

# Transparency in the Selection of Constitutional Court Judges: Contextualised Comparison between the U.S.A., Germany and the European Courts in Luxembourg and Strasbourg

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# Constitutional Jurisdiction on the National, International and Supranational Level

Constitutional courts exercise constitutional jurisdiction, either alongside their other jurisdiction, such as the CJEU and the U.S. Supreme Court (SCOTUS),  
or as specialised constitutional courts, such as the European Court of Human Rights and the German Federal Constitutional Court (FCC).

# The Political Character of Constitutional Jurisdiction – and Its Discontents

- Constitutional courts enforce the constitutional constraints to which political power is subject in any system based on the rule of law.
- Their exercise of political power in judicial forms gives rise to the “counter-majoritarian difficulty” (Alexander Bickel).
- Since constitutional courts have come under attack from populists and autocrats, it is important to sustain public confidence in their indispensability as guardians of the rule of law against arbitrary government.

# Legitimacy of Constitutional Courts

## – Transparency in Its Democratic and Other Contexts

- In a democratic system, the rule of law cannot be maintained without public confidence in the institutional and operational legitimacy of constitutional courts.
- With regard to the process of selecting the judges, that legitimacy derives from a synthesis of transparency and effectiveness.

# Institutional Legitimacy of Constitutional Courts

- The institutional legitimacy of constitutional courts pertains to their input legitimacy as a branch of the government “by the people”.
- It also pertains to their social legitimacy, *i.e.* their popular acceptance as a branch of the government “of the people”.

# Democratic and Federal Legitimacy of Constitutional Courts

- The input and social legitimacy of constitutional courts depend on their democratic legitimacy, one important element being the transparency of the judge-selection process and the social representativeness of the bench.
- The federal or supranational representativeness (where applicable) is an important additional factor.

# Operational Legitimacy of Constitutional Courts

- The operational legitimacy of constitutional courts is linked to their output legitimacy as a branch of the government “for the people”.
- It depends on these courts’ effectiveness, *i.e.* their ability properly to dispense justice in high quality and good time through persuasive opinions which definitely settle the constitutional issues.
- The most important prerequisite is the personal and professional quality of the judges.

# Personal and Professional Quality of Constitutional Court Judges

- Their personal quality consists in their unquestionable independence and impartiality.
- Their professional quality is characterised by their excellent knowledge of the law and ability to function as a constitutional court judge.



# Judge-Selection Process from Operational Legitimacy Perspective

- The main concern is not the transparency of the judge-selection process, but its ability to produce a high-quality bench that ensures the effective functioning of the constitutional court.
- This may require certain trade-offs with regard to the transparency of the process.

# Institutional Legitimacy – Democratic Legitimacy

- The constitutional courts' exercise of political power in judicial forms presupposes that they have a considerable degree of democratic legitimacy of their own.
- Otherwise, they cannot overcome the “counter-majoritarian difficulty”.
- This requires parliamentary control of judicial appointments which also tends to increase the transparency of the process.

# Democratic Legitimacy v. Effectiveness of Constitutional Courts

- The democratic legitimacy of constitutional courts must accommodate the three fundamental conditions of effective fulfilment of their judicial tasks, namely independence, impartiality and professionalism.
- The appointment process must ensure the selection of judges whose credibility in these respects is beyond doubt.
- The transparency of that process may be limited inasmuch as excessive transparency deters suitable candidates for what is primarily a judicial and not a political office.

# Effective Legal Safeguards Against „Court Packing“ by Political Majority

- Constitutionalisation of the important rules, including those on judge selection (eligibility criteria and procedure)
- Qualified majority for parliamentary election of judges
- Judicial review to increase transparency of reasons for appointment of a certain judge and enable annulment of arbitrary appointments?

# Informal Accountability and Separate Opinions

- Due to their independence, constitutional court judges are only indirectly accountable in the “court” of public opinion.
- Their indirect accountability is enhanced if separate opinions are permitted.
- Separate opinions also increase the transparency of the adjudication process, thus promoting public confidence in the constitutional court.

# Contextual Question (CQ) with Regard to Transparency of Judge Selection

- Since the transparency of the judge-selection process is but one important element ensuring the legitimacy of constitutional courts, it needs to be contextualised.
- CQ: Does the selection process demonstrably reconcile conflicting popular demands for transparency and effectiveness, social and federal/supranational representativeness in a way that promotes public confidence in the constitutional court?

# Contextualised Analysis of Transparency of Selection Process in the U.S. I

- Few constitutional provisions regulate the appointment of SCOTUS Justices, leaving broad discretion to Congressional legislation and to volatile political practice.
- Justices enjoy life tenure. This gives appointing authorities the power to influence the Court's case-law for decades and is the reason why the appointment of Justices can give rise to major political battles.

# Contextualised Analysis of Transparency of Selection Process in the U.S. II

- The individual Justices are constantly present as authors of majority opinions and separate opinions. The adjudication process is therefore as transparent as possible.
- The appointment process requires the cooperation of the President and the Senate that both enjoy a high degree of democratic legitimacy which they pass on to the Justices. Moreover, the involvement of the Senate ensures their federal legitimacy.
- There is an important but informal quality control by the American Bar Association.



# Contextualised Analysis of Transparency of Selection Process in the U.S. III

- While the President alone determines the amount of transparency of the nomination process, the confirmation process in the Senate is transparent.
- Each nominee is subject to a long and intense public confirmation hearing in the Senate Judiciary Committee.
- This hearing probes the nominee's character, knowledge and "judicial philosophy". It can get aggressive, if political opponents try to "destroy" a certain nominee in front of the cameras.

# Contextualised Analysis of Transparency of Selection Process in the U.S. IV

- Senate confirmation requires no more than a simple majority.
- If the President and the Senate majority are politically close, they can staff SCOTUS with their ideological partisans.
- The filibuster had temporarily been used to raise the necessary majority to 60 percent, but that practice was abandoned last year with the confirmation of Neil Gorsuch.

# Contextualised Analysis of Transparency of Selection Process in Germany I

- The German Basic Law contains few provisions on the appointment of FCC judges, setting forth only that half of them are to be elected by parliament (the Federal Diet), and the other half by the Federal Council, the representation of the constituent states.
- The Federal Constitutional Court Act stipulates one single twelve-year term of office and requires a two-thirds majority in the Federal Diet or the Federal Council. As a result, the FCC judges enjoy a solid democratic as well as federal legitimacy.

# Contextualised Analysis of Transparency of Selection Process in Germany II

- The Federal Diet elects half the judges upon proposal of a twelve-member Election Committee. The Committee procedure is confidential.
- Until 2015, that Committee carried out the election for the plenary.
- Even after the retransfer of the electoral power to the plenary in 2015, the Election Committee remains important, because the candidates it proposes are always elected.

# Contextualised Analysis of Transparency of Selection Process in Germany III

- The FCC held that the delegation of electoral power by the plenary to the Committee until 2015 was constitutional.
- Although that delegation conflicted with the equality of deputies because it excluded so many of them from the election, it was supported by confidentiality concerns in the interest of the FCC's reputation and proper functioning.

# Contextualised Analysis of Transparency of Selection Process in Germany IV

- In view of the two-thirds majority requirement, the two major political parties in Germany – the Christian Democrats and the Social Democrats – have so far jointly controlled the election process.
- According to an unwritten, but generally known political agreement between them, they both have the right to nominate four of the eight judges in each of the two Chambers of the FCC.
- While this *modus vivendi* as such is transparent, its application in concrete cases remains completely obscure.

# Contextualised Analysis of Transparency of Selection Process in Germany V

- This *modus vivendi* is an instance of political patronage which violates basic constitutional principles such as the prohibition of discrimination based on political opinion and the command that every German shall be equally eligible for any public office according to her aptitude, qualifications and professional achievements.

# Contextualised Analysis of Transparency of Selection Process in Germany VI

- In a representative democracy, however, it is impossible to eliminate the influence of political parties on political appointments.
- Since the Christian Democrats and the Social Democrats lost their two-thirds majority in the Federal Diet in the election of last September, the fate of their *modus vivendi* remains uncertain.



# Contextualised Analysis of Transparency of Selection Process in Germany VII

- The procedure for the selection of FCC judges is completely non-transparent.
- Demands to make it more transparent by introducing a public hearing of candidates have not been fulfilled because of fears that this would lead to an excessive politicisation like in the U.S. and discourage well qualified candidates.
- A public hearing by the Election Committee of a small number of short-listed candidates should be introduced and be conducted in a civilised way.

# Contextualised Analysis of Transparency of Selection Process in Germany VIII

- The current non-transparent procedure has so far ensured the selection of highly qualified judges with a distinct sense of judicial duty beyond political partisanship.
- It has produced a well-balanced bench whose decisions have been both well-reasoned and politically sound.
- Public confidence in the FCC has constantly been high in Germany.
- The selection process having thus been effective, it should nonetheless be made more transparent.

# Contextualised Analysis of Transparency of Selection Process of CJEU Members I

- All the relevant rules on the appointment of the Judges and Advocates-General (A-G) of the CJEU are laid down in the Treaties.
- The selection procedure is completely in the hands of the member states, largely non-transparent and anachronistic.
- The Judges and A-G are appointed by common accord of the national governments for a term of six years. Reappointments are permitted.
- In practice, each government proposes a candidate who is then confirmed by all the others.

# Contextualised Analysis of Transparency of Selection Process of CJEU Members II

- The Treaty of Lisbon introduced an expert Panel in order to rationalise and objectify the appointment process, ensure the personal and professional quality of candidates and eliminate arbitrary considerations, such as partisanship, closeness to a government or national interest.

# Contextualised Analysis of Transparency of Selection Process of CJEU Members III

- The Panel reviews the suitability of candidates proposed by the governments in a confidential procedure that avoids transparency in order to protect personality rights. This lack of transparency is partly compensated by the Panel's period activity reports.
- The “opinion” of the Panel is not legally binding, but a disqualified candidate will in practice not be appointed.

# Contextualised Analysis of Transparency of Selection Process of CJEU Members IV

- Since 2009, German candidates are nominated by the Federal Government by agreement with the Committee for the Election of Judges. That Committee consists of the ministers of justice of the sixteen *Länder* and sixteen members elected by the Federal Diet.
- While the national legitimation basis of the German candidates has thereby been broadened considerably, the selection process remains non-transparent because the proceedings in the Committee are confidential.

# Contextualised Analysis of Transparency of Selection Process of CJEU Members V

- The appointment procedure of the Judges and A-G raises an issue with regard to their independence.
- Their term of office is short and renewable and their re-appointment depends on the proposal by their government.
- That situation “may well consciously or otherwise impact ... his or her conduct ... or, no less importantly, give the appearance of lack of independence.” (Joseph H.H. Weiler)

# Contextualised Analysis of Transparency of Selection Process of CJEU Members VI

- The independence problem should be fixed by introducing one longer non-renewable term.
- With that amendment, the judges should also be permitted to write separate opinions in order to increase the transparency of the adjudication process and promote public confidence in the CJEU.



# Contextualised Analysis of Transparency of Selection Process of CJEU Members VII

- The over-federalised appointment procedure should be replaced by the following parliamentary procedure:
- The member states propose candidates who, after having been approved by the expert Panel and obtained the consent of the qualified majority of the Council, are elected by the European Parliament.
- Before the vote in the plenary, a public hearing of the candidates is conducted by a parliamentary committee. This can be done without constraining critical questions or jeopardising judicial impartiality.

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR I

- The judges of the ECtHR now serve for one non-renewable nine-year term. The criteria for office are set forth in the Convention.
- The selection process has been characterised as a “unique mix of meritocracy and democracy.” (Koen Lemmens)

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR II

- The judges are elected by the Parliamentary Assembly (PACE) from a list of three candidates nominated by the respective state party.
- Election results are publicly announced by the President of the Assembly.
- “[V]irtually nothing is known publicly about the internal mechanics of the election process within PACE.” (David Kosař)

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR III

- Problems with the quality of candidates from various states have prompted interventions by both PACE and the Committee of Ministers (CM) of the Council of Europe (CoE).
- In 2010, the CM set up an Advisory Panel of Experts that is modelled on the Panel established under Art. 255 TFEU.

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR IV

- PACE has insisted that all three candidates included in a state's list must meet the criteria for office, giving PACE a real choice.
- Every list should include candidates of both genders.
- The national selection procedures need to be fair, transparent and consistent and be based on public and open calls for candidatures.
- If the list submitted by a state does not meet these standards, PACE will reject it.

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR V

- The PACE Committee on the Election of Judges examines the candidates, conducts personal interviews and makes recommendations to PACE (including a ranking of the three candidates). It meets *in camera*.
- The confidentiality of the Committee procedure is (wrongly) considered as essential for two reasons:
  - (1) Protecting the personal data and personality rights of the candidates
  - (2) Ensuring the Committee's effective functioning, including the possibility of posing critical questions to and making unfavourable assessments of candidates.

# Contextualised Analysis of Transparency of Selection Process of Judges of the ECtHR VI

- The federal and democratic legitimacy of the Strasbourg judges rests on a sound basis.
- The European part of the selection process is more transparent than the national part, but the latter's transparency has been considerably improved.
- European demands in this regard were not focused on the transparency of the national process as such, but on its effectiveness in identifying suitable candidates.

# Transparency in the Contexts of Legitimacy, Effectiveness, Quality and Independence

- In the judge-selection process, democracy (including transparency) and meritocracy have to be reconciled.
- Parliamentary appointment process necessary for democratic legitimacy and conducive to transparency: FCC (+), ECtHR (+), SCOTUS (++), CJEU (-)
- First priority – effectiveness of selection process concerning recruitment of high-quality candidates: SCOTUS (+), FCC (+), CJEU (+/-), ECtHR (+/-)



# Transparency in the Contexts of Legitimacy, Effectiveness, Quality and Independence

- Advisory expert panels were introduced by EU and CoE to ensure high quality of candidates.
- But parliamentary procedure (FCC, ECtHR) and Panel procedures (CJEU, ECtHR) are non-transparent.
- The confidentiality of the selection process is based on the false assumption that transparency would impede the recruitment of high-quality candidates.

# Transparency in the Contexts of Legitimacy, Effectiveness, Quality and Independence

- Important rules on constitutional courts (including judge-selection) should be entrenched in the Constitution, in order to make them transparent and prevent political majority from undermining the effectiveness of the courts: CJEU (++), ECtHR (+), FCC (-), SCOTUS (--)

# Transparency in the Contexts of Legitimacy, Effectiveness, Quality and Independence

- Qualified majority for election of judges in order to prevent “court-packing” with political partisans: FCC (+), CJEU (+), ECtHR (-/+), SCOTUS (-)
- Effective subsidiary mechanism to avoid excessive delay in filling vacancies: FCC (-), CJEU (-), ECtHR (-), SCOTUS (-)

# Transparency in the Contexts of Legitimacy, Effectiveness, Quality and Independence

- Single non-renewable longer terms of office: FCC (+), ECtHR (+), CJEU (-), SCOTUS (-)
- Separate opinions should be permitted and frequently written in order to increase transparency of adjudication process and enhance indirect public accountability: FCC (+), ECtHR (++), SCOTUS (++), CJEU (-)
- Possibility of judicial review of appointments: FCC (-), ECtHR (-), CJEU (-), SCOTUS (-)

# Answer to Contextual Question with Regard to Transparency of Judge Selection

- All four jurisdictions demonstrably reconcile the conflicting popular demands for transparency and effectiveness, social and federal/supranational representativeness of constitutional courts differently, but more or less well.
- Need for improvement is discernible in all of them with regard to different aspects of the judge-selection procedure. The three European courts should hazard more transparency.