JUDICIAL INDEPENDENCE VS. JUDICIAL ACCOUNTABILITY JUDICIAL SELECTION MODELS FOR CONSTITUTIONAL COURTS. A COMPARATIVE ANALYSIS

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0. INTRODUCTION

In March 2006, the New York Times[1] reported that a man in Afghanistan was facing a death sentence for the crime of apostasy, converting from Islam to Christianity. The United States Secretary of State reportedly called the President of Afghanistan to urge a "favorable resolution." Meanwhile, the President of the Afghanistan Supreme Court expressed his intention to maintain his judicial independence and resist whatever interference with the resolution of the case.[2]

For our juridical culture it is impossible to conceive that a person would face a death sentence for a personal view concerning religion. But how do you feel about a judge who claims his independence of judgment under the law in such a case? Judicial independence is generally viewed as an essential feature of liberal

[1] Elliott, A. "In Kabul, a Test for Shariah", http://www.nytimes.com/2006/03/26.

[2] Kritzer, H. "Law is the mere continuation of politics by different means: American judicial selection in the twenty-first century", *DePaul Law Review*, (2007): 423.

democracy[3]; thus, don't we want judges to exercise their independent judgment in interpreting and applying the law? The answer to this question is ambiguous. Yes, we want judges to exercise their independent judgment but so long as they are not too independent. Indeed, judges should be accountable to the public, especially to democratic institutions. Actually, as the role of courts has increased around the world, country after country has begun to face what Professor Alan Paterson succinctly described as a «conundrum of the apparently insoluble tension between judicial independence and judicial accountability».[4]

Indeed, rarely these two principles find the right balance and it is evident in several contexts especially if you look models and procedures to select Constitutional and Supreme Court Judges. Indeed, often the way judges are recruited is not exclusively an administrative datum which affects only social and professional composition of the bench but it is an element which affects also the relationship that the judiciary establishes with other political actors, first of all, the people and the political institutions. As Herbert Kritzer said, with regard to the United States: «we are fundamentally conflicted about the role of law in politics and the role of politics in law, and that is evident in our ambivalence toward the way we choose and retain judges».[5]

Usually when we refer to Supreme and Constitutional Courts, we speak about judicial review, rarely we study Courts' structure and the way this structure could influence their functioning. Indeed, judicial selection procedures for constitutional judges contain norms which convey important values: values which are able to influence both Courts' *status* and role in the constitutional order. The consequence is that Judicial selection process is not a neutral procedure: norms which refer to judicial selection, like all the positive norms of the system, convey a value. As J.H.H.

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[3] Russell, P. "Toward a General Theory of Judicial Independence" *Judicial Independence in the Age of Democracy*. Eds. P. H. Russell and D. O'Brien. Charlottesville: University Press of Virginia, 2001: 1.

[4] Paterson, A. "The Scottish Judicial Appointment Board: New Wine in Old Bottles?" *Appointing Judges in an Age of Judicial Power: critical perspectives from around the world*. Eds. P. Russell and K. Malleson. Toronto, Buffalo: University of Toronto Press, 2006.

[5] Kritzer, H. "Law is the mere continuation of politics by different means: American judicial selection in the twenty-first century", cit., 423.

Wailer said: «it is evident that there is not a neutral standing between two options».[6] The method to select the judiciary is so rooted in a broader context which involves various individuals, groups and political institutions which can influence Judicial independence. Indeed, in economics, judicial recruitment would be defined as an "endogenous" variable, i.e. a variable which is a function of other variables.

In this paper who wrote makes a comparative analysis of judicial selection procedures for Constitutional Courts in five well known countries: three (France, Italy and Germany) belonging to civil law tradition and two (United States and United Kingdom) belonging to common law tradition. Indeed, we are going to talk about a "sample group" of countries which are able to make easier the analysis of the relationship between Judicial independence and accountability in Judicial selection.

Indeed, the most part of the countries in the world select Constitutional Judges through political procedures: however none of them choose "direct" democracy model.[7] Indeed, normally they choose intermediate models which substantially reflect one of these two principles: *independence* or *accountability*. The content of these two principle could appear obvious but it is not. Indeed, on the one hand, it is important to consider that when we refer to "Judicial independence" we comprehend both *external* and *internal* independence: in fact, as everybody knows, the first one regards to the independence of judges from the other constitutional powers; the second one, the independence of judges from the other judges. On the other hand, when we refer to "Judicial accountability" we must also consider that it is something different from judicial "responsibility": the last one generally arises from the violation of norms (especially in meeting debts or payments). It is perfectly sharable and non always final. On the contrary, accountability can never be shared, indeed it affects in some way ethics and governance (for this reason it is often called "ultimate responsibility"). Finally, accountability is related to an "account-giving relationship" between individuals: in this context, a judge should be accountable not only to written norms, but also to people and society so to democratic institutions.

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[6] Weiler, J. H. H. *Un'Europa cristiana,Un saggio esplorativo.* Milano: Giuffré, 2003: 68.
[7] So, Judicial selection procedures where judges are directly elected by people.

These two principles, independence and accountability, usually have an instrumental nature: indeed, they are pursued because of their capacity to give legitimacy to Courts. However, it often happens that from pillars of courts' legitimacy they became "absolute" principles. The risks are, with regard to judicial independence, to have Courts too much separate from political context and political institutions; with regard to accountability, instead, the relevant risk is to have Court too much politicized (so susceptible to be influenced by political parties). These situations often determine political crisis and institutional antagonisms.

In this paper, we suggest to find out the instruments to face such institutional crisis, often caused by these absolutisms, in the rules of Constitutional Courts' composition and selection. Indeed, we think that these rules could have a crucial role to increase Courts' legitimacy, especially with regard to the other constitutional bodies. For these reasons, is necessary to analyze carefully these six elements: *legal sources* and *transparency* in judicial selection, *number of Judges*, *professional requirements* and *Justices' professional background*, *tenure in office*, *authorities involved in judicial nomination*, *Dissenting and Concurring opinion.*

In all the countries analyzed, the full consideration of these elements would give fundamental information to understand the relationships between constitutional justice and form of government.

I. LEGAL SOURCES

In each country we are going to consider in this paper, judicial selection procedures for Constitutional and Supreme Courts are entrusted in *fundamental* laws: that is Constitutions or Acts which have a constitutional rank. This choice seems to be full of significance and coherent with the particular *status* of these courts: the courts' structure actually reflects the «hybrid role, somewhere between justice and politics»[8] which all these courts play. In this field Robert Dahl[9], one of the most

[8] Meny, Y. *Government and Politics in Western Europe.* Oxford: Oxford University Press, 1990: 299.

[9] Robert Alan Dahl (born 17 December 1915), is the Sterling Professor emeritus of political science at Yale, where he earned his Ph.D. in political science in 1940. He is past president of the American Political Science Association and one of the most distinguished political scientists writing today. Dahl has often been described as "the Dean" of American political scientists. He earned this title by his prolific writing output and the fact that scores of prominent political scientists studied under him

popular American political scientist, stated that «*to consider the Supreme Court strictly as a legal institution is to underestimate its significance in the American political system*»[10]. Probably, according to the same reasons, the framer of European Constitutions opted for judicial selection procedures which respect both the balances between political powers (being a manifest example of institutional compromise) and which have a constitutional legitimacy.

Consequently, in France, as we know, Constitutional Council composition is ruled under art. 56 of the French constitution.[11] According to this norm it is composed of nine ordinary members and several of *ex officio* members that correspond to the former Presidents of the Republic.[12] Only these last judges enjoy a life tenure[13], whereas Constitutional Council's ordinary members are nominated for a term of nine years non renewable.

In Italy, art. 135 of the Italian Constitution[14] provides that the *Corte costituzionale* shall be composed of fifteen members and ascribes the nomination of

[10] Dahl, R. "Decision-Making in a democracy: the Supreme Court as national policy- maker." *Emory L. J.* 50 (2001): 582.

[11] Art. 56 of French Constitution."*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.*

In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council.

The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie."

[12] However, only former President Auriol and Coty used this opportunity, none of their successors have done so.

[13] However, only former President Auriol and Coty used this opportunity, none of their successors have done so.

[14] Art. 135.*The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts. The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.*

Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be re-appointed.

At the expiry of their term, the constitutional judges shall leave office and the exercise of the functions thereof.

The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges.

The office of constitutional judge shall be incompatible with membership of Parliament, of a Regional Council, the practice of the legal profession, and with every appointment and office indicated by law.

In impeachment procedures against the President of the Republic, in addition to the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate, which the Parliament prepares every nine years through election using the same procedures as those followed in appointing ordinary judges.

five members, respectively, to the Italian Parliament in joint sitting, to the President of the Republic and to the ordinary and administrative High Courts.

In the US Constitution the Supreme Court selection process is governed by a sole legal rule.[15] That rule is embedded under the Section 2, Art. II of the US Constitution which states that:

«with the advice and consent of the Senate, the President shall appoint […] judges of the Supreme Court». The nine judges are in office «until good behavior»[16], in few words, this means that Justices enjoy a life tenure in office except voluntary resignation or retire.

Two cases which are different from the others are Germany and United Kingdom. The formal procedure concerning the composition and the functions of German Federal Constitutional Court (the *Bundersverfassungsgericht* hereafter *BVerfGG*) are settled in the Fundamental (or Basic) law (hereafter FL) both under art. 93 and 100 (functions), 94 (compositions) and under sections 3, 4, 5, 6, 7, 8, 9 and 10 of the Constitutional Court Law, consequently, also under ordinary laws. The Fundamental law only says that «*half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundestrat*». We can see as Court's members number is not established by the FL but it is ruled by an ordinary law which disciplines also all the details of *Bundestag* and *Bundestrat* nominations.

Also in United Kingdom Judicial selections procedures are now ruled in details: indeed the Constitutional Reform Act 2005 (hereafter CRA), pursuing the goal of judicial independence, tries to figure out a system which is characterized for extreme transparency. Consequently part III of the CRA disciplines the Judicial appointment procedure with extreme specification.

This short overview shows that formal appointments mechanisms are always known and ruled by constitutional norms. The reasons of this choice seem to be two: on the one hand, the Constitution emphasizes the particular *status* of these courts, on the other hand, there is the aim to legitimize throughout the Constitution important institutional compromises.

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[15] Goldberg, D. and Kozlowsky, M. "The Politics of Choosing United States Supreme Court Justices" *Brennan Center for Justice at NYU School of Law* (2009): 6.
[16] Art. III Sect. 8, § 1, American Constitution

However, while formal appointments mechanisms are always known, the reality of the process by which judges are chosen is not. Usually it is ruled by informal customs which are not well known and easy to be detected. Anyway, the degree of this lack of transparency is changeable: it is minimum in Germany and United Kingdom where, as we have pointed out, a certain degree of specification is achieved by ordinary laws or by the same Constitutional Statute; it is higher in the United States where the "not written" procedures have a fundamental role. However it has to be considered that the informal American procedures are completely balanced by the high degree of advertising and general involvement of both institutional and not institutional bodies (think about the public hearings of the Senate, the involvement of the American Bar Association and interest groups). These elements are totally absent in France and Italy where the small formal regulation is not balanced by a sufficient degree of transparency and public involvement .

II. NUMBER OF JUDGES

Significant elements arise from the analysis of Judges' number. Indeed, whether Italy and Germany opt for big courts, respectively, composed by 15 and 16 Judges, on the contrary, France and Unites States opt for smaller courts of nine judges for each. In the middle there is the UK Supreme Court which, according to art. 23 of the CRA, is composed by 12 judges.

Being in force the majority principle, is evident as the choice of big or small courts has an important influence on courts functioning. Normally a bigger court is created to guarantee a greater judiciousness of courts decisions. This quality is requested for courts which are conceived as guardians of the equilibrium in the constitutional system (and it is the case of Italy and Germany where the constitutional courts are officially entrusted of this guaranty role).

On the other side, the danger of smaller courts is that they can take decisions which are partial and not shared into the court. The political and ideological positions can be easily stigmatized in a smaller court. In this regard, is useful to refer to the US Supreme Court where ideological alignments are manifest.

III. PROFESSIONAL REQUIREMENTS AND PROFESSIONAL BACKGROUND

Another important indicator of the values which are rooted in judicial selection procedures for Constitutional Courts is the request of high professional standards. Indeed, it is evident that when there is an high specification of professional requirements there will be a *lower* degree of "discretion" in judicial nominations (so a *higher* degree of judicial independence). Indeed, the authority (often a political one) entrusted to judicial nominations power will select the candidate not according to subjective or ideological criteria, but according to objective, strictly established criteria (free of any political evaluation) often based on merit. In addition to this, a constitutional court mainly composed by professionals will pursue a *modus operandi* which is typical of a juridical culture.

The situation appears in these terms in Italy, Germany and, after the CRA, also in the United Kingdom. Indeed, in both of these countries are established precise professional requirements in order to be elected as a Judge to constitutional courts. Art. 135 phar. 2 of Italian Constitution states that: «the judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years of practice». Therefore, in the Italian constitutional court are represented three professional categories: the academics, the jurisdictional order and the lawyers. However they are provided two common criteria: an old service and a law degree.

The German Fundamental law states that both *Bundestrat* and *Bundestag* will elect, at least, three professional judges who must have worked for three years as judges of a Federal High Court (so, in total, professional judges have to be six over sixteen). The remaining judges are lay judges, however, the law provides that lay judges must be qualified to judicial career (in practice this consists in passing the second public examination with high scores, an examination which has to be overcome to perform all the legal professions) in this way enforcing the judicial nature of the Court.

Finally, the CRA establishes several requirements in order to be appointed to the UK Supreme Court: for example, the candidate has to have held high judicial offices for a period of at least 2 years, or have been a qualifying practitioner for a period of at least 15 years (art. 25).

Coherently with the rules and principles stated before, the following data show important evidences: indeed, looking to tables number 1, 2 and 5 we can notice how the most part of Italian, German and British judges have been ordinary or administrative judges: so not involved in politics. The circumstances are totally different in France where (see table number 4) the most part of Court's members have a professional experience as public officials and, moreover, where six out of nine judges have had a political past in the executive or in the legislative branch. Surely, the lack of specific qualifications in order to be appointed as a judge (not even a law degree) [17] has relevant influence on Court composition; surely, this datum contributes to consider the *Conseil Constitutionnel* as a sort of appendix of the political power.

These last considerations are not valid with regard to the United States: here, as well as in France, there is no constitutional norm which establishes a minimum standard to be appointed as a Supreme Court Judge. However, it is evident that, in practice, several criteria are taken into consideration. For example, in the last decade of the twentieth century the form of political appointment which became increasingly important is the "criterion driven appointment."[18] The White House and the Department of Justice developed criteria that they would use when the possibility of a nomination materialized. These criteria included the demographic identity of the candidate, but also the age, the gender and judicial philosophy or ideology (criteria which, often, are not easily identifiable). All these versions of politics still have an important role. In 2008, for example, there was a common agreement that the next nomination should go to a person of Hispanic origin and, if possible, a woman (Judge O' Connor, the only woman in the court, in fact would be departed for the

[17] Since the *D'Estaign* presidency, the trend has been to appoint candidates with legal experience, although *Mitterrant* relied on the tradition standard of personal loyalty. In Stone, A. *The Birth of Judicial politics in France*, *the constitutional Council in comparative prospective*, Oxford: Oxford University press, 1992.
[18] Yalof, D. A. Pursuit of Justice: Presidential Politics and the selection of Supreme Court nominees. Chicago: University of Chicago Press, 1999: 240 ff..

court soon). This led to the nomination of Judge *Sonia Sotomayor*. Indeed, in the US will be found judges who correspond not only to high "professional" standards but, also, to high "representative" standards. In the United States, being the awareness of Supreme Court's political power, the principal scope is not an independent Court but a Court which is able to represent the several "spirits" of American people. Table number 5 confirms the analysis: all Judges have an important academic past or an experience as judges. All judges can be considered an evident representation of religious, ethnic, sexual expectation of the country.

In conclusion, we can state that judicial selection procedures, providing or not professional requirements, have an important influence on the real composition of the Constitutional or Supreme Court, including the academic or professional qualification of judges. The following table makes an overview of these evidences:

*- In **France**, where professional requirements ARE NOT established:*
• *5/9 judges studied political sciences and came from the ENA: equal to 55,5%* • *5/9 judges before nomination exercised administrative or political offices: 55,5%* • *8/9 have a political or administrative past: 88,9%*
*- In **Italy**, where very strict requirements ARE established:*
• *15/15 judges have a law degree: 100%* • *7/15 judges have been professors, 6/15 judges, only 2/15 are lawyers* • *10/15 judges have a political or administrative past: 66,7%(2/3)*
*- In **Germany**, where requirements exist:*
• *13/16 judges have a PhD in Law: 81,3%10/16 have been professors (62,5%),* • *6/16 are judges* • *8/16 judges have a political or administrative past: 50%*
*- In the **United States**, where there ARE NOT written requirements:*
• *5/9 judges have a law degree at Harvard (2 Yale, 1 Columbia): 55,6%* • *5/9 have been professors,* • *4/9 judges.4/9 exercised a political office: 44,4%*
*- In the **United Kingdom**, where there ARE written requirements:*
• *8/12 judges come from Cambridge or Oxford University; 66%* • *12/12 have a judicial experience; 100%* • *4/12 have had a political or an administrative past 33,3%*

IV. TENURE IN OFFICE.

One of the instruments conceived to grant Constitutional Courts' independence is the term of judges' tenure in office: indeed, normally Constitutions provide long and no renewable terms. The goal is to prevent a strong degree of political homogeneity with the representative bodies. In fact, in this case there is the risk to pass from a control to an "self control".[19]

In France Constitutional Council's ordinary members are nominated for a term of nine years not renewable *(*except *ex officio* members, that is the former Presidents of the Republic, who enjoy a life tenure).[20] The same nine years term is in Italy where don't exist members with a life tenure. In Germany, until 1970, it was provided a life tenure for professional judges and, on the contrary, a tenure of eight years for lay judges. Then Constitutional judges are in office for twelve years and they are not renewable. In conclusion, we can observe that Continental European courts generally opt for medium or long terms (always not renewable).

On the contrary, in UK and US we find "life" appointment. Art. 33 of the CRA states that «a judge of the Supreme Court holds that office *during good behavior*, but may be removed from it on the address of both Houses of Parliament». However, like all British judges, Supreme Court justices are forced to retire at age 70 if first appointed to a judicial office after 31 March 1995, or at age 75 otherwise.[21]

In the same way, the US Supreme Court, since its creation in 1789, has been composed by "life tenure" judges. This means that a member of the Court leaves the Court only in case of resignation, retire, or death. This extreme choice is proportionate with the high degree of politicization of judicial nomination for US Supreme Court. Recently we saw the retirement of the oldest and arguably most liberal justice of the Court: the ninety years old *Paul Stevens*. This man even if he was appointed by the republican president Gerald Ford in 1975, became a hero of liberal

[19] De Siervo, U. *La Corte costituzionale nel nostro sistema costituzionale*, Pavia 29 march 2011. Web. 9 April 2011 <http://giurisprudenza.unipv.it/docsDidattica/rigano/DeSiervo_Pavia_20010329.pdf>.
[20] However, only former President Auriol and Coty used this opportunity, none of their successors have done so.
[21] See Judicial Pensions and Retirement Act 1993

vote. Stevens will be known as the dissenter in the case *Bush v. Gore*[22], the decision which decreed the victory of *George W. Bush* at the Presidential elections. *Stevens* commented the US Supreme Court decision with these words:

> *«although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear: It is the nation's confidence in the judge as the impartial guardian of the rule of law.»*[23]

Notwithstanding his past, Stevens decided to leave the court just during Obama presidency. As we know, *Obama* replaced Stevens with *Elena Kagan* a candidate who was not greeted with particular enthusiasm. Indeed, during the *public hearings* in the Senate, republicans opposed her nomination saying that *«it is difficult to see how her experience fundraising for Harvard Law School qualifies her for a seat on the Nation's high court»* and underlying how much the candidate is *"disturbingly out of the mainstream".*[24]

Nevertheless, *Elena Kagan (*the first woman Dean of Harvard Law School) took a judicial office for the first time in her life only in January 5, 2009 (once nominated *Solicitor General* by the same Obama).

In conclusion, with this overview we noticed that both the "long terms" and the "life tenure" have the same goal: to favor judicial independence. However to understand the different rationales which justify such choices, we must verify how these tenure terms articulate with appointment provisions. Indeed this deals with the "core" business of our analysis: the relationship (so the equilibrium) between Political institutions and Constitutional courts in the context of judicial nominations.

V. AUTHORITIES CHARGED WITH JUDICIAL SELECTION.

As we said before, none of the considered countries chooses direct democracy models to select Constitutional judges: normally, judges are elected or

[22] 121 S. Ct. 525.

[23] http://abcnews.go.com/ Politics/Supreme_Court/ justice –john –paul –stevens -retires-us-supreme-court/story?id=9615609 (last visited March 2011).

[24] http://www.redstate.com/jrichardson/ 2010/04/04/ stevens –retirement -makes-way-for-second-obama-scotus-pick/ (last visited march 2011)

appointed by several authorities. These authorities could be political or not political and they could decide separately or in cooperation with other authorities. An important premise to analyze the datum is understand that political authorities which decide separately are a sign of politicization. On the contrary, the absence of political authorities and cooperation are a sign of independence. Developing this scheme we can observe as in France judges are appointed by the most relevant *individual* authorities of the State: indeed, three of the nine judges are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The authorities entitled of the appointing power decide without any cooperation and, moreover, have complete discretion as to whom they appoint: indeed, as we said before, no specific qualifications are required for appointments, not even a law degree.[25] The constitutional reform of 2008 tried to temper this asset providing a form of political assembly involvement. Indeed, new art. 56 stated that *«les nominations effectuées par le président de chaque assemblée sont soumises au seul avis de la commission permanente compétente de l'assemblée concernée*». Consequently, the nominees are valued by a permanent commission. Although this is an important reform which enhances parliament prerogatives in judicial selection, it has to be considered that the contribute of the parliament is only an "*avis*", so a simple advice which is never binding. Moreover, the France Constitution saying that "it is sole the permanent commission which is able to value the nominations" underlines that the scope is always to safeguard political authorities' discretion, reducing transparency and public involvement in judicial procedures. This systems seems to be the less representative of both judicial independence and transparency. Nevertheless all these considerations are perfectly coherent with the difficulties which the Constitutional Council met to achieve its legitimacy. Even if France is the homeland of Montesquieu, the author of the separation of powers' principle, in this country the power has been concentrated in a sole body: the Parliament. The strict application of the principles of the popular sovereignty and of the supremacy of the legislative power did not leave any space to accept any juridical, so external control over the

[25] Since the *D'Estaign* presidency, the trend has been to appoint candidates with legal experience, although *Mitterrant r*elied on the traditional standard of personal loyalty. In Stone, A. *The Birth of Judicial politics in France*, *the constitutional Council in comparative prospective*, cit.

legislation. Indeed, as we know, when the Constitutional Council was created it exercised only an "abstract review" (or *a priori* review). It was the constitutional reform of 1974, (which expanded the right of referral to a parliament minorities: sixty deputies and senators) and the recognition as binding of the *Déclaration des Droits de l'Homme et du Citoyen* in 1997, which contributed to increase Counsel's influence. Finally, the constitutional reform of July 2008 (known as *"Réforme Balladur"*) provides a sort of *a posteriori* review and the possibility for individuals to raise a defense of unconstitutionality before an ordinary court (even if the real innovation of this reform is still doubted) [26].

In the US, Supreme Court Justices are selected by a procedure which sees the cooperation between two fundamental institutions. The formal procedure to select Supreme Court judges is simple: when a vacancy occurs (because a member of the Court resigns, retires, or dies), the President makes a nomination with the advice and consent of the Senate. Although it is not expressly stated in the Constitution, the Senate's prerogative of "advise and consent" has been interpreted as the power to confirm judicial nominees with a simple majority vote.

However, the actual process of selection is complicated by several factors such as the role of unofficial participants, both individuals and groups, with a deep interest in nomination and confirmation decisions. Apart from the members of the president administration, the most important of these informal participants can be reconnected to three categories: legal community, other interest groups and potential justices. The largest and the more powerful legal community is the American Bar Association (hereafter ABA). Indeed, an ABA committee investigates over presidential nominees who wait confirmation and evaluates them as "well qualified," "qualified," or "not qualified." The experience confirms that an unanimous rating of "well qualified" helps to smooth the path to Senate approval. Indeed, treating judicial selection of Supreme Court judges, we should not underestimate the role of the Senate: James Madison, in forming and supporting the role of the Senate, noted that the «Executive and the Senate, in the cases of appointments to office and of treaty,

[26] Fabbrini, F. "La loi organique sul controllo di costituzionalità in via incidentale e lo scrutinio preventivo del Consil Constitutionnel." *Quaderni Costituzionali* 1 (2010): 124.

must be considered as independent of and coordinate with each other».[27] According to him, the President and the Senate shared a power as a function of Art. II. Several subsequent Presidents gave their opinions on the appointment power of Art. II and, generally, they argued for the exclusive power of the presidency. A part from these juridical disputes, the role of the Senate has an indubitable importance: the Senate's power to confirm or reject presidential nominees to the Court has resulted in the rejection of 28 of 148 nominations in the Court's history,[28] which means that the 18% (one out of five) of presidential nominations have been rejected. Concretely, the presidential nomination is directly referred to a Judiciary Committee of the Senate, which gathers extensive information on the nominee but, especially, holds the public hearings of the candidates. The main purpose of these interviews is to obtain public testimony or comment on the "future" judge, including personal and sensible pieces of information such as religion, ideology and even political views. Subsequently, the Committee votes its recommendation for Senate action. After this vote the nomination is referred to the floor, when, after a debate, is taken a confirmation vote which requires a simple majority (although a large minority of senators could block confirmation through a filibuster that uses extended debate to prevent a confirmation vote). Several factors affect Senate's action: one is the president's political strength in the Senate: in this case senators of the majority party, which is the president's party, chair the Judicial committee and schedule votes on the floor. Another factor is president's strength. Usually, presidents who enjoy a large public approval have an advantage: strong public support deters opposition to their nominees.[29] Finally, the Senate's appointment power is extremely important during the period of "divided government", that is when the executive and the legislative powers belong to different parties. Indeed, presidents have had an 87.9% success rate with respect to Senate confirmations of Supreme Court nominees at times when the

[27] Madison, J. "To the Senate of the United States, July 6, 1813." *A Compilation of the Messages and Papers of the Presidents, 1789-1897*. Ed. J. D. Richardson. Washington, DC: Government Printing Office, 1897, 1: 531.
[28] Savage, D. *The Supreme Court and the powers of the American government*. 2nd ed. Washington DC: CQ Press, 2009: 551.
[29] Baum, L. *The Supreme Court*. Washington DC: CQ Press, 2007: 44.

White House and the Senate are controlled by the same political party. During times of divided government, this figure drops to 54.5%[30] !

In conclusion, the political nature of the judicial selection for US Supreme Court is evident as well as its political role. However, unlike judicial recruitment of the majority of European Constitutional Courts' judges the selection seems to be affected by a relevant degree of transparency, which explains also the large amount of research concerning this subject. Moreover, transparency of judicial appointment procedures, also achieved by the involvement of interest groups, media and political and non political actors, contributes to legitimize, in part, the political nature and role of this court.

In Germany judicial selection procedure is still different: indeed the 16 judges are not selected by individual authorities but elected with a majority of the two-third of the votes. One-half of them are nominated by the Federal Parliament, the *Bundestag,* and the other half by the *Bundestrat* the Federal Council.[31] More specifically, the *Bundestag* elects its eight judges indirectly through a twelve-person Judicial Selection Committee (hereafter JSC). According only to these formal information in Germany the sixteen judges of the *BVerfGG* are elected by a more democratic procedure which, indeed, involves both the houses of the Parliament. Indeed, the Constitutional Court composition reflects both the sources of legitimization of federal power: the people (through the *Bundestag*) and the *Länder* (through the *Bundestrat*).

The smallest degree of politicization, at least according to a formal point of view, concerns the Italian Constitutional Court. Judicial selection procedure seems to be more balanced because of two criteria: the first one is that in two cases out of three we have collegiate nominations, the second one is that there is the participation of all the powers of the State. As we now, under art. 135 of the Italian Constitution,[32]

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[30] Goldberg, D. and Kozlowsky, M. "The Politics of Choosing United States Supreme Court Justices" cit., 6.

[31] The *Bundestag* is an organ of the legislature, while the *Bundestrat* is an organ through which the Länder assist in the passing of federal law and in the administration of the *Bund.* In Fisher, H. D. *The German Legal System and Legal Language*. New York: Routledge and Cavendish, 2009.

[32] Art. 135. *The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts. The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.*

the *Corte costituzionale* shall be composed of fifteen members. The Constitution ascribes the nomination of five members, respectively, to the Italian Parliament in joint sitting, to the President of the Republic and, above all, to the ordinary and administrative High Courts. This norm is the result of a compromise which takes into account both juridical reasons and political ones. The Constitutional Court composition recalls the division of powers[33] of *Montesquieu*: indeed this is the sole case where a (conspicuous) part of the Court is selected by the Judiciary [34]. However, politics remains inside judicial selection: indeed, according to a conventional rule, the parliamentary nominations are allocated among the parties, using the same distribution as Parliament according to a sort of *lottizzazione*[35]. In spite of this phenomenon in the Italian contest the independence of the Court is a consolidate opinion: its decisions are considered *«unsigned and without dissents, making partisanship difficult to measure»*[36].

However we should consider that in 2004 the Parliament discussed a reform project, the n. 4862[37] which provided, under art. 40, a change of Court's ordinary composition: on the one hand it was proposed to reduce both judges nominated by the President of the Republic and by the highest ordinary and administrative Courts

Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be re-appointed.
At the expiry of their term, the constitutional judges shall leave office and the exercise of the functions thereof.
The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges.
The office of constitutional judge shall be incompatible with membership of Parliament, of a Regional Council, the practice of the legal profession, and with every appointment and office indicated by law.
In impeachment procedures against the President of the Republic, in addition to the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate, which the Parliament prepares every nine years through election using the same procedures as those followed in appointing ordinary judges.

[33] Celotto, A. "Rappresentanza e Corte costituzionale." *Rappresentanza politica, gruppi di pressione,* élites *al potere, Atti del Convegno di Caserta, 6-7 maggio 2005*. Ed. L. Chieffi. Torino: Giappichelli, 2006: 179 ss.

[34] So, by non-political authorities.

[35] The "lottizzazione" is an Italian political custom according to which there should be the same political parties equilibrium both in the Parliament and in the Constitutional court. Concretely, this means that when a judge leaves his office, and the political equilibrium in the Parliament is unchanged (so, the same political party has the majority), the following judge has to be proposed by the same political party which made the previous judicial nomination.

[36] Volcansek, M. "Political Power and Judicial Review in Italy." *Comparative political studies* 26 (1994): 492.

[37] Atti Parlamentari, XIV Legislatura, Camera dei deputati, *A proposal of Constitutional reform to the Part II of the Italian Constitution, (Disegno di legge costituzionale recante "Modifiche di articoli della Parte II della Costituzione*)" signed by Berlusconi, Fini and others, consigned to the presidency in march, 30th 2004, printed N. 2544.

(from five to four) and, on the other hand, to increase the parliamentary nominations (from five to seven). These last nominations shall be entrusted to a Federal Senate integrated with the Presidents of the Regions and of the autonomous Provinces. This proposal has been criticized because of two reasons: firstly, this reform reduces the number of judges who are not elected according to political criteria; secondly, assigning to the Federal Senate (and not to the Parliament in joint sitting) the nomination of the majority of Constitutional judges, the reform project reveals the idea to introduce a sort of "federalist factor" to the Constitutional Court radically changing the nature of this body (which is supposed to be impartial). According to this position the new composition of the Court could totally change the nature of this organ especially relating to its arbiter role during the conflicts between State and Regions.[38]

Finally, we must pay particular attention to UK Supreme Court selection procedures. Indeed, although it is a Court which acts in a common law tradition country, the primary rationale for its creation was to remove the United Kingdom's top court from Parliament so as to ensure a clearer formal separation of powers between the legislature and the judiciary. Consequently, the appointment process for the Supreme Court is strongly focused on avoiding the usual political commitment. Under article 27 of the CRA candidates are selected by a Supreme Court Judicial Appointments Commission made up of the President of the Court, the Deputy President and one representative of each of the regional judicial appointment bodies (England and Wales, Scotland and Northern Ireland). Only one of these three members needs be a layperson. This ad hoc commission selects one name to go to the Lord Chancellor who has limited powers to reject that name or ask the Commission to reconsider their decision. The role of the Prime Minister is now reduced to that of a conduit, passing the name provided by the Lord Chancellor to the Queen for appointment.[39] Art. 27 of the Reform Act highlights that the selection "must be on merit," and that «in making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom».

[38] Caretti, P. De Siervo, U. *Istituzioni di diritto pubblico* Torino: Giappichelli Editore, 2004: 381.
[39] Malleson, K. "The evolving role of the Supreme Court" *Public Law* (2011): 43.

VI. Dissenting and Concurring opinion

The last aspect which contributes to accomplish, with several interesting stimuli, the overview of justice and politics relationships is the possibility to publish dissenting and concurring opinions. This datum, apparently untied with precedent analysis could be important to detect the implications between judicial selection procedures on justice and politics relationship. As we know, continental European courts, with the exception of Germany, adopt collegiate judgments as a means to, concretely, favor judicial independence; on the contrary, common law courts pacifically adopt dissenting and concurring opinions. This element stresses the individuality of each judge, giving the possibility to stigmatize judge's attitudes and allows it to verify judges' s political loyalty. In the US, the transparency of judges' decisions and opinions allows to detect liberal or conservative ideological lines which are, often, in contrast between them. In this context it is relevant to cite the US case: indeed, the last US Supreme Court term, which ended in June, was the stormiest in recent memory, with more 5-to-4 decisions split along ideological lines than at any time in the court's history. According to the rumors among Supreme Court law clerks, the level of tension among the Justices is higher than at any point since *Bush v. Gore* in 2000. Not long after beginning his tenure as Chief Justice in 2005, John G. Robert Jr. announced publicly that he would try to promote unanimity and collegiality on the court. During his first months on the job, the court managed to achieve his goal, issuing a series of 9-to-0 opinions. But the brief period of harmony abruptly ended: the percentage of 5-to-4 decisions in which the four liberals were together in dissent rose to 80 percent, up from 55 percent in the 2004 term. For the foreseeable future, the Court seems likely to be polarized, with the conservative bloc ascendant and the liberal bloc embattled. Justice Stevens, the oldest and arguably most liberal justice, now finds himself the leader of the opposition.[40]

However the US example is not representative of all possible consequences: the possibility of dissenting and concurring opinions is not always cause of division and fragmentation. In Germany, for example, where dissenting opinions are

[40] Rosen, J. "The Dissenter, Justice John Paul Stevens." 23 Sept. 2007 <http://www.nytimes.com/>.

accepted, recently only the 9% of the decisions have been adopted with a majority vote. Indeed, decisions have been often taken with the unanimity. It is relevant that the prestige of the Court was increased by this conduct: a conduct totally transparent which gave legitimacy to the court. On the other hand, in Italy and in France the absence of dissenting opinions contributes to create ambiguous courts: difficult to understand and classify in the political schema [41]. In the present the absence of dissenting opinions could worsen the relationships between institutions, making more difficult the direct relationship with the people.

VII. CONCLUSIONS

Our analysis pointed out as judicial selection procedures for Constitutional and Supreme Courts are strongly related to the rules governing the "institutional equilibrium". A good knowledge of Courts' structure could give important information about their functioning. According to this point, we made an overview of six "structural" elements (legal sources, number of Judges, professional requirements, authorities charged with nominations, dissenting and concurring opinions) which reveals the importance that each country gives to judicial independence or, vice versa, to judicial accountability.

The analysis of the first of these data showed that Judicial selection procedures for Constitutional and Supreme Courts are mostly entrusted in fundamental laws. The reasons of this choice seem to be two: on one hand the constitution emphasizes the particular *status* of these courts, on the other hand there is the aim to legitimize throughout the constitution some important institutional compromises. Hardly ever, except the US case, this constitutional regulation is associated to an appropriate degree of transparency of informal praxis which drives to nominations. This determines a greater degree of discretion of political authorities in judicial nomination, so a greater influence of politics in Constitutional Court composition.

The second structural datum, which is related to the number of judges, points out that whether Italy and Germany (and also the United Kingdom) opt for big

[41] Celotto, A. "Rappresentanza e Corte costituzionale." cit., (34?).

courts, France and the Unites States opt, on the contrary, for smaller courts. The first choice is justified by the research of independent and balanced decisions, completely free from political influences; the second one is, on the contrary, typical of a country which accepts ideological positions inside Courts.

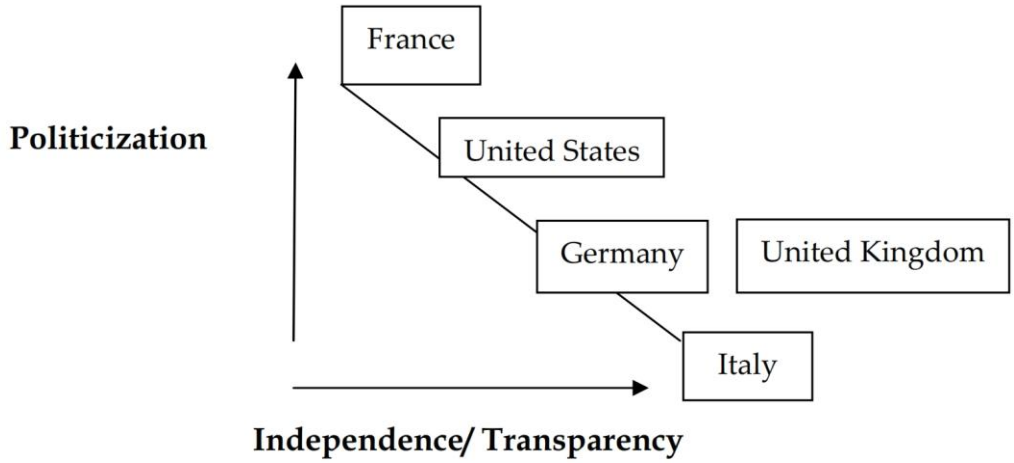
The third element which was analyzed was the expectation of Professional requirements in order to be appointed as a judge. In Italy, Germany and the United Kingdom the respective constitutions provide strict and high selective professional curricula. This is coherent which the aim to have the maximum professional standard. Moreover, it is evident that when professional requirements are specified, the degree of authorities' political discretion will be lower (so will be higher the degree of judicial independence). Indeed, authorities (often with political features) charged with judicial nominations could not select the candidates according to subjective or ideological criteria, but according to strictly established criteria (free of any political evaluation and often focused on merit). The situation is totally different in France, where no specific qualifications are required for appointments: not even a law degree.[42] We saw that this datum contributes to consider the court as an appendix of the political power. Indeed authorities' discretion in the appointments has two consequences: Court's members have a professional experience mostly as public officials and they have a political past in the executive or in the legislative branch. The situation seems to present further special features in the US: indeed, throughout the consideration of demographic, sexual and, above all, ideological criteria in the US the scope is to find judges who correspond not only to high professional standards but, also, to high "representative" standards. In the US, on the basis of the awareness of Court's intrinsic political power, the principal scope is not to have an independent Court but a Court which is able to represent the several spirits of American people.

With regard to Judges' tenure in office we noticed as, normally, States provide long and no renewable terms with the scope to prevent a strong degree of

[42] Since the *D'Estaign* presidency, the trend has been to appoint candidates with legal experience, although *Mitterrant* relied on the traditional standard of personal loyalty. In Stone, A. *The Birth of Judicial politics in France*, *the constitutional Council in comparative prospective*, cit.

political homogeneity with the representative bodies. This is particularly true in the US and UK where we have life tenure judges.

The fifth (and, maybe, the most important) datum which has been analyzed, concerns the typology of authorities involved in judicial nominations. In this field, we can easily find how Judicial selection procedures are clearly a point where Justice and Politics intersect. Indeed, in the most of countries Constitutional judges are elected by political procedures: the question is what is the real degree of this politicization. Trying to measure this element, we placed in the following picture France and Italy respectively to the first and the last place: indeed French Judicial Selections procedure seems to be still too much influenced by politics, while the Italian ones are a sort of "manifest" of judicial independence (thank to the involvement of the Highest Judicial bodies in the appointment procedures). In the middle there are Germany and the United Kingdom where judges are respectively selected by more "democratic" or "impartial" methods (which see the participation of both the houses of the Parliament or of independent Judicial Appointment Commissions). However, we find in the middle also the United States where the strong politicization of judicial selection procedures is balanced by a high degree of transparency and cooperation.



In the follow table we'll sign in blue elements which could be reconnected to accountability and in red elements which could be reconnected to independence.

	Legal sources	N.	Professional requirements	Tenure in office	Authorities	*D&C opinion*
FRA	Art. 56 Const.	9	/	9y, NR	3 Pres. Rep. 3 Pres. Sen. 3 Pres. Nat. Ass.	No
ITA	Art. 135 Const.	15	1-High Judiciary. 2- University Prof. 3- attorneys 20 y (art. 135 c. 2)	9 y NR	5 Pres. Rep 5 Parl 5 Magistr.	No
GER	Artt. 93-100 LF + sez. 3-10 St. C	16	-N.3 law judges (High federal court) -Juristen	12y NR	*Bundestrat Bundestag* (2/3)	Yes
USA	Art. II s. 2 Const.	9	crit. driven app. trasparency	Life	Pres. US +Sen	Yes
UK	Part III, art.23ss CRA		- High judicial off. 2 y. - Legal practice 15 y.	Life (until 70)	JAC Lord Chancellor	Yes

In conclusion, from the following table we find the confirmation that France has the highest number of elements in favor of accountability and Italy the highest number of elements in favor of independence. We also underlined the datum of transparency which is proper of the US: this element is able to balance the politicization of judicial selection procedures (an element which France likes).

	INDIPENDENCE	ACCOUNTABILITY	TRANSPARECY
FRANCE	1	4	
ITALY	5		
GERMANY	4	1	
UNITED STATES	1	3	1
UNITED KINGDOM	4	1	

The last question which, naturally, arises from this paper is: is it possible to detect the "best" way to select Constitutional and Supreme Court Judges? Certainly, the growing role of these Judicial bodies poses more and more problems with regard to their legitimacy: a judicial recruitment process which mixes up political accountability and transparency seems to be, in theory, the best solution to this

dilemma. However, we must consider that, in practice, does not exist "the best" selection system. We could ask ourselves: what is the best judicial selection method, a meritocratic one or a political one? Our opinion is that the answer is not one or the other: the answers can be both. Indeed, we think that the key to find out the right answer is considering, also, which form of government is involved, in brief which is the best selection system comprehending the role that the judiciary has in the balance of powers. Consequently, looking to the actual debates concerning the reform of Justice in Italy, my opinion is that any attempt to influence or modify the degree of judicial independence or accountability through a legal reform (also, involving Judicial Selection procedures for the Constitutional Court), must confront itself with some of the most important pillars of the constitutional order: above all the rules governing the separation of powers and the form of Government.

Appendix
Italian Constitutional Court's composition (Tab. No. 1)[43]

	Appointment	**Education**	**Professional experience**	**Political or administrative experience**
Lattanzi (2010)	Court of cassation	Law	Ordinary magistrate, long experience at the Court of cassation	
Finocchiaro (2002)	″	″	Ord. Magistrate	
Criscuolo (2008)	″	″	″	Judicial association (President), Higher Council of the Judiciary (1990-94)
Maddalena (2002)	Court of Accounts	″	Accounting magistrate	Ministerial cabinets
Quaranta (2004)	Council of State	″	Administrative judge	Ministerial cabinets
Gallo (2004)	President of the Republic	″	University Fiscal Law	Finance Minister (Ciampi)
Cassese (2005)	″	″	University Administrative Law	Minister (Public Administration) (Ciampi)
Saulle (2005)	″	″	University International Law	
Tesauro (2005)	″	″	University International Law	Anti-trust Authority (President)
Grossi (2009)	″	″	University History of Italian Law	
De Siervo (2002)	Parliament	″	University Constitutional law	Left, Privacy Authority (Member)
Mazzella (2005)	″	″	State Attorney	Right, Minister (Public Administration) (Berlusconi), ministerial cabinets
Silvestri (2005)	″	″	University Constitutional Law	Left, Higher Council of the Judiciary (1990-94)
Napolitano (2006)	″	″	Administrative judge	Right, Ministerial cabinets
Frigo (2008)	″	″	Criminal Attorney	Right, President of the Criminal Bar

[43] March 2011 http://www.cortecostituzionale.it/actionCollegio.do. Ugo De Siervo left the Court in April 2011, Paolo Maddalena ended his office in July 2011. In September 2011 Marta Cartabia was appointed by the President of the Republic replacing the seat of Anna Maria Saulle (deceased).

German Federal Constitutional Court's composition [44] (Tab. No. 2)

	Appointment	Education	Professional experience	Political or administrative experience
Ferdinand Kirchhof	NA; Fist Senate	Dr. iur. (Heidelberg), Law	University Professor, Judge	
Christine Hohmann-Dennhardt	"	Dr. jur., (Johann-Wolfgang-Goethe University), Law	University Professor and judge	Head of the Department of Social Affairs of Frankfurt/Main; Minister of Justice of Hesse
Brun-Otto Bryde	"	Dr. jur., (Hamburg). Law	Professor of Public Law	
Reinhard Gaier	"	Dr. jur. (Dresden), Law	Judge	
Michael Eichberger	"	Dr. iur. (Mainz), Law	Judge	Minister Cabinet Baden-Württemberg
Wilhelm Schluckebier	"	Law (Justus-Liebig-Universität Gießen)	Judge	Federal Chancellery (Law and Administration Department)
Johannes Masing	"	Dr. jur. (Freiburg); law and philosophy	Professor	
Andreas L. Paulus	"	Dr. iur. (Munich);Law	Professor	
Andreas Voßkuhle	NA, Second Senate	Dr. iur. (Ludwigs-Maximilians-Universität Munich), Law	Professor	Desk officer at the Bavarian State Ministry of the Interior
Siegfried Broß	"	Dr. iur. (Munich)	Professor	Legal Department of the Bavarian State Chancellery
Lerke Osterloh	"	Dr. jur. Institute of Law of Public Finance, (Hamburg)	Professor	
Udo Di Fabio	"	Dr. jur. (Bonn), Law	Judge and Professor	Municipal adminstration official
Rudolf Mellinghoff	"	Studies at the University of Münster	Judge	
Gertrude Lübbe-Wolff	"	Dr. jur. (Freiburg)	Professor	
Michael Gerhardt	"	Dr. jur.	Judge	Bavarian Ministry of the Interior
Herbert Landau	"	Studied law (Justus-Liebig-Universität in Gießen)	Judge	Federal Ministry of Justice

[44] March 2011. http://www.bundesverfassungsgericht.de/en/judges.html.

France *Conseil Constitutionnel's* composition[45] (Tab. No. 3)

	Appointment	Education	Professional experience[46]	Political or administrative experience[47]
Debré (2007)	President of the Republic	Political Science Paris, Law	Ordinary magistrate	Deputy, minister, speaker National Assembly
Steinmetz (2004)	President of the Republic	PS Paris, ENA	Prefect	Ministerial cabinets
Guillenchmidt (2004)	President of the Senate	PS Paris, Law	Ordinary magistrate	Ministerial cabinets
Denoix de Saint Marc (2007)	President of the Senate	PS Paris, Law, ENA	State councillor (Vice-Pr.)	Ministerial cabinets
Canivet (2007)	President of the National Assembly	Law, ENM	Ordinary magistrate, Pres. Court of cassation	
Michel Charasse (2010)	President of the Republic	Law degree	Politician	Ministerial cabinet, member of the Senat
Hubert Haenel (2010)	President of the Senate	Law, ENM	Administrative magistrate, University professor	Member of different government commissions
Jacques Barrot (2010)	President of the National Assembly	Political Studies	Politician in the national and European context	Ministerial cabinet, member of the Parliament
Claire Bazy-Malaurie (2010)	President of the National Assembly	Political Studies	Administrative functions	Public Administration

[45] March 2011. www.conseil-constitutionnel.fr.
[46] In courts, at the bar, in universities…
[47] Ministerial cabinet and/or other top administrative appointments.

United States Supreme Court's Composition[48] (tab. No.4)

	Appointment	Education	Professional experience[49]	Political and administrative experience
John G. Roberts (2005)	George W. Bush	J.D. from Harvard Law School in 1979.	Law clerk, judge to United States Court of Appeals for the District of Columbia	U.S. Department of Justice, Associate Counsel to President Ronald Reagan, W
Antonin Scalia (1986)	Reagan	LL.B. from Harvard Law School	Professor, Judge of the United States Court of Appeals for the District of Columbia Circuit	
Anthony M. Kennedy (1988)	Reagan	LL.B. from Harvard Law School.	Professor of Constitutional Law, judge appeal court	
Clarence Thomas (1991)	Bush	J.D. from Yale Law School	Attorney, Judge of the United States Court of Appeals for the District of Columbia Circuit	Chairman of the U.S. Equal Employment Opportunity Commission
Ruth Bader Ginsburg (1993)	Clinton	LL.B. from Columbia Law School	Professor of Law, Judge of the United States Court of Appeals for the District of Columbia Circuit	
Stephen G. Breyer (1994)	Clinton	LL.B. from Harvard Law School	Professor of Law, judge	Member of the Judicial Conference of the United States
Samuel Anthony Alito (2006)	George W. Bush	NA	Judge, attorney	
Sonia Sotomayor (2009)	Barack Obama	J.D. from Yale Law School	Attorney, judge	
Elena Kagan (2010)	Obama	J.D. from Harvard Law School	Law Clerk, Professor	Deputy assistant to the for Domestic Policy, Solicitor General of the United States

[48] March 2011. http://www.supremecourt.gov/about/biographies.aspx.
[49] In courts, at the bar, in universities…

The UK Supreme Court's composition[50] (table No. 5)

	Appointment	Education	Professional experience	Political or administrative experience
Lord Phillips	Judicial Appointment Commission	Law	Judge	
Lord Hope	"	Law, Cambridge, Edinburgh	Member Scottish Bar, Judge	Queens Counsel
Lord Saville de Newdigate	"	Law, Oxford	Judge	Chair Committee of the Department of Trade and Industry
Lord Rodger	"	Law, Glasgow, Oxford	University, Judge, Solicitor General	
Lord Walker	"	Cambridge	Bar; judge	
Lady Hale	"	Cambridge	Bar; University; judge	Law Commission
Lord Brown	"	Law, Oxford	Bar; judge	Chairman of Sub-Committee E (Law and Institutions) of the House of Lords European Union Select Committee from 2005 to 2007.
Lord Mance	"	Law, Oxford	Bar; Judge	
Lord Collins	"	Law, Cambridge, Columbia (USA)	Solicitor; Judge	
Lord Kerr	"	Law, Queen's University, Belfast	Bar; Crown Counsel; Judge	
Lord Clarke	"	Law, Maritime and Commercial	Bar; judge (Master of the Rolls)	
John Dyson	"	Law	Bar, judge to the High Court	

[50] March 2011 http://www.supremecourt.gov.uk/about/biographies.html.

Constitutional Courts' comparative analysis (tab. n° 13)

	France	Germany	Italy	United Kingdom	United States
Name	*Conseil Constitutionnel*	*Bundesverfassungsgericht*	*Corte Costituzionale*	The Supreme Court	US Supreme Court
Date of creation	1958	1949	1948	2005	1787
Number of judges	9	16	15	12	9
Terms of appointment	9 y	12 y	9 y	Life (until 70)	Life
Appointing authorities	President of the Republic(3), pr. of the Senate (3), pr. of the National Assembly(3)	Bundestag (8) Bundesrat (8)	Pr. of the Republic(5), Parliament (5), Highest Courts (5)	Judicial Appointment Commission	President and Senate
Type of judicial review	Centralized	Centralized	Centralized	Decentralized	Decentralized
Concrete review: indirect appeal through ordinary courts	No[1]	Yes	Yes	Yes	Yes
Abstract review: type	A priori	A posterior	A posterior	No	No
Institutions able to initiate abstract review	Pr. Republic, Pr. Senate and Assembly, 60 senators, 60 deputies	Federal government, Regional governments, 1/3 Bundestag	Government, Regional governments		
Dissenting/ Concurring opinions	No	Yes	No	Yes	Yes