hungarian citizen who has no criminal record and has the right to stand as a candidate in parliamentary elections shall be eligible to become a Member of the Constitutional Court, if they have a law degree; have reached 45 years of age, but have not reached 70 years of age; and are theoretical lawyers of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or have at least twenty years of professional work experience in the field of law.[85]

Members of the Constitutional Court are proposed by a Nominating Committee, made up of at least nine and at most fifteen members, appointed by the parliamentary fractions of the parties represented in the parliament. The Committee contains at least one member from each of the parliamentary fractions. Candidates are heard by the Parliament's standing committee dealing with constitutional matters. The Parliament then elects the members.[86]

The public usually does not know much about the candidates, their qualifications or the requirements for their selection. The CVs of the candidates are usually attached to the draft resolution, but these are opaque and have a non-uniform structure; it is even hard to check their fulfilment of the statutory requirements.[87]

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79 Renoux, de Villiers (n 69) 694.

80 Gicquel, Gicquel (n 73) 733.

81 Pactet, Mélin-Soucramanien (n 68) 499.

82 *Magyarország Alaptörvénye* (Fundamental Law of Hungary) Article 24 (1).

83 *Magyarország Alaptörvénye* (Fundamental Law of Hungary) Article 24 (8).

84 Act CLI of 2011 on the Constitutional Court Section 6 (3).

85 Act CLI of 2011 on the Constitutional Court Section 6 (1).

86 Act CLI of 2011 on the Constitutional Court Section 7–8.

87 See for example the attachments of the last resolution on the election of members of Constitutional Court: <www.parlament.hu/irom40/12970/12970.pdf> accessed 23 May 2018. The same is criticized by Attila Vincze,

In 2011, non-governmental organisations prepared a report in which they outlined the careers of the candidates, using the publicly available data that were not included in the candidacy documents. They also made recommendations for the Members of Parliament on what kind of questions they should ask during the committee hearing of each candidate. [88]

The sittings of the Nominating Committee are closed at the decision of the committee, as there is no statutory obligation to make them public. It means that the public hearing before the standing committee dealing with constitutional matters is the first time when the public can have access to some information about the candidates and the selection criteria.

However, the public hearings before the standing committee cannot fulfil their functions at this late phase of the selection process. The public can hardly know what happened at the hearing (only a few camera shots in the media informs them), and the opinion of the committee is made after the same pattern. It contains only the fact that the committee heard the candidate and supported him or her unanimously.[89] Upon a great number of occasions, the public hearing occurred without a real discussion of the merits, without questions, so making it impossible to have public access to any relevant information about the candidates. Before 2010, the cause for that was that the parliamentary groups usually made an agreement on the candidate before the hearing, a closed session held by the Nominating Committee or even before that, in informal meetings. As such, the public hearing tended to be a compulsory 'theatre play'. After 2010, the Government had a two-thirds majority in the parliament. They modified the Constitution and the Constitutional Court Act and changed the composition of the Nominating Committee. Instead of the former solution, where all the parliamentary groups could send one member to the Committee, the new rule prescribed a composition that mirrored the proportion of the parliamentary groups.[90] It means that the government majority was able to make proposals for the mandates of the Constitutional Court justices. Consequently, the opposition parties refused to take part in several public hearings of candidates proposed by the governmental majority.[91]

Since 1989, there were several occasions when the necessity and opportunity of a model change came up. These ideas were partly about establishing an external, independent body that could make proposals for the Parliament, partly about the introduction of the multi-channel electoral system, where one part of the mandates comes from the President of the Republic and one part from the representatives of the judiciary.[92]

Péter Csuhány, Pál Sonnevend, András Jakab, '32/A. § [Az Alkotmánybíróság]' in András Jakab, *Az Alkotmány kommentárja* (Századvég Kiadó 2009, Budapest) para 240.

88 Jelentés a kormánypártok alkotmánybíró-jelöltjeiről. ekint.org/lib/documents/1479662414-nyilv%C3%A1nos_jelent%C3%A9s_ekint_tasz_final.pdf.

89 Vincze and others (n 87) para 240.

90 *Az Alkotmány 2010. július 5-i módosítása; az Alkotmánybíróságról szóló 1989. évi XXXII. törvény módosításáról szóló 2010. évi LXV. törvény.*

91 See for example: Paródiának tűnt az alkotmánybíró-jelöltek meghallgatása. <index.hu/belfold/2014/09/22/alkotmanybirok_meghallgatasa/> accessed 23 May 2018.

92 András Holló, *Az alkotmányjognak asztalánál* (HVG-Orac 2015, Budapest) 29, 100, 105, 112, 129.

Changes were also proposed by László Sólyom, former President of the Constitutional Court, while he was the President of the Republic. In his veto, where he sent back to the Parliament the above-mentioned amendment on the composition of the Nominating Committee for further consideration, he wrote '[t]he current election system of the members of the Constitutional Court in the Constitution did not work. It would be necessary to have new rules that better serve the independence and high professional quality of the justices, and at the same time enable the quick fulfilment of the vacant mandates by ensuring constitutional guarantees.' He proposed the introduction of a multi-channel, mixed model. According to him, this would ensure the Court's operations also in the long term, decrease the possibility of direct political party influence and, at the same time, it is in harmony with the regulations that are generally used in Western Europe and in the Central and Eastern European region. He proposed the division of the selection among the parliament, the President of the Supreme Court and the President of the Republic.[93]

The Venice Commission also proposed a change of model in its opinion on the Act on the Constitutional Court. According to it, while the 'Parliament-only' model provides high democratic legitimacy, a mixed composition has the advantage of shielding the appointment of some of the members from political actors. Taking into account the situation at that time, the Commission recommended a mixed composition to avoid the risk of the Constitutional Court becoming politicised.[94] However, these ideas never became real, and both the new Constitution and the new Act on the Constitutional Court adopted in 2011 maintained the former solution.

3 Selection of the Members of the Constitutional Court of Germany

As in Hungary, Germany also elects the members of the Federal Constitutional Court. Half of the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat.[95]

The Constitutional Court consists of two Senates, each composed of eight Justices. Three Justices of each Senate are elected from among the judges of the Supreme Federal Courts. Only judges who have served at least three years with one of the Supreme Federal Courts should be elected.[96]

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93 *Elnöki levél a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról szóló törvény (T/189. számú törvényjavaslat) visszaküldéséről,* 2010. június 21. 5–7. <www.solyomlaszlo.hu/archiv/admin/data/file/6939_20100621_visszakuldo_level_alkotmanybirok_cimerrel.pdf> accessed 23 May 2018.

94 Opinion on Act CLI OF 2011 on the Constitutional Court of Hungary. Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15–16 June 2012) point 8. <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)009-e> accessed 23 May 2018.

95 Basic Law of Germany, Article 94.

96 Federal Constitutional Court Act § 2.

The Justices must be at least 40 years of age, be eligible for election to the Bundestag, must have stated in writing that they are willing to become a member of the Federal Constitutional Court, and must be eligible for judicial office.[97] Originally, it was also an eligibility requirement that the judges had to be distinguished by a special knowledge of public law and must be experienced in public life. After the deletion of this provision, it is the responsibility of the electoral boards to fully appreciate the professional competence and overall personality of the nominees.[98]

Most of the justices come from the ordinary courts. Lawyers, former members of the Bundestag and former members of the federal or state governments are also represented. Political parties usually strive after having a certain number of law professors in the Court.[99]

The Justices who are to be elected by the Bundestag shall, without prior debate, be elected by secret ballot and upon a proposal by the Electoral Committee. This Electoral Committee consists of twelve members of the Bundestag and is elected pursuant to the principles of proportional representation. A proposal shall require at least eight votes in the Electoral Committee to pass.[100]

The Bundestag elects the members not directly but via its Electoral Committee. The Constitutional Court held this delegation constitutional,[101] even if there are critical opinions in the legal scholarship.[102] From a constitutional political point of view, the aim of the indirect election is to be able to examine exhaustively the professional quality of the candidates. This is easier if the elective body is smaller. However, the discussion on the candidates and their qualities is not public.[103] In addition, the members of the Electoral Committee are obliged to maintain confidentiality concerning the candidates' personal circumstances that become known to them as a result of their work in the Committee, as well as about the Committee's discussions on this issue and the casting of votes.[104] This confidentiality also covers information on the candidates' private contacts and political beliefs, i.e. all information discussed in the meeting. However, it does not cover the data that the committee members obtained from a different source. On the other hand, there is no sanction in the event of the breach of confidentiality. As arguments for the secrecy, the following are cited: protection of the justice candidate, avoidance of misguided considerations during the election, and guarantee of the

97 Federal Constitutional Court Act § 3 (1) and (2).

98 Benda and others (n 2) Rn 124.

99 Klaus Schlaich, Stefan Korioth, *Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidung* (C. H. Beck 2012, München) Rn 41.

100 Federal Constitutional Court Act § 6.

101 BVerfGE 131, 230.

102 Volker Epping, Christian Hilgruber, *Grundgesetz Kommentar* (C. H. Beck 2013, München) Artikel 94, Rn. 5; Dieter Wiefelspütz, Berlin, Die Bundesverfassungsrichter werden vom Deutschen Bundestag direkt gewählt! (2012) 65 (24) Die Öffentliche Verwaltung.

103 Benda and others (n 2) Rn 133–134.

104 Federal Constitutional Court Act § 6 (4).

independence of the committee member.[105] Critics propose the introduction of public hearings to give an opportunity for all participants (judges and politicians) to debate the scope and nature of constitutional review in a democracy. Media coverage of the hearings would allow the public to be better informed on these issues, and learn about the educational, professional, societal, and political experiences of candidates.[106]

The Justices who are to be elected by the Bundesrat shall be elected by two-thirds of the votes of the Bundesrat.[107] Finally, the Federal President shall appoint the elected Justices.[108] He can refuse the appointment only if he is convinced that the eligibility requirements are not met, that the election procedure has been violated or the appointment of the person concerned has caused damage to the interests of Germany. If there is a dispute between the Bundestag/Bundesrat and the Federal President, the Constitutional Court can decide on the matter.[109]

The multi-channel election system (partly Bundestag, partly Bundesrat) ensures, on one hand, the democratic legitimacy through the attachment to the political majority and, on the other hand, the federal-state principle, represented by the Bundesrat in the procedure.[110]

According to certain critics, in reality, Constitutional Court judges in Germany are selected by a very small group of leading members of political parties.[111] The two-thirds majority should prevent the parliamentary majority from choosing close friends, associates or otherwise favourable judges by itself. Because the participation of the opposition is practically necessary due to the majority requirements, a broad basis of trust should be secured for the members of the Constitutional Court.[112]

In the practice, however, the selection process has become a 'collaborative exercise between the ruling coalition and the main opposition parties in both houses'.[113] Very similar to the situation in Hungary before 2010, the political parties in Germany do not seek consensus but elect their own candidate alternately or use a 'candidate package' and wait until two mandates are vacant and they can share the places. It means also that neutrality becomes merely a formal requirement of non-membership of one of the two parties. The actual selection does not happen in the committee but by the two biggest parties each naming one

105 Dieter C Umbach, Thomas Clemens, Franz-Wilhelm Dollinger, *Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar und Handbuch* (C.F. Müller 2005, Heidelberg) § 6, Rn 20; Brigitte Zypries, 'The Basic Law at 60 – Politics and the Federal Constitutional Court' (2010) 11 (1) German Law Journal 97.

106 Landfried (n 3) 208.

107 Federal Constitutional Court Act § 7.

108 Federal Constitutional Court Act § 10.

109 Benda and others (n 2) Rn 138.

110 Epping, Hilgruber (n 102) Artikel 94, Rn. 3.

111 Ulrich K. Preuß, 'Die Wahl der Mitglieder des BVerfG als verfassungsrechtliches und -politisches Problem' (Oktober 1988) Zeitschrift für Rechtspolitik 392.

112 Benda and others (n 2) Rn 128.

113 Donald P. Kommers, 'Autonomy versus Accountability. The German Judiciary' in Peter H. Russell, David M. O'Brien (ed), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001) 149.

candidate. Sometimes the candidate of the other party is totally unacceptable, and the party makes it public. As such, this process does help to avoid candidates with extreme convictions,[114] while purely political candidates who might not be sufficiently qualified tend to be vetoed by the other party.[115]

4 Selection of the Members of the Supreme Court of the United States

The United States of America uses the hybrid model for the selection of Supreme Court justices. The Constitution does not regulate the selection process; it only establishes the Supreme Court and gives the justices a lifelong mandate, 'during good behavior'.[116]

The power to nominate the Supreme Court justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate. This is the procedure that is followed in the case of all federal judges. This selection system promotes the greatest degree of judicial independence,[117] especially compared to the state judges' selection systems, which usually promote judicial accountability.

Historically, vacancies have occurred every two or three years, so presidents having two full terms can have a serious impact on the composition of the Court. The recent advances in life expectancy resulted in justices tending to serve longer today, and vacancies occur irregularly and unpredictably, which is why the president's choice is more crucial.[118]

While the Framers of the Constitution inserted qualifications for all elected offices, they were notably silent when it came to requirements for the federal judiciary. Nominees for the bench need not have even read the law, much less hold a law degree. There are recommendations in the legal scholarship to specify qualifications for the office.[119]

However, presidents use a variety of criteria when selecting their candidates. The first set of criteria includes the qualifications of the potential nominee, namely competence, experience, judicial temperament, and ethical standards. The second set of concerns is mostly ideological and concerns the political and ideological belief of the candidate. The third aspect can be rewarding those who have been active in the president's party. The fourth category involves the pursuit of political support from a societal group, such as Latino voters. Finally, the symbolic representativity of the Court can be also relevant. The best example for that is the nomination of the first Afro-American justice.[120]

The way the executive branch handles the nomination process varies depending on the president's political interest in judicial appointments. The task of evaluating potential

114 Umbach and others (n 105) § 6, Rn 23–24.

115 Uwe Kranenpohl, 'Bewährt oder reformbedürftig? Für und Wider das aktuelle Verfahren der Richterauswahl zum Bundesverfassungsgericht' (2011) 9 (1) Zeitschrift für Staats- und Europawissenschaften 82.

116 Constitution Article III, Section 1.

117 Mark C. Miller, *Judicial Politics in the United States* (Westview Press 2015, Boulder) 55.

118 Ralph A. Rossum, G. Alan Tarr, *American Constitutional Law* (Westview Press 2014, Boulder) 26.

119 Epstein and others (n 19) 17, 36.

120 Miller (n 117) 69.

nominees is divided between the Department of Justice and the Executive Office of the President. The first tends to concentrate its attention on nominees' qualifications, including the nominees' judicial philosophy, while the White House tends to focus on the political dimensions of the appointment.[121]

The Senate has never exercised its power to advise the president on judicial appointments in any formal way, although informal advice is common. During the last nomination process, a constitutional debate was sparked on whether the Senate has a constitutional obligation to advise on and consent to the president's nominee in a timely manner. Although in practice the Senate refused to hold confirmation hearings for the nominees of President Obama, there are critical voices that insist on the constitutional duty of the Senate to advise and consent in a timely manner to preserve the integrity of the Court and to maintain the political morality of democracy in the process.[122]

Today, one of the most important elements of the U.S. appointment procedure is its high publicity. The 'advice and consent' requirement contained in Article III of the federal Constitution resulted in a practice in which the Judiciary Committee of the Senate, created for the purpose of nominating judges, hears all the candidates before making its decision. These hearings receive high media attention and are usually broadcasted by national television.[123] Although the Judiciary Committee could end the nominee's chances prior to the Senate's vote by deciding not to report a nomination, the Committee's practice is to report all nominees to the full Senate, including those who it opposes.[124]

The politics of the appointment process have changed over time, particularly in the Senate. Until the 1920's, Senate deliberations on prospective justices were secret. The nominees did not testify, and they were confirmed or rejected without a roll call vote. It was impossible to know how individual senators had voted.

Today, instead, nominees testify before the Senate Judiciary Committee in public hearings, as do groups and individuals supporting or opposing the nominees. Since 1982, these hearings have been televised. This opened up the process and made it easier for groups to mobilise opinion for and against nominees and to influence votes on confirmation by threatening to hold senators electorally accountable. Yet whether groups mobilise depends on the character and views of the nominee.[125]

According to empirical research, these hearings are not always informative. Because Supreme Court confirmations now attract enormous media attention, they increasingly afford senators an attractive opportunity to perform for their constituents. The result is that nominees now repeatedly confront the same 'tough' questions and give unresponsive answers.[126]

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121 Mark Tushnet, *The Constitution of the United States of America* (Hart 2015, Oxford and Portland) 125.
122 Vincent J. Samar, 'Politicizing the Supreme Court' (2016) 41 Southern Illinois University Law Journal 2–3.
123 Kelemen (n 1) 20.
124 Samar (n 122) 19.
125 Rossum, Tarr (n 118) 28.
126 Geoffrey R. Stone, 'Understanding Supreme Court confirmations' (2010) 9 Supreme Court Review 439.

IV What Can the World Learn from Canada; What Can Canada Learn from the World?

As in our age most of the political questions have become judicial ones, the selection of constitutional court judges is a crucial part of the regulation of constitutional adjudication.

This paper seeks an answer to the question of what elements can make the selection process of supreme court judges ideal in a constitutional democracy.

As it seems from our comparative overview above, the selection of judges is a matter of politics. To demand a non-political selection process would be unrealistic. However, we accept that the basic aim of the selection process is to have independent, competent and experienced judges and a balanced and legitimate composition. In the following, I will examine what choices should be made to devise regulations and practices that could ensure these aims.

The first point is the choice of the model. There is a presumption that the elective model is ideal as it provides high democratic legitimacy. Even if it cannot stop parliamentary groups from electing candidates who share their political views, it is able to guarantee the diversity of the composition. In the parliamentary debate, the personal and professional characteristics of the candidates are under scrutiny, which can eliminate extreme or incompetent candidates. Another advantage is that, as politicisation is inevitable, it can ensure at least the representation of current legal and political opinions.[127]

A supermajority requirement for judicial selection will tend to protect the minority from losing in both the courts and the legislature and by extension will tend to produce more moderate and acceptable judicial candidates.[128]

A disadvantage is that, if such consensus is lacking, the mandates will remain vacant, and that may hinder the operation of the court.[129] This happened several times in Hungary and Germany. Such a delay can be considered a violation of the right to a lawful judge.[130]

If several parties must make an agreement on the candidates, they usually do it in informal meetings; the selection procedure and the selection criteria are not transparent for the public and the public hearing may become simple theatre play'. It is even more problematic if one party has a two-thirds majority and can elect the justices alone.

In addition, as the political parties have to make a consensus or at least accept each other's candidate, this may exclude those, otherwise qualified, candidates, who are not connected with a political party or have no expressed party preference.[131]

The international soft law requirements prefer the mixed model instead. This can decrease the possibility of direct political party influence, as the appointments are coming from different appointment bodies and there is a lower risk that they all have the same political

127 Rousseau (n 68) Rn 59.
128 Dennis C. Mueller, *Constitutional democracy* (Oxford University Press 1996, Oxford) 281.
129 Péter Tilk, *Az Alkotmánybíróság hatásköre és működése* (PTE ÁJK 2003, Pécs) 32.
130 Benda and others (n 2) 139.
131 Ibid.

affiliation. This system can shield the appointment of some of its members from political actors and avoid the risk of politicisation of the constitutional court.

The Canadian system made a step in this direction by involving the parliament in the process as well. However, it would be advisable to give the legislative power not only a right to discuss but also to really participate. Solutions could be to require the support of the parliament (as in the United States) or a veto right (as in France). It is even better if the selection is shared between different state organs and the elective and appointment system is mixed.

If there is no political intention and support to change the selection model, which usually demands the amendment of the constitution or a qualified majority of supporters in the parliament, there is also a way to reform the process without a model change, as we saw with the Canadian example. This paper does not deal with them, but that was the case also with the selection of the members of two international courts, the European Court of Human Rights and the Court of Justice of the European Union.[132]

Making the decision-making process and the selection criteria more transparent can help to enhance the authority and legitimacy of the court and public trust in its operation.

One way is to make public the selection criteria that are above and beyond the statutory requirements. The Canadian solution may be regarded as best practice in this field. The Government set criteria above the statutory requirements and made them public. Hence, the intentions, such as ensuring the diversity of the Court, could be discovered and were open to democratic criticism. It also meant that the Government imposed a restriction on itself, of finding a candidate that fulfils all of these requirements.

One additional point is making public the application documents of the candidates (or at least one part of it). Not only the Members of Parliament can prepare for the public hearing from these data and information, but the public can also become acquainted with the personal and professional qualities of the judge and his or her opinion on the role of the judiciary and constitutional justices.

The other element that can enhance the transparency of the process is the introduction of a public hearing. This plays a more important role in the common law systems, where a judgment is a personal decision that expresses the opinion of the judge and is linked to his person.[133] However, it can be also useful in the European systems, especially where judges are allowed to express a dissenting opinion.

When the public and the media watch and comment on the selection process with critical attention, this can also lead to a control function and prevent false decisions.[134] One of the main arguments against public hearings is that the qualities that characterise a good judge are hardly recognisable in a public hearing. In such a situation, the candidate may even be forced to rule on hypothetical issues on which he really has to decide later. As such, according to certain opinions, the confidentiality of the procedure is more important than the desire for

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132 Armin von Bogdandy, Christoph Krenn, 'Zur demokratischen Legitimation von Europas Richtern' (2014) 69 (11) Juristen Zeitung 529–537.

133 Kelemen (n 1) 21.

134 Benda and others (n 2) Rn. 140.

transparency.[135] However, in our view, the advantages of a hearing, if it is regulated and practiced inappropriately, are greater than the disadvantages.

Civil society organisations can play a crucial role in the process. In the United States, they participate very actively in the selection procedure. Two preconditions: a strong civil society and an open process. The lack of civil society is problematic also regarding political deadlocks because it is not perturbed by other channels, for example by citizens' pressure on relevant institutional actors. With the strengthening of civil society, the publicity of appointments can also increase.[136] On the other hand, their participation can be encouraged by making the process more transparent. One way is to involve them directly in the process, as is the case with regard to federal judges in the United States.[137] Nevertheless, it might also be helpful when there is communication on the candidates well in advance so that civil society can express its opinion before the decision.[138]

Finally, it should be essential to provide an opportunity for the court itself to be able to annul the selection if the eligibility requirements are not met or the rules of the election procedure have been violated. In Canada, this happened once[139] but in Hungary, for example, the Constitutional Court has no such competence.[140]

In conclusion, the proposed system mixes the professional and political elements and involves the public as a guarantee. The selection criteria are transparent and can be easily discovered; the application process is open, comprehensive and capable of really establishing the candidate's fitness for the role. The candidates are ranked according to their qualities and the nomination is negotiated with several political and civil society stakeholders. However, the final decisions come from a political actor who can take political responsibility for the decision. As referred to in the part on the theoretical background, the candidates do not have to be independent but rather 'become independent'. This model is able to enforce the independence of later constitutional judges.

The ideal selection process does not exist. However, we can identify the elements that help to reach the above-mentioned aims of the procedure and contribute to the composition of an independent, highly respected and diverse institution..

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135 Ibid, Rn. 134.

136 Kelemen (n 1) 21.

137 Tushnet (n 121) 126.

138 As it happened in Hungary in 2011. Jelentés a kormánypártok alkotmánybíró-jelöltjeiről. <ekint.org/lib/documents/1479662414-nyilv%C3%A1nos_jelent%C3%A9s_ekint_tasz_final.pdf> accessed 23 May 2018 At the later elections the time was so short between the nomination and the election that they could hardly react.

139 Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21.

140 According to Section 16 (4), (5) of the Act on the Constitutional Court, the mandate of a Member of the Constitutional Court may be terminated by exclusion if the Member fails to perform his or her duties for reasons imputable to him or her, or has become unworthy of his or her office, has intentionally committed a publicly prosecutable crime according to a final court judgement, has not participated in the work of the Constitutional Court for one year for reasons imputable to him or her, or has intentionally failed to meet his or her obligation to make a declaration of assets or intentionally made a false declaration on important data or facts in his or her declaration of assets.